

NO. 137, ORIGINAL

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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REPORTER'S TRANSCRIPT OF TELEPHONIC STATUS HEARING

November 30, 2012

Reported by: LYNN PENFIELD, CSR No. 8589, RPR

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22 TELEPHONIC STATUS HEARING

23 commencing on Friday, November 30, 2012, at 11:02 a.m.

24 before Lynn Penfield, Certified Shorthand Reporter,

25 Registered Professional Reporter.

1 November 30, 2012 11:02 a.m.

2 SPECIAL MASTER THOMPSON: So this is a status  
3 conference in State of Montana versus State of Wyoming,  
4 which is No. 137 Original in the Supreme Court of the  
5 United States.

6 And so let's begin with identification of  
7 counsel for the parties.

8 So we can begin with State of Montana.

9 MR. DRAPER: Yes, sir. Your Honor, this is  
10 John Draper, counsel of record for State of Montana.

11 With me here is Jeff Wechsler and Donna Omerod,  
12 and also on the phone on behalf of Montana are Jennifer  
13 Anders and Anne Yates.

14 SPECIAL MASTER THOMPSON: Okay. Thank you,  
15 Mr. Draper.

16 So next, State of Wyoming.

17 MR. KASTE: Thank you, Your Honor. This is  
18 James Kaste appearing on behalf of the State of Wyoming.

19 Appearing also with me is Peter Michael, and we  
20 also have Andrew Kuhlmann, Chris Brown, David Willms,  
21 and Matthias Sayer here with me on the phone.

22 SPECIAL MASTER THOMPSON: Okay. And let me  
23 actually just say to Lynn, I don't know how best to get  
24 you the spelling of all those names.

25 Is it okay if counsel just send you an e-mail?

1 THE REPORTER: I have it already. Thank you,  
2 Your Honor.

3 SPECIAL MASTER THOMPSON: Fantastic.

4 Next, is there anyone on the line for the State  
5 of North Dakota?

6 MS. VERLEGER: Jen Verleger, Your Honor.

7 SPECIAL MASTER THOMPSON: Good morning.

8 And then we have the various amicus. So first,  
9 the United States?

10 MR. DUBOIS: This is Jim DuBois on behalf of  
11 the United States, Your Honor. Good afternoon.

12 SPECIAL MASTER THOMPSON: Good afternoon --  
13 afternoon? I guess that's right. Good afternoon for  
14 all of you.

15 And then next for the -- is Ms. Whiteing on the  
16 line?

17 MS. WHITEING: Yes, Your Honor. This is Jeanne  
18 Whiteing for the Northern Cheyenne Tribe.

19 SPECIAL MASTER THOMPSON: Okay. Great. And  
20 then finally is there anyone on the line for Anadarko?

21 MR. WIGMORE: Yes, Your Honor, Michael Wigmore,  
22 Bingham, McCutchen for Anadarko.

23 SPECIAL MASTER THOMPSON: Thank you. So the  
24 agenda which I have today is -- seems to primarily  
25 surround some discovery disputes, and what I would

1 propose is that we start out with a discussion of the  
2 dispute that Wyoming sent an e-mail around about on  
3 November the 13th, and then we can turn to a discussion  
4 of the dispute that Montana raised in an e-mail this  
5 morning, and then in a little bit -- I'm talking about  
6 the general status of discovery.

7 So does that agenda sound fine to people?

8 And I realize that the -- that Montana's  
9 papers, at least I just received those this morning, so  
10 I just want to let Wyoming know that I fully recognize  
11 that you probably haven't had much time to review those,  
12 although most of those papers are probably things you're  
13 familiar with already.

14 MR. KASTE: Your Honor, this is James Kaste on  
15 behalf of the State of Wyoming. I guess I'll start.

16 We did receive Montana's filing sometime last  
17 night, had an opportunity to look over it briefly this  
18 morning, and we're prepared to discuss that in some  
19 detail if necessary.

20 I guess I'd like to begin by letting you know  
21 what we've done in the last month since our last status  
22 conference, to put things in context. Of course, at  
23 that time there were some pending discovery requests  
24 that had been promulgated by the State of Wyoming and  
25 offered to Montana.

1           We have received some responses to those, had  
2           some communications back and forth about the content of  
3           those answers, and you have those in your hands.

4           In addition, the parties have taken the  
5           depositions -- well, Montana has taken the depositions  
6           of a number of State of Wyoming employees and a number  
7           of private individuals. In fact, the counsel for the  
8           State of Wyoming and the State of Montana are sitting  
9           here in our conference room here in Cheyenne in the  
10          midst of one of those depositions. So we've had, I want  
11          to say, almost 15 depositions perhaps; in the  
12          neighborhood of a dozen to 15. I don't remember the  
13          exact number to this point, but I can tell you the State  
14          of Wyoming has made every effort to accommodate each and  
15          every deposition the State of Montana has requested to  
16          take since our last meeting.

17          In addition, the State of Wyoming has provided  
18          supplemental materials to the State of Montana. Those  
19          materials became apparent to us during the course of  
20          depositions. When materials came up during the course  
21          of depositions that weren't in Montana's possession,  
22          they were generally provided with the exceptions that  
23          you might hear about later today.

24          So, you know, from our perspective, the State  
25          of Wyoming has gone above and beyond to facilitate

1 discovery for the State of Montana.

2 Now, the State of Wyoming, of course, stands in  
3 a very different position than the State of Montana in  
4 this litigation. We are the defendant; and, as such, we  
5 have been proceeding in discovery in this case for about  
6 the last year basically blind.

7 We've asked the State of Montana to outline for  
8 us the specific nature of their claims and contentions  
9 and have pretty much uniformly been met with a series of  
10 legal objections and answers of zero consequence, and I  
11 think you can see that when you look at their responses  
12 to the very simple, very basic interrogatories  
13 promulgated by the State of Wyoming. We did a very  
14 substantial set of interrogatories and request for  
15 production when discovery began, I think back in  
16 January. We received unsatisfactory answers to those  
17 requests.

18 In an effort just to try and figure out the  
19 bare bones and basics of this litigation, we honed in on  
20 those fundamental claims and contentions that Montana  
21 would be asserting, I assume, to give us and our experts  
22 an idea of where we ought to be looking, what we should  
23 be looking at, what points on either side of the map are  
24 in issue, what dates are in issue, and wetlands are in  
25 issue, and a simple answer of "Everything" is wholly

1     inadequate.

