
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.)
)

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

STATUS CONFERENCE

DECEMBER 13, 2012

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20 TELEPHONIC STATUS CONFERENCE HEARING,

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23 11:03 a.m. before Antonia Sueoka, Certified Shorthand

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

25 California,

1 THURSDAY, DECEMBER 13, 2012, 11:03 A.M.

2 - - -

3 SPECIAL MASTER THOMPSON: Why don't we go on the
4 record.

5 This is a status conference in State of Montana
6 vs. State of Wyoming and State of North Dakota, which is
7 Number 137 Original in the Supreme Court of the United
8 States.

9 And why don't we begin by having identification
10 of counsel. So we'll start as always with the State of
11 Montana.

12 MR. DRAPER: Good morning, Your Honor. This is
13 John Draper. Also appearing this morning by telephone is
14 Jennifer Anders from the State of Montana.

15 SPECIAL MASTER THOMPSON: Thank you, very much,
16 Mr. Draper.

17 And next is Wyoming?

18 MR. KASTE: Good morning, Your Honor. This is
19 James Kaste on behalf of the State of Wyoming. With me
20 today is Peter Michael and David Willms.

21 SPECIAL MASTER THOMPSON: Thank you, Mr. Kaste.
22 So next, State of North Dakota?

23 MS. VERLEGER: Jennifer Verleger.

24 SPECIAL MASTER THOMPSON: Thank you very much.

25 And then we have Amicus United States?

1 MR. DuBOIS: James DuBois for the United States,
2 Your Honor. Good morning.

3 SPECIAL MASTER THOMPSON: Good morning,
4 Mr. DuBois.

5 And then next, North Cheyenne Tribe?

6 MS. WHITEING: Yes. This is Jeanne Whiteing for
7 the Tribe.

8 SPECIAL MASTER THOMPSON: Thank you very much.
9 Good morning, Ms. Whiteing.

10 And then finally, Anadarko?

11 MR. WIGMORE: Yes, Your Honor. Michael Wigmore
12 of Bingham McCutchen for Anadarko.

13 SPECIAL MASTER THOMPSON: Thank you.

14 So the things that I wanted to cover this morning
15 were, first of all, just get an update on the status of
16 discovery and see whether or not there are any disputes
17 that need to be raised this morning, and then, second of
18 all, I just wanted to talk just very briefly about the
19 Renewed Motion for Partial Summary Judgment and Montana's
20 submission last Friday. And then I also just wanted to
21 alert everyone that I'll probably be putting in a fee
22 motion to the Supreme Court within the next week or two.

23 So let's start with discovery. And I got last
24 week both of the two parties' discovery update, but I'm
25 just curious, are people holding depositions again this

1 week?

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

3 (Interruption)

4 SPECIAL MASTER THOMPSON: Mr. Draper, why don't
5 you start over.

6 MR. DRAPER: Okay. In answer to your question,
7 Your Honor, we have conducted depositions in Sheridan
8 yesterday, and so we have completed the depositions that
9 we were expecting to take this week. And we're working on
10 completing our expert reports.

11 We do have some remaining concerns that we have
12 spoken to Wyoming about getting together to work out.
13 We're hopeful that we can do that, but we don't have
14 anything in the category of discovery disputes to bring to
15 you this morning.

16 And, as I say, we're continuing to work in
17 accordance with deadlines that have been imposed to
18 provide our expert disclosures by January 4.

19 And as part of our expert report preparation, we
20 came to the determination yesterday that we will not be
21 pursuing any claims on the Powder River, the Powder River
22 Basin at this time. So I wanted to let you and Wyoming
23 know that immediately. And so that's just a very recent
24 result of our work and preparation.

25 SPECIAL MASTER THOMPSON: So that -- go ahead.

1 MR. DRAPER: That covers our status at the
2 moment.

3 SPECIAL MASTER THOMPSON: Okay. And so that's --
4 so that's very helpful. Thank you for that update.

5 Now, when we talked several weeks ago, there were
6 some disputes regarding documents and information on
7 various water claims. Is that part of what you're still
8 working out with Wyoming?