2             What we got in response to those fairly simple  
3 and very targeted interrogatories were either answers  
4 that, We don't know, or, We're not going to say, and I  
5 find that to be unacceptable at this point and wanted to  
6 bring the matter to your attention, because at this  
7 point in the litigation, we really should know what  
8 we're fighting about, and the State of Montana has to  
9 this point not told us. And, frankly, I've sat through  
10 almost every one of the depositions that we've done  
11 recently, and even at the conclusion of those I don't  
12 know what we're fighting about.

13             At no point have we honed in on those time  
14 periods that are really at issue, nor have we been  
15 directed to water rights in the State of Wyoming that  
16 should have been regulated in order to fulfill a compact  
17 obligation to the State of Montana, and in no way have  
18 we been directed to lands that have been irrigated that  
19 shouldn't have been.

20             And, of course, I'm not asking the State of  
21 Montana what it can prove; I'm asking what does it  
22 contend and claim in this litigation, and that's  
23 something normally I would expect to find in a  
24 complaint. And here we are, six years into this case  
25 and I don't have any idea what we're fighting about, and

1 I find that to be problematic.

2 We have complied with the case management order  
3 and advised you of this dispute prior to filing a motion  
4 by e-mail, and I guess we're looking to you for some  
5 guidance about how we handle this problem which is  
6 fundamental for the further progression of this case.

7 You know, my view is that if these questions  
8 can't be answered, why are we here? It's a problem, and  
9 the problem needs to be addressed now. And I can go  
10 through each one of those interrogatory responses and  
11 discuss them, if you'd like, but -- there's only about  
12 eight, and I'm pretty sure you're probably familiar with  
13 them.

14 SPECIAL MASTER THOMPSON: Thank you, Mr. Kaste.

15 Let me just ask you one question. I noted in  
16 Montana's responses that they had noted that they would  
17 be providing additional information, I believe, on  
18 November 21st, so my question is whether or not there's  
19 been any additional developments with respect to your  
20 second set of interrogatories and your first request for  
21 admissions since you submitted these papers.

22 MR. KASTE: Yes, Your Honor. They did, in  
23 conformity with their statement, supply a supplemental  
24 response to that one particular interrogatory, and I can  
25 tell you although they used a lot more words, the

1 content of their response was "all of the rights," which  
2 of course is a remarkably unsophisticated answer to the  
3 question, and an unhelpful one for the question that  
4 we're asking, because no matter what the hydrologic  
5 conditions on the river are, not all of the rights would  
6 have been unsatisfied in a way that would make Wyoming  
7 liable. Certainly there could be a situation where no  
8 matter what the hydrologic conditions are, the first  
9 right could have been satisfied with the water that was  
10 available.

11 An answer that says "all of them" is an  
12 indication that the analysis hasn't been done and that  
13 the claim is -- remains unknown even to the State of  
14 Montana. And so there was a supplemental response and I  
15 struggled with whether or not to send that on or not.  
16 I'm more than happy to do that, but I find the response  
17 to be wholly unsatisfactory. To tell me "all of them"  
18 tells me nothing.

19 SPECIAL MASTER THOMPSON: Okay. Thanks.

20 So, Mr. Draper, I'd love to hear from you now  
21 on this. And in looking over Wyoming's concerns, I --  
22 the concerns to me fall into two different categories,  
23 and I'd love for you to address both of them: First of  
24 all, information specifically about which Montana rights  
25 have gone unfulfilled in which years, what amount,

1 et cetera; and then the second is their interrogatories,  
2 request for admissions regarding the various Wyoming  
3 actions that Montana contends violate the contact.

4 So if you can address those, that would be very  
5 helpful for me.

6 MR. DRAPER: Thank you, Your Honor.

7 This is John Draper. As you can see, we -- we  
8 do take exception to the -- what we believe is posturing  
9 by counsel for Wyoming in this regard. It's been quite  
10 a change in the last month or so from the generally  
11 cooperative approach that we've been able to take  
12 mutually in this case, and we believe that the -- the  
13 activities in recent weeks have been for other purposes  
14 than simply obtaining discovery.

15 As you can tell from Mr. Kaste's remarks, his  
16 complaint is that we don't know certain things and if --  
17 if we have provided what we're aware of, we've satisfied  
18 the discovery requirements and we've done so fully, we  
19 believe. And if he thinks we should know more before  
20 we've finished our expert analysis and before we've  
21 finished the depositions and review of the information  
22 that we've been able to obtain so far from State of  
23 Wyoming, that's a different kind of concern. It's not a  
24 discovery concern.

25 We believe that given the information that we

1 have been able to develop from the State of Wyoming and  
2 otherwise, that we have accurately represented the state  
3 of our knowledge at this point, but that is prior to  
4 hearing from our experts.

5           And with respect to both of the matters that  
6 you have raised, we are still learning what the exact  
7 facts are with respect to whether certain bases that may  
8 be available to support our claims are in fact. We have  
9 been deposing all week here in Cheyenne the officials  
10 located here at the State Engineer's Office in -- as  
11 part of that endeavor.

12           We have been learning exactly what rights -- at  
13 least to the extent that Wyoming has cooperated with our  
14 discovery requests, that regulation of water rights was  
15 going on in various years in the past that appear to us  
16 to involve potential violations of the compact, and so  
17 we are -- we are very actively involved in that, and it  
18 seems to -- that the main thing that has arisen in the  
19 last month or so is that Mr. Kaste is not satisfied with  
20 the state of our knowledge which, as we've mentioned in  
21 the submittal that we just made, we believe has been  
22 thwarted in some important regards by their failure to  
23 cooperate where they should have cooperated.

24           So our contentions are those that -- referring  
25 particularly to your second question, our contentions,

1 of course, were stated in the -- in the complaint, and  
2 any concerns about the specificity of those contentions  
3 was resolved earlier in the case and we are now in the  
4 process of determining exactly what facts exist and can  
5 be relied upon to support those claims. And we -- we  
6 have acquired a good deal of information, especially in  
7 the time since the discovery has been allowed to proceed  
8 again, and we are still in the throes of that process  
9 and working diligently to complete that and provide the  
10 physical information that we need to in conformance with  
11 the January 4 deadline for our expert disclosures.

12 SPECIAL MASTER THOMPSON: So if I understand  
13 what you're saying, then, is basically that when it  
14 comes to information such as for a particular year, say  
15 2004, that, you know, what pre-1950 water rights were  
16 not able to be met because of one of these actions, at  
17 the moment you don't have any information about that;  
18 that's what you're developing through your expert  
19 witnesses?

20 MR. DRAPER: That's correct, Your Honor, to the  
21 extent we have not already disclosed that to Wyoming.  
22 That's -- that's exactly the situation.

23 MR. KASTE: Well -- Your Honor, this is  
24 Mr. Kaste, the source of all these problems, apparently.  
25 Which I don't mind, because frankly I don't like being

1 on this boat. I think what you heard from Mr. Draper is  
2 we're in the midst of a fishing expedition, attempting  
3 to develop possible violations that may have occurred.

4 I kind of think we should know what we did  
5 wrong when the suit was filed and not six years into it.  
6 I don't think that's an unfair question to ask, and I  
7 certainly don't think it's unfair to ask it before the  
8 expert designation deadline.

9 You know, I have experts of my own who in order  
10 to do their analysis, need to know what exactly we're  
11 being accused of doing that violated the compact. I  
12 have no such information at this point; and, frankly,  
13 none has been developed during the course of these  
14 depositions that I have been aware of.

15 In fact, I'm the only person who has asked any  
16 witness whether there were any rights in Wyoming that  
17 were on during the period which we know or recall within  
18 our facts, and the witnesses with the best available  
19 knowledge said, No, there weren't any. I had to develop  
20 that testimony of my own witnesses on my own.

21 I'm having a hard time figuring out why the  
22 State of Wyoming should be forced to engage in an  
23 ongoing and expensive process that is no more than a  
24 fishing expedition, and until we understand what their  
25 contentions are, I frankly don't see why this litigation

1 ought to continue. Obviously we're not probably going  
2 to let it go today, but I think we need to think about  
3 how we're going to bring this boat to shore in an  
4 orderly manner.

5 SPECIAL MASTER THOMPSON: I agree with you on  
6 that last point, Mr. Kaste.

7 So what specific relief are you looking for?

8 MR. KASTE: Well, I would like the answer to  
9 some questions I've proposed in a meaningful and  
10 specific way now.

11 We're a month away from plaintiff's expert  
12 witness deadline. I'm not asking for expert  
13 information; I'm asking for contentions, claims. It's  
14 not what they can prove, not the specific content of  
15 their expert report, just tell me the -- the points on  
16 the map that are at issue. Tell me what I did wrong,  
17 tell me who got hurt in Montana, and tell me when it  
18 happened. I don't think that's too much to ask, and I  
19 think we're entitled to an answer now. I mean we asked  
20 these same questions in January of 2012 and didn't get  
21 answers then.

22 And so to some extent the suggestion that  
23 something radical has changed in this litigation in the  
24 last month is a bit odd. We haven't got answers for the  
25 past year, and I guess the thing that's changed is I'm

1 actually kind of fed up with it.

2 MR. DRAPER: Your Honor, this is John Draper.  
3 We believe that we are refining our claims in a way that  
4 is consistent with your rulings, and both States, I  
5 think, have learned a good deal about where you believe  
6 the critical information and basis of claims has to be  
7 as a result of your rulings, and we are proceeding  
8 and -- in as best a manner as is allowed by the schedule  
9 to make those claims definite in a way that is  
10 consistent with your rulings and is supportable.

11 I think to say that there's some intermediate  
12 point where the contentions of the complaint have  
13 somehow now become inadequate and that there is some  
14 requirement that before we finish our analysis -- that  
15 there is something wrong if we don't have the final  
16 answers while we're still in the midst of depositions  
17 and analysis I think is a -- it is a misunderstanding of  
18 the purposes of discovery and the proper use of it in a  
19 case like this.

20 MR. KASTE: Well, I agree with that, that  
21 discovery serves an important purpose and we discover  
22 some of the specifics. And I'm not asking for the final  
23 answer; I'm asking for the first one. You know, six  
24 years later, I'm still trying to figure out what it is  
25 we did wrong, and at this point in response to pretty

1 simple discovery requests, I'd really like to ask you to  
2 ask them to provide an answer that we can rely on for  
3 the remainder of this litigation. I'd like you to do it  
4 soon.

5 MR. DRAPER: Your Honor, this is John Draper.  
6 I find it particularly inappropriate for counsel for  
7 Wyoming to be demanding information about matters that  
8 are based on data and information that are in their  
9 control and to some important degree they have not  
10 allowed us access to, and to say that we have done  
11 something wrong because we have not developed a position  
12 because we've been unable to gain full access to the  
13 information that we're entitled to I think is -- is  
14 wrongheaded.

15 MR. KASTE: Well, Your Honor, I think that this  
16 is going to go to the -- Montana's motion, but I'd like  
17 to address it first, because there seems to be some  
18 dramatic misunderstanding about what the State of  
19 Wyoming has, and what it has and has not made available.

20 I've been in this state for a while and we've  
21 been a state for a while, and ever since then the State  
22 Engineer's Office has been open to the public, and there  
23 are 130 years' worth of records in there. There are  
24 8 million records in there, and since statehood until  
25 today, those records have been open and available to the

1 public, including Montana and its paid consultants.

2 I have got to tell you there isn't a person who  
3 is sitting on our side of the table today that isn't  
4 stunned and amazed that there hasn't been a Montana  
5 consultant sitting in our records room with a pad and  
6 pen and perhaps an old copier making notes, copying maps  
7 and doing the research that it takes to compile the data  
8 analysis that they're asking for in this case.

9 They haven't done it. I don't know why and,  
10 frankly, I don't care. It's not my job to prosecute  
11 their case, but the doors have been open wide and, in  
12 fact, I think very early on in the discovery portion of  
13 this case, they were given a tour and shown the drawers  
14 and the maps and the files and the cabinets and we  
15 turned them loose: Go ahead; have at it.