9 MR. DRAPER: Yes. This is John Draper, again,
10 Your Honor.

11 Yes. As you know, we did resolve certain
12 disputes in conjunction with the last status conference,
13 and we were given access to the materials that we had
14 asked for. We still have some lingering concerns that we
15 are hopeful will be resolved in a telephone conference
16 tomorrow.

17 SPECIAL MASTER THOMPSON: Okay. Thanks.

18 And so, Mr. Kaste?

19 MR. KASTE: I think Mr. Draper has pretty well
20 accurately outlined the course of discovery in the last
21 two weeks. We had three depositions up in Sheridan
22 yesterday, no additional depositions have been scheduled
23 at this time. And we anticipate having a call tomorrow
24 between the parties to discuss the narrowing that we
25 discussed of the discovery requests and trying to hone in

1 on those things that we can easily find for Montana. And
2 we -- I'm not sure exactly what -- how they're going to
3 approach that and how they're going to ask for it, but
4 we'll do what we can to accommodate their requests
5 tomorrow.

6 SPECIAL MASTER THOMPSON: Okay. So if you need
7 to call me for any reason in connection with that
8 discovery, I will be in town. And, in fact, I will tell
9 you right now, I will be in town through December 29th. I
10 then will disappear for a couple of days to go down to
11 Pasadena for a Bowl Game, but otherwise I'll be here.

12 MR. KASTE: I want to bring -- this is James
13 Kaste -- a matter, I guess, up and get it on everybody's
14 radar.

15 The State of Wyoming anticipates in the very near
16 future -- and when I'm saying "near future," I mean like
17 tomorrow and next week -- beginning to issue subpoenas for
18 the production of documents to various water users in the
19 State of Montana.

20 Obviously, in light of the representation made
21 this morning, the number of subpoenas is going to drop
22 somewhat by eliminating water users along the Powder River
23 basin, but there are significant number of water users in
24 the Tongue River Basin who we will be sending subpoenas to
25 obtain information about their water use and calls

1 regulations and things of that sort.

2 There are two things that I want to mention about
3 that. One ties into the discussion we're going to have
4 here in a minute about the additional materials that
5 Montana submitted with regard to the Renewed Motion for
6 Summary Judgment. As these subpoenas are currently being
7 drafted, we're going to be asking water users in the State
8 of Montana on the Tongue River Basin for information
9 related to all the years that are in issue currently.

10 If we were able to know what the final
11 determination is going to be with regard to the years in
12 issue, obviously, we would limit our subpoenas to those
13 years. You know, if it was two years, four years, or if
14 it's the full nine years, whatever it is, that's the
15 subpoena the folks are going to get. And so to, you know,
16 limit the burden as much as we all possibly can on these
17 various citizens, the sooner we know what that final
18 outcome is going to be, the better.

19 I have sat on these subpoenas for a while, but,
20 you know, it's beginning to be our turn to go out and talk
21 to folks and take depositions about what went on in
22 Montana during the periods in issue, and so I can't really
23 sit on issuing these subpoenas much longer.

24 The second issue with regard to these subpoenas
25 is that there are about eight of them that are going to go

1 to like, I think, six to water users and two to water
2 commissioners that the State of Montana identified in
3 their joint -- or in their initial witness list as folks
4 that should be contacted through counsel for the State of
5 Wyoming. And I just want to have it clear between counsel
6 and the Court that if these subpoenas are sent directly to
7 counsel for the State of Montana, that that is an
8 effective mechanism of service because these individuals
9 are not employed by the State of Montana, the water
10 commissioners and some of the water users, and I think
11 they're the -- kind of the big ones on the Tongue River,
12 but they're not in Montana's actual control.