16 They have access just like every member of the  
17 public does to our EPERM filing system. For what it's  
18 worth, it's not a complete accounting by any means. We  
19 don't have a complete electronic database yet for any  
20 division yet in the State of Wyoming. That's a goal,  
21 but we have 130 years' worth of records to put in there.

22 The idea we have somehow precluded them from  
23 doing their work because we haven't done it for them  
24 really bothers me, and it's wrong. I'm not going to do  
25 their expert work for them. I cannot compile the data

1 analysis that they require in an easy way. It requires  
2 somebody to go into this library, sit down with the  
3 books, and do a bunch of research and compile data that  
4 suits their needs. That takes a long time.

5 I don't know why they haven't done it. It's  
6 not my fault, and I shouldn't be prejudiced in this  
7 litigation as a result of that failure. I don't know  
8 why anybody thinks that was a secret; that these  
9 materials have been available forever.

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

11 I take strong exception to Mr. Kaste's  
12 description there. To say that millions of documents  
13 are available and that other documents that they have  
14 prepared in the normal course of their water  
15 administration will not be made available to us, we  
16 think this a contrary to the requirements of the  
17 discovery rules.

18 We're entitled to that information, and he is  
19 basically saying, We're not going to give it to you. It  
20 is in our office, we have it, we maintain it, it was  
21 prepared in the normal course of our water  
22 administration, but we're not going to give it to you.

23 And that goes particularly to some of the items  
24 that we mentioned in our submittal, and we think this  
25 violates the most fundamental precepts of discovery.

1 We're not asking for them to go out and do some analysis  
2 that has not been done. We're simply asking that they  
3 do what the discovery rules require, and that is provide  
4 us their records, and they will not do that unless you  
5 intervene on our behalf.

6 MR. KASTE: Maybe I was -- maybe he was out of  
7 the room just now when I was just talking. The door is  
8 open. It's been open for 100 years.

9 I'm not going to pick up the entire third floor  
10 of the Herschler Building and 8 million records and run  
11 them through a copier. This is a burden that falls  
12 equally on the parties.

13 If you want to know certain information about  
14 these rights, you have to go and pull a bunch of books  
15 off the shelves and you have to search from one to the  
16 other, and you have to pull them outside of the drawers  
17 and search from one to the other and -- to compile the  
18 information that they want. And it's not merely  
19 copying; it's compiling and ascertaining the  
20 significance of any particular information and sending  
21 it on its way, exactly the kind of work that a  
22 consultant or expert would do.

23 And that's not what's required by the rules.  
24 We can make that library available, and we have, to  
25 plaintiff's counsel and to every member of the public.

1           MR. DRAPER: Your Honor, this is John Draper,  
2 if I may.

3           SPECIAL MASTER THOMPSON: Yes, go ahead. I  
4 have a couple of questions.

5           MR. DRAPER: We are not asking for them to make  
6 any new compilations. We're asking them to give us  
7 documents that already exist, and that is what they're  
8 refusing to do.

9           And, as I say, this is -- this is quite a  
10 change from recent activities. We, I think, have had a  
11 good relationship up until recently. We have made  
12 strenuous efforts to accommodate the State of Wyoming.  
13 While we counsel were busy doing those briefs in the  
14 other case, we arranged for counsel for Wyoming to go  
15 down to one of the important water users and inspect  
16 records.

17           We have performed data selection runs from our  
18 databases to accommodate their requests to get them the  
19 kind of information that they asked for in a form that's  
20 useful to them, and Mr. Kaste is saying they are not  
21 going to do that. Perhaps that's fine, but we're not  
22 asking -- we're not asking them to do the extra things  
23 that we have done, but simply provide us documents that  
24 are already in existence that were created in the  
25 routine administration of water rights in Wyoming.

1           SPECIAL MASTER THOMPSON: Okay. So let me just  
2 ask several questions here.

3           First of all, in terms of documents that have  
4 already been compiled and that you are seeking access to  
5 and believe that you have not been given access to yet,  
6 in the e-mail that you sent around yesterday evening,  
7 you mention the electronic GIS files and also the  
8 additional tag books.

9           Are there any documents other than those that  
10 you're referring to?

11           MR. DRAPER: Your Honor, we have been told by  
12 Mr. Kaste just before the call, since we're all at the  
13 same place, that they have submitted on the tag book  
14 question and that indeed we have received all of the tag  
15 books, and so we're sure that's correct.

16           SPECIAL MASTER THOMPSON: Who just rejoined?  
17 Did somebody just rejoin the call?

18           MR. DUBOIS: Yes. This is Jim DuBois. I got  
19 cut off.

20           SPECIAL MASTER THOMPSON: Thank you. I just  
21 wanted to make sure it wasn't the court reporter.

22           THE REPORTER: No, I'm still here.

23           SPECIAL MASTER THOMPSON: Sorry, Mr. Draper.

24           So you are saying, just to clarify, that there  
25 are now apparently no additional tag books that you

1 haven't been provided?

2 MR. DRAPER: That's right. There are tag books  
3 that are missing, but even Wyoming doesn't have those.

4 SPECIAL MASTER THOMPSON: Okay.

5 MR. DRAPER: So if they don't have them, we  
6 can't ask for them, and the ones that we sought and they  
7 had told us they had not provided, they have now  
8 determined that they have provided everything that they  
9 do have, so that's -- that's been resolved to my  
10 satisfaction.

11 The remaining item, then, is the refusal to  
12 provide the GIS files that were used for creating the  
13 maps that we only recently became aware of, because  
14 those maps -- the existence even of the printouts of the  
15 maps had not been revealed to us until -- until a very  
16 recent deposition, as I mentioned in the e-mail.

17 So we believe that we have been now provided  
18 those maps just within the last week or so, but after  
19 suggesting that we take our experts' time to have a  
20 technical telephonic meeting to determine how to produce  
21 those records, we have been told that that time was  
22 wasted and that there will be no production of those  
23 electronic files.

24 SPECIAL MASTER THOMPSON: Okay.

25 MR. KASTE: I can address that.

1           SPECIAL MASTER THOMPSON: Sure. Let me just  
2 interrupt just for a second, because I think both of the  
3 two sides are editorializing a little bit also, and what  
4 I'm interested in is just the facts. I mean I  
5 understand all of the concerns on both sides and I  
6 understand the level of frustration, so at the moment  
7 I'm just interested in facts.

8           MR. KASTE: Let me tell you the facts with  
9 regards to these maps, Your Honor. This is James Kaste.  
10 During the course of one of the depositions that we held  
11 in Sheridan of William Knapp, the hydrographer  
12 commissioner in the Tongue River Basin, we learned that  
13 there were some maps made in his office.

14           We subsequently did an investigation as soon as  
15 we were made aware of it, and it turns out that Deb  
16 Reed, who's the secretary at the Sheridan office on some  
17 drive on her computer had some maps, and she is mortally  
18 embarrassed by the fact that she forgot to include those  
19 with all the other documents that we've provided from  
20 the State Engineer's Office.

21           And they had pretty much carte blanche in their  
22 inspection to go through the Sheridan office and get  
23 what they'd like, but these things on this drive weren't  
24 apparent to her supervisor, and she forgot about them.  
25 As soon as we were made aware of their existence -- most

1 of these are maps in which she used a little tool to  
2 draw on, like you would a pencil, but she did it  
3 electronically. So they were mostly stored as .pdf  
4 files, some of them were not; some of them were stored  
5 as GIS data, but essentially the secretary had maps. We  
6 made them .pdfs, we sent them out. As soon as we got  
7 them here in our office, we sent them out again with  
8 Bates stamp numbers on them so we can track them.  
9 Plaintiffs have every one of those maps in their  
10 possession.

11 In addition, however, they had requested we  
12 provide the underlying GIS data from Ms. Reed's computer  
13 for these maps. And, of course, these aren't models;  
14 these are just pictures that the secretary has drafted.  
15 And what she does is a customer comes in and says, I'd  
16 really like to know about my water rights, or, I want to  
17 know about my neighbor's rights so I know he's not  
18 cheating me, and she will make him a little map in  
19 response to that specific customer inquiry and print it  
20 out for them.

21 And, you know, having given plaintiffs these  
22 documents in a reasonably usable format, which is what  
23 Rule 34 requires, I don't think we're obligated to give  
24 them what we view as wholly unreliable GIS data created  
25 by the secretary. She is not a mapping expert or

1 anything like that, and it seems like we're going to  
2 cause more trouble than we're going to help, so my view  
3 is they have the maps in their hands and I don't know  
4 what they're complaining about.

5 MR. DRAPER: Your Honor, if I may respond?

6 SPECIAL MASTER THOMPSON: Yes, you may.

7 MR. DRAPER: John Draper. Sorry, I should have  
8 mentioned that. Thank you.

9 The mapping -- you don't have a copy of the map  
10 in front of you or an example of these maps, but they're  
11 quite different than the impression that Mr. Kaste's  
12 statements just made -- made it appear. This mapping  
13 was done by a person in the Sheridan office with the  
14 help and cooperation, as we understand it, of persons in  
15 the main office of the State Engineer in Cheyenne with  
16 their GIS files and input.

17 They look very professional to my eye. They  
18 are very accurate appearing maps with section lines and  
19 township and range indicated, and color keys for  
20 different water rights and different priorities, and  
21 these -- these are the maps that came to our attention  
22 as existing in the area that's the center of this  
23 particular proceeding during this late  
24 October deposition. And in order for us to understand  
25 those maps and have a complete set of the maps as we

1 believe that the state rules entitle us to, the  
2 documents which are the GIS files and -- as noted in our  
3 e-mail, just because information is in an electronic  
4 form doesn't mean it is not a document; it is a  
5 document. These electronic GIS files are documents  
6 under the joint production order.

7 And they are important tools for analyzing  
8 things like the accuracy. We do have to assess the  
9 accuracy, but that, it seems to me, is something that we  
10 need to do with the help of our experts and not be told  
11 we're not going to be allowed access to the information  
12 because Mr. Kaste thinks it is unreliable. That is not  
13 a test that is applied in the discovery process.

14 SPECIAL MASTER THOMPSON: So really quickly,  
15 can either of you give me a sense of what type of  
16 information is in the GIS files?

17 MR. KASTE: The GIS files are -- well, GIS  
18 mapping is -- you've probably seen hundreds of them and  
19 either known it or not known it, but it's a series of  
20 different layers.

21 SPECIAL MASTER THOMPSON: I'm familiar with GIS  
22 systems generally, and I'm just curious as to what  
23 specific types of information -- effectively, what  
24 layers -- are in these GIS files.

25 MR. KASTE: There's a series of public layers

1 and then Deb put polygons on that she created from the  
2 original maps that are submitted with applications.  
3 I'll tell you, you can have them. I will take them off  
4 the table. You can have them, issue solved, because I  
5 want to keep this litigation on track.

6 SPECIAL MASTER THOMPSON: Okay. Thank you.

7 So then getting to -- so we've now taken care  
8 of, then, Mr. Draper, the paragraph 1 of your e-mail and  
9 also paragraph 3, and so that leaves, then, the second  
10 category.

11 And here my understanding is Wyoming is  
12 basically saying that they have provided you with the  
13 location of the information needed to answer these  
14 various questions, and it's easy for you to utilize that  
15 information to find the answers, as for them.

16 Is that right, Mr. Kaste?

17 MR. KASTE: That's it.

18 MR. DRAPER: Your Honor, we --

19 SPECIAL MASTER THOMPSON: So my question is,  
20 Item No. 1, are there -- have they not been particular  
21 enough in pointing you to the particular information, or  
22 in what way is it more difficult for you than for them  
23 to actually utilize that information to answer your  
24 questions?

25 MR. DRAPER: Your Honor, of course there's an

1 inherent disadvantage we're at, not being familiar with  
2 these files, having the electronic files that Mr. Kaste  
3 mentioned were incomplete, and this is true especially  
4 with respect to the information going back a little way  
5 that we need.

6 The complaint that we have with their answers  
7 to interrogatories is that they are simply avoiding  
8 answering with knowledge that they have, which is not  
9 expert knowledge but they know, because they are -- as  
10 we've been finding out, they are involved in various  
11 forms of intrastate water regulation.

12 And these questions which relate to that are  
13 the questions that they can easily answer, that they  
14 know the answers to, and they're objecting to it saying,  
15 Well, we're not going to answer them. We think you  
16 ought to go in the files, which may take more time than  
17 you have, but you can do it, and search records both at  
18 the State Engineer's Office and they require information  
19 outside the State Engineer's Office that has been  
20 acquired by the State Engineer's Office in the normal  
21 conduct of its water administration.