13 And I'm more than happy to have them served, like
14 any other water user, but if that's -- if that's not
15 everybody's preference, I'm more than happy to send it
16 directly to counsel for the State of Montana. I kind of
17 just want some direction mostly so that we don't cause any
18 confusion about that.

19 SPECIAL MASTER THOMPSON: So just to clarify for
20 me, so there are a total of eight of the subpoenas that
21 you plan to issue that will go to individuals that Montana
22 in prior documents asked that you contact through them
23 rather than directly, and then in addition to that, there
24 are a number of other subpoenas that you'll be issuing
25 directly to other individuals.

1 MR. KASTE: That's correct. Just regular
2 citizens in Montana who have water rights along the Tongue
3 and whose irrigation is an issue.

4 SPECIAL MASTER THOMPSON: Okay. So I think,
5 Mr. Draper, that Mr. Kaste's last question was really
6 addressed to you as to whether or not, given that you've
7 requested that he contact those eight individuals through
8 you, whether or not that is an appropriate service.

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

10 Yes, we hadn't heard about this before this call.
11 I would suggest that Wyoming provide us draft subpoenas to
12 us, and then that will be a subject of discussion at our
13 conference call tomorrow so that we can minimize any
14 confusion and make it as streamlined as possible for
15 everyone concerned. And we are certainly happy to
16 cooperate with that to achieve that goal.

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

18 I will e-mail counsel from Montana the list of
19 individuals that I'm interested in after this call, and
20 then when we speak tomorrow, then they can tell me up or
21 down whether they want the subpoena directly to the
22 individual or to counsel.

23 MR. DRAPER: Your Honor, John Draper.

24 That's fine with me.

25 SPECIAL MASTER THOMPSON: Okay. Great. And

1 again, I'll be available up until December 21st. If you
2 need to set up a time when we can meet and discuss any
3 discovery issues, then you can e-mail or contact
4 Ms. Carter on that, and she can find a time as quickly as
5 possible for us to meet over the telephone.

6 After January -- I'm sorry, after December 21,
7 the university closes down, and so at that point, probably
8 the easiest thing to do will be to send me an e-mail
9 directly because there will be no other way to alert me to
10 that and then I can set something up. And what I'll ask
11 Ms. Carter do is to, well, send my e-mail around to
12 everybody so that you have that available.

13 MR. DRAPER: This is John Draper.

14 Thank you, Your Honor.

15 SPECIAL MASTER THOMPSON: Anything else on
16 discovery for the moment?

17 MR. KASTE: Not from the State of Wyoming.

18 SPECIAL MASTER THOMPSON: Okay. Thank you.

19 Finally, my intent then is the supplemental
20 evidence that Montana produced in response to my order.
21 And so I've reviewed this, and I can tell you that, you
22 know, sort of preliminarily, that although -- you know,
23 again, this is not everything that I'd hoped for and would
24 like memories to -- well, to be better, that for the 2000
25 years -- 2000, 2001, 2002, and 2003 -- that in those

1 years, my inclination is to permit Montana to present
2 evidence on damages in those particular years, recognizing
3 that that would not be resolving the ultimate question as
4 to whether or not Montana can claim those, but that they
5 at least can present evidence.

6 I'm more uncertain about the years in the 1980s,
7 in part because the information that is provided is much
8 less detailed and more spotty, which might be -- to be
9 expected given the difficulties of actually recalling
10 events back at that point in time.

11 And so I would love to actually hear a little bit
12 from both sides as to their thoughts as to those years,
13 that's the 1987, 1988, and 1989 years, and maybe start
14 with Montana.

15 So I've read through your papers, Mr. Draper, and
16 I understand entirely your point that given the particular
17 way in which original jurisdiction cases are tried, that
18 as a general matter I should error in favor of permitting
19 full development of the record so that we don't end up in
20 a situation where the Supreme Court disagrees with me on
21 the years in which you should have been able to present
22 evidence and then we're all back here four or five years
23 from now having to present evidence on those particular
24 years.