22 And we don't ask them, again, to go out and do  
23 any analysis or create any knowledge or acquire any  
24 knowledge that they don't already have, but as the  
25 central administrator for water rights in Wyoming, and

1 in particular in this area of the Powder and Tongue  
2 basins, they know this information and they are simply  
3 refusing to answer these questions. And, as we pointed  
4 out, there's indications they know this, but they want  
5 to make it as hard as possible for us to figure this  
6 out. They won't impart information that they have and  
7 then they complain that we're not answering their  
8 interrogatories about the same subjects with enough  
9 specificity; and we believe at a minimum, they need to  
10 answer forthrightly with the information they have at  
11 this time.

12 SPECIAL MASTER THOMPSON: So here's the problem  
13 I have in dealing with this portion of your concerns,  
14 which is that if you told me at this stage that, you  
15 know, you need the following particular information --  
16 and right now there's hundreds of thousands of documents  
17 out there that, you know, you could potentially be  
18 looking at -- that Wyoming knows exactly which documents  
19 have those answers, but they haven't been willing to  
20 specify them for you so you really are at a disadvantage  
21 in accessing that information, then I would think that  
22 you would have a legitimate beef.

23 Similarly, if there was an easy way for Wyoming  
24 to actually obtain particular information, that you  
25 might have access to all the same documents, but, you

1 know, there's -- it's just a lot easier for them to  
2 actually compile the information than it is for you,  
3 again, legitimate beef.

4 Finally, if they've actually already done an  
5 analysis and -- in the course of their regular work, and  
6 they're not handing it over, that's a legitimate beef.  
7 And so if -- you know, if you have a particular concern  
8 of that nature, I think it's easy to address.

9 Right now, I hear, again, Wyoming saying  
10 basically, We've -- they've pointed you to the  
11 particular information where you can answer your  
12 questions, and it would take them as much time as it  
13 would take you to actually access, and it's very  
14 difficult for me to -- to disagree with that.

15 MR. DRAPER: Your Honor, this is John Draper.  
16 I appreciate your remarks, and I -- I agree that the  
17 categories that you set out are the categories that we  
18 agree are where they have an obligation to do that, and  
19 it appears to me that it may be appropriate for us to,  
20 to the extent we can, identify the documents. Of  
21 course, that's very difficult when you're looking at --  
22 from the outside in, to more specifically identify the  
23 documents than we have.

24 I hear that as a concern of yours, and I would  
25 be glad to take another look at that and also have a

1 further word with Wyoming, and if there was still a  
2 problem, make a further filing with you.

3 SPECIAL MASTER THOMPSON: So I would suggest  
4 that that is the right approach, and what I would expect  
5 is, you know, again, in trying to obtain particular  
6 information that requires going through current  
7 documents in either a hard form or electronic form, I  
8 would hope and expect that counsel for both Montana and  
9 Wyoming could sit down, that Montana would be able to --  
10 I think you already have indicated to Wyoming exactly  
11 what you're looking for, and then if you have a problem  
12 that right now you have far more information sitting out  
13 there than you actually know where to look, that Wyoming  
14 would help you in actually identifying exactly where you  
15 should look to obtain the particular information that  
16 you need.

17 And that then the only remaining question is,  
18 is there an -- you know, an advantage that Wyoming has  
19 in actually being able to -- well, to obtain the answers  
20 to the specific questions? And my understanding from  
21 Wyoming is they think that if they point you to the  
22 correct documents -- and my guess is they probably feel  
23 they already have -- but that you can then do it just as  
24 easily as they can.

25 So hopefully if the two sides could sit down

1 together and try to work that out, particularly since  
2 you're in the same location at the moment, you know,  
3 that's -- that I think is the correct approach; and at  
4 the moment I'm not willing to order anything more  
5 because I have no basis for believing that Wyoming  
6 hasn't actually been as helpful as they claim they have.

7 MR. DRAPER: Very good, Your Honor. This is  
8 John Draper.

9 SPECIAL MASTER THOMPSON: Mr. Kaste, do you  
10 have any problem with that?

11 MR. KASTE: No. If they get up a more specific  
12 list, we will respond to it to the best of our ability.

13 You know, I don't know what your schedule is  
14 like, but frankly I think you might enjoy coming out at  
15 some point during the course of this case and looking at  
16 the State Engineer's Office here.

17 I went over yesterday with Mr. Draper and  
18 Mr. Brown and got a great tour from Allan Cunningham,  
19 our board of control administrator. And the scope of  
20 our records that they've got in there is pretty  
21 impressive, and somebody could walk you through the  
22 process of what it takes to find out, you know, the  
23 exact status of a particularized water right. And it's  
24 a lot like a title search, if you've ever been through  
25 that miserable process at your local courthouse. It's

1 an involved process and it involves, you know, pulling  
2 one book and moving to the next and so on and so forth  
3 as you follow this water right over time, and go get the  
4 corresponding maps and things.

5 And, if nothing else, if you have the  
6 opportunity for your own personal curiosity, I would  
7 check it out, because it's pretty impressive after 130  
8 years.

9 To the extent that we can respond to narrower  
10 requests, we will, but I'm going to tell you some of the  
11 answers you're going to be -- you know, that's one  
12 that's going to require the same amount of work, because  
13 we're not yet into the 21st century with our 1890 water  
14 rights. We don't have a database that we can hit  
15 "Print" and give people the right answer to a  
16 particularized question, but I -- we will do what we  
17 can, and we have done a lot already.

18 MR. DRAPER: Your Honor, this is John Draper.  
19 I'll second what Mr. Kaste just said. We did -- we took  
20 the deposition of Mr. Cunningham yesterday, and  
21 afterwards he did show me around and the records are  
22 over there. They're -- they are in banks higher than  
23 your head and there are literally hundreds of thousands  
24 of documents, and so it's -- that's where the original  
25 records are, but they are also very difficult to assess

1 for purposes of a case like this.

2 If you had to do a title search on each tract  
3 of land in a basin, it's -- it's obviously something  
4 that cannot be done in the context of this suit, and  
5 where the State of Wyoming has done compilations of its  
6 water rights and assessments and is in a position to  
7 make groupings of this information available, we believe  
8 we're entitled to and would appreciate very much  
9 Wyoming's help in doing that.

10 MR. MICHAEL: Your Honor, this is Peter  
11 Michael. If I could add just one footnote to what both  
12 counsel said, it is important to remember throughout  
13 this discussion and if we're back to talking about this  
14 again, there's a very big distinction between the water  
15 rights, which most of the last discussion focused on  
16 which are centralized in Wyoming in the room that  
17 Mr. Kaste and Mr. Draper were just talking of, and the  
18 actual records of regulating those rights, which is more  
19 of a field operation, and those are not in a  
20 centralized, computerized, regularized record process.

21 And I know that Mr. Draper -- they're taking  
22 the depositions of our field people, and they know  
23 today, to the extent they questioned how that process  
24 works, what kinds of records there are. We certainly  
25 turned those over, the diaries of the various people, to

1 try to reconstruct what they did.

2           And the fact of the matter is, I think,  
3 Your Honor, and I'll just -- maybe this is editorial  
4 comment or what I think -- I think probably both sides  
5 are going to find out -- certainly Montana may have  
6 found this out already -- if you reach back very far in  
7 the past, you really need the memories of regulators not  
8 just with respect to the water rights, but with respect  
9 to what a regulator may have done in 1987, two decades  
10 before this case was filed.

11           And that information -- you know, if we hear  
12 argument later that Wyoming won't play ball, this  
13 information should be available, simply it isn't. And  
14 I'm not talking about the water rights; I'm talking  
15 about the history of regulation, who regulated what.

16           And that's why Montana, of course, has been  
17 taking these depositions recently, to talk to the people  
18 that do that. So I want to make that distinction and  
19 keep it in everybody's mind there's two sets of records  
20 here, and we don't want to get confused in future  
21 discussions.

22           SPECIAL MASTER THOMPSON: Okay. That's  
23 actually very helpful, Mr. Michael.

24           So going back to, then, the Wyoming dispute  
25 that was raised on November 13th, so I certainly

1 understand the frustration of Wyoming that at this  
2 stage, there's still some basic contentions there that  
3 have not been specified, and particularly those with  
4 respect to when Montana did not have adequate water in  
5 order to satisfy its pre1950 appropriative water rights,  
6 which I would have thought would have been readily  
7 available to Montana and that Montana would have an  
8 answer to.

9 But, again, Mr. Draper, you're telling me you  
10 won't know that until you submit your -- your expert  
11 witness?

12 MR. DRAPER: Well, Your Honor, I think that as  
13 a -- there's a different culture in the two states as  
14 far as the administration of rights, and Wyoming is  
15 simply assuming that it's done the same way in Montana  
16 as it's done in Wyoming, and it just isn't that way.

17 Rather than having water commissioners as  
18 Wyoming has, we have commissioners that are appointed by  
19 the local courts when necessary to do this, so we know  
20 when -- we know we're short, but if the demand is, Oh,  
21 well, you have to say which water right is short and by  
22 how much, on which day or which period, that's -- that's  
23 not something our system is set up automatically to  
24 answer and so it's -- it's not unexpected that -- to the  
25 extent we can answer those, those types of questions,

1 that it takes investigation and it's not immediately  
2 available.

3 SPECIAL MASTER THOMPSON: And at the same time,  
4 as Mr. Kaste started out saying, they are flying largely  
5 in the dark. They know particular years, but other than  
6 that, they don't have much of a certainty of what they  
7 need to be defending against here or not.

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

10 We're trying to shed light on that for  
11 ourselves as well and, as you can tell, we're right in  
12 the middle of that. As Mr. Michael points out, it's a  
13 combination of rights and administration, and you need  
14 both aspects of that, including the mapping that's been  
15 done that we talked about.

16 And this all has been provided to us very late  
17 in the game, and then within weeks of getting that kind  
18 of very useful information, they're criticizing us for  
19 not having an analysis already available on that  
20 subject. So I feel it's a little unfair for them to  
21 believe that they're frustrated under the circumstances.

22 We've been thwarted here, we believe. It  
23 sounds like we are now going to get information to which  
24 we feel we've been entitled to a long time ago, back in  
25 the early part of this calendar year and did not get,

1 and now we'll gladly accept what they're now offering as  
2 of today and go forward with best efforts and be  
3 prepared to provide that information to them just as  
4 soon as it's available to us.

5 SPECIAL MASTER THOMPSON: Okay. So I am going  
6 to have to end the conference call in just a few minutes  
7 here because I have another meeting that I need to get  
8 into.

9 You know, I think I probably share everyone's  
10 frustrations, but I understand Wyoming's concerns at  
11 this stage, that they're still flying relatively blind  
12 and that we need to begin to actually get some specific  
13 contentions as well as hopefully facts to back these up.

14 And the -- I think one of the problems that --  
15 that I see right now, Mr. Kaste -- and I appreciate your  
16 thoughts on this -- is that right now we have -- I think  
17 it's this coming Friday that the supplemental  
18 declarations and information and -- that I've ordered in  
19 response to Wyoming's motion for partial summary  
20 judgment will be due.

21 Hopefully at that point we will have narrowed  
22 down in hopefully a more concrete fashion exactly what  
23 the dates are that we are looking at. And Montana's  
24 expert reports are due at the beginning of this next  
25 year, and my -- my own preference is I want to get those

1 two things out and move forward at that point, and  
2 I'm -- I guess my question is, you know, whether or not  
3 at this stage, asking for further answers to the  
4 interrogatories is going to get you to that information  
5 much faster than you're already going to get it.

6 I realize that this might at that point mean  
7 that you will be needing and requesting additional time  
8 to submit your expert witness designations and reports,  
9 but I'm wondering whether or not the best route is to  
10 just move forward with those deadlines.

11 MR. KASTE: Well, Your Honor, we can live with  
12 that, you know. I understand that there's -- there's  
13 the potential that the years in issue will be narrowed  
14 down as a result of what happens next week. That would  
15 be to everyone's benefit if we can hone down what the  
16 years are in issue.

17 If we're going to learn what Montana's case is  
18 on January 4th, and that's the earliest we can learn it,  
19 that's as early as we can learn it.