25 At the same time, I also do not want to take up

1 an immense amount of counsel time, counsel expense,
2 witness time trying years that ultimately you're unable to
3 convince me and then the Court that you actually should
4 have been able to present evidence of damages.

5 So that, as always, is my quandary on this, and
6 would love to -- if you have any additional thoughts to
7 those that you had presented in your -- in your brief in
8 support of the supplemental evidence, I would love to give
9 you the opportunity.

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

11 One point that I think might be helpful to
12 mention is the distinction here between liability and
13 damages, this has been with me, pursuant to the Memorandum
14 of the Special Master on Wyoming's Renewed Motion for
15 Partial Summary Judgment (Notice Requirement For Damages).
16 And I think that expresses well the distinction I just
17 want to remind everyone else, and that is between
18 liability and remedies, damages is a remedy and liability,
19 on the other hand, is -- which I -- that's the state of
20 the case we're in now, relates to whether there's a
21 violation and the amount of the violations, as opposed to
22 any remedy for that violation.

23 So I view this particular ruling as really
24 focused more on the issues that will be addressed as
25 necessary in the remedies phase of the case. It may be

1 that there are violations of the Compact, for instance,
2 that Your Honor will rule that even if there were
3 violations, the notice was insufficient, and therefore, no
4 remedy would be provided for those in terms of damages or
5 under compensation. So I just wanted to make sure that
6 that distinction was clear.

7 And as I think Your Honor is aware, as we get
8 back in time, it is harder to identify as specifically the
9 notices and conversations that would qualify as notice of
10 a violation from Montana to Wyoming. But I would -- I
11 would point out that typically in the Tongue River Basin,
12 the pre-Compact rights have to start calling for stored
13 water by mid-July, specifically, even in relatively normal
14 years. And that means that the supply through direct
15 flows for those pre-Compact rights has become
16 insufficient. And at that point there is, I think, an
17 obvious situation where those pre-Compact rights are not
18 being satisfied, which I think is a generally known
19 condition.

20 And it's in that context that we're trying --
21 that we did our best in our submittal to find specific
22 instances where there has been communications that could
23 be identified at this date that might help in providing
24 more specific information for you.

25 So I think maybe that's what I can add at this

1 point, Your Honor.

2 SPECIAL MASTER THOMPSON: So let me ask you two
3 or three questions.

4 So the first one is: I understand your --
5 entirely your distinction between liability and damages.
6 Although we haven't talked about this before, I think
7 it's, you know, an interesting question. I have to take a
8 look back at the cases and prior rulings as to whether or
9 not the issue of notice here goes to just damages or
10 whether or not it's really an issue of liability as to
11 whether or not there's even an obligation to provide water
12 unless there is -- unless there's notice.

13 But assume for the moment that the issue is
14 simply one of damages. So I guess I'm struggling with if,
15 in fact, you knew that you couldn't present damages --
16 evidence for damages in particular years, why you would
17 still be arguing over liability; in other words, what's
18 the relevance of liability here for those prior years if
19 there's no damages?

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

21 The relevance, I believe, is that it shows that
22 indeed there has been violations in the past of the
23 requirements of the Compact and that an appropriate decree
24 needs to be entered against allowing those violations to
25 occur in the future.

1 SPECIAL MASTER THOMPSON: Okay. I understand
2 that.

3 Okay. So then a second question I had, and you
4 might not know the answer to this, I was curious, in the
5 declaration of Richard Moy, he has in Paragraph 24, which
6 is on Page 6 of his declaration, a statement that during
7 these informal meetings, and he talked the year before --
8 I'm sorry, in the paragraph above about various informal
9 meetings during the drought years of '87, '88, and '89.
10 It says: "During these informal meetings from 1987 to
11 1989, I personally informed Wyoming water officials that
12 Montana was not receiving sufficient water to satisfy its
13 pre-1950 water rights."