20 And I appreciate your willingness to be  
21 understanding because of the potential problems, but  
22 that causes us having -- obviously we have just not  
23 started preparing our experts to try and address this  
24 litigation; they've been well on their way for a very  
25 long time, but they need time to specify and hone in

1 their opinions on the particulars of the case, and if we  
2 need more time to do that because we're just learning  
3 what Montana's particular definite claims are on January  
4 4th, we'd like to have that opportunity.

5 Of course, I don't know what those claims are  
6 going to be on January 4th. We may not need more time.  
7 We'll have to take a particularized look at the content  
8 of those reports. But you're right, that could -- I  
9 think it has already put us behind the eight ball, and  
10 if there's some way to address that in the future with  
11 regard to our deadlines, I would appreciate it.

12 SPECIAL MASTER THOMPSON: Again, I probably  
13 share everyone's frustration with these issues, but they  
14 are still arriving at this particular point in time, and  
15 it makes the deadlines coming up all the more important.

16 Are there any other discovery disputes that are  
17 boiling below the surface right now that I should expect  
18 to receive in the next week or two?

19 MR. KASTE: I have vented all I can,  
20 Your Honor.

21 MR. MICHAEL: Yes, Your Honor. This is Peter  
22 Michael.

23 And we had a meeting with Mr. Draper last  
24 evening and I know we're talking about depositions. I  
25 think next week there won't be any deposition, but

1 that's probably a good thing because -- excuse me --  
2 Montana needs to be providing that pleading on Friday on  
3 the crawl issue, and then I think we've been discussing  
4 I think the next week, so we're still on track for what  
5 we had offered the last status conference, which was  
6 clear the decks of as much as has to do with discovery,  
7 which is depositions, and that is depositions through  
8 the end of the year. And we are still on track with  
9 that from our discussions yesterday, as far as I'm  
10 concerned.

11 And then after, I think we talked to  
12 Mr. Draper, that, of course, after the experts'  
13 designations coming in from Montana in January, we're  
14 going to have to come back and do more depositions. We  
15 didn't get done what we wanted to get done before this  
16 day, and what we need to get done, and I think at some  
17 point we certainly want to have some room for our  
18 depositions.

19 MR. DRAPER: Your Honor, this is John Draper.  
20 I confirm we did get together yesterday evening and we  
21 are looking at a schedule for a week off, this coming  
22 week, for the purposes Mr. Michael mentioned and for  
23 preparation of our case.

24 The following week we're looking at doing  
25 further depositions of Wyoming local officials and water

1 users in the Sheridan area, so we appreciate the  
2 accommodation on that, and we'll redouble our efforts to  
3 meet the existing deadlines and to appropriately  
4 cooperate with Wyoming.

5 SPECIAL MASTER THOMPSON: Okay. Thank you.

6 Let me ask, is there a value, do you think, of  
7 setting another status conference in approximately two  
8 weeks' time? Or I could do it even sooner, just to have  
9 a time set aside where we can check in and, again, if  
10 there's any other issues that have arisen during that  
11 point, we can discuss them.

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

13 I don't think it would hurt. I'm not aware of  
14 issues that might need to be considered at that time,  
15 but with the pressures that people are under, it's  
16 not -- it would not be surprising if there were some  
17 issues that we would need your guidance on.

18 MR. KASTE: Your Honor, two weeks from today,  
19 if Montana is taking depositions in Sheridan, I would  
20 think there would -- counsel would be together -- at  
21 least some counsel together on Friday, two weeks from  
22 today. So if everybody wanted to check their calendars,  
23 I'm sure we could accommodate that.

24 SPECIAL MASTER THOMPSON: Yes. Let's -- let me  
25 just look at this.

1           What --

2           MR. KASTE:   The 14th, December 14th.

3           SPECIAL MASTER THOMPSON:   December 14th?   So  
4 does it look like both of you -- both of the two  
5 principal sides will be in deposition together on that  
6 day?

7           MR. DRAPER:   If -- in my mind, we're not sure  
8 to be together on that day and it would make better  
9 sense to look at maybe Wednesday or Thursday of that  
10 week.  There are travel issues that we haven't resolved  
11 yet.

12          SPECIAL MASTER THOMPSON:   Thursday, I actually  
13 am pretty open.

14          MR. KASTE:   13th?  Thursday the 13th?

15          SPECIAL MASTER THOMPSON:   Yes.  So right now I  
16 don't have anything on my calendar until 2:30 your time,  
17 so any time before 2:30 your time would be fine with me.

18          MR. DRAPER:   All right.  Let's say  
19 11:00 o'clock your time?

20          SPECIAL MASTER THOMPSON:   12:00 your time?  
21 That would be fine.

22          Okay.  So we will set that aside, and let's  
23 definitely plan to have a status conference that day.  
24 Even if there are not any issues, I think on this case I  
25 would feel more comfortable if we checked in.

1 MR. DRAPER: Very good.

2 MR. KASTE: Great.

3 SPECIAL MASTER THOMPSON: Okay. Is there any  
4 other issue we need to discuss today?

5 MR. KASTE: Not that we need to discuss.

6 There was a series of future status  
7 conferences, potential dates, and I think the parties  
8 could respond to that by e-mail so you can get to your  
9 other meeting.

10 SPECIAL MASTER THOMPSON: That would be great.  
11 Okay. Thank you very much, everybody.

12 MR. KASTE: Thank you, Your Honor.

13 MR. DRAPER: Thank you, Your Honor.

14 SPECIAL MASTER THOMPSON: Enjoy the rest of  
15 your day.

16 (The Telephonic Status Hearing concluded at 12:08 p.m.)

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1 I, Lynn Penfield, a Certified Shorthand Reporter  
2 No. 8589, State of California, RPR, hereby  
3 certify:

4 That the foregoing proceeding was reported by me  
5 and was thereafter transcribed with Computer-Aided  
6 Transcription; that the foregoing 48 pages is a full,  
7 complete and true record of said proceeding.

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

12 The dismantling, unsealing, or unbinding of the  
13 original transcript will render the reporter's  
14 certificate null and void.

15 IN WITNESS WHEREOF, I have hereunto set my hand  
16 this 6th day of December, 2012.

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Lynn Penfield, CSR No. 8589, RPR