14 And then on Page 8, and this is the very end of
15 Paragraph 35, he says: "I believe I informed Wyoming that
16 Montana was not receiving sufficient water to satisfy its
17 pre-1950 water rights in the following years," and he now
18 lists '88 and '89 and he no longer lists '87. And I just
19 want to make sure that when I do rule on this, that I
20 have, you know, an accurate record.

21 Do you have any reason -- do you know why there's
22 that discrepancy or do you think its a typo?

23 MR. DRAPER: Your Honor, my first reaction --
24 this is John Draper again. My first reaction is that it's
25 a typo and that that year was inadvertently left out of

1 that list.

2 SPECIAL MASTER THOMPSON: Okay. Thanks.

3 And how easy is it to reach Mr. Moy and verify
4 that?

5 MR. DRAPER: I believe we can reach him and
6 verify that and provide that clarification to you and the
7 parties.

8 SPECIAL MASTER THOMPSON: Okay. That would be
9 useful, if you could. I think no matter which way I go on
10 these years, I think that's useful for the record.

11 So, Mr. Kaste, your thoughts.

12 MR. KASTE: Well, I get the impression that my
13 thoughts are limited to the '80s.

14 SPECIAL MASTER THOMPSON: As I said, that's just
15 my initial inclination having read these papers, so feel
16 free to address the 2000s if you want to.

17 MR. KASTE: Well, clearly, I think the 1980s
18 stand out in terms of the quality of the evidence
19 presented in the supplemental materials, it is
20 qualitatively similar to the preexisting evidence in that
21 it is so inspecific -- or unspecific in its particulars as
22 to be unhelpful.

23 I think that as it relates to 1987 and 1988 and
24 1989, at best we can glean from Mr. Moy's supplemental
25 affidavit, that he had a communication at some point

1 during the year. It's not clear from the content of his
2 affidavit when during the year. It appears that it
3 occurred during Compact commission meetings and the
4 informal meetings that are associated with the formal
5 Compact commission meetings which, of course, occur
6 outside of the irrigation season.

7 And I think -- I mean, the easiest way to address
8 the 1980s here is to look at that portion of your draft
9 ruling that says that if a specific date can't be
10 identified, we'll assume it's the last date in that
11 period. And in light of Mr. Moy's supplemental affidavit,
12 I think we should assume it's the last day in the water
13 year and that those years are really off of the table.

14 And frankly, there's just no -- nothing new that
15 was submitted that would lead us to a different conclusion
16 as it relates to those years. And it would be an awful
17 lot simpler for the folks on both sides of the case and
18 the folks on the ground in Montana and Wyoming who are
19 going to be asked to provide information about these
20 claims if we're just talking about things that occurred at
21 least in the last 12 years, as opposed to the last 20.

22 The pragmatic effect of that ruling isn't really
23 a good basis for throwing out all those years, but I just
24 note that it would make a lot of people's lives easier.
25 And there's just nothing new in there.

1 As it relates to the 2000s, I think we do need to
2 focus very heavily on the representation essentially that
3 while we made these communications during the irrigation
4 season and you look at the declaration of Mr. Stults and
5 the best he can do is to say, "Well, it was May or June
6 of 2001 and 2002," and this isn't much more specific than
7 what we got before. I think at a minimum, those claims in
8 years preceding 2004 and 2006 have to be limited to at
9 most the end of June in any given year.

10 You know, as it relates to the communications,
11 the evidence before you from our side, of course, is clear
12 and definitive from the supposed recipients of these
13 communications. I will tell you, and it's entirely up to
14 you and what your preference is, there have been some
15 depositions taken, and I see that you were provided with
16 some deposition testimony by the State of Montana, but
17 there is other deposition testimony that has been
18 developed subsequent to the original hearing on this
19 matter, particularly from Mr. Mike Whitaker, who is the
20 supposed recipient of these communications, Ms. Sue Lowry,
21 another supposed recipient, who were asked point-blank
22 whether they ever received a call, and the answer was, no,
23 in no uncertain terms.

24 We could submit those portions of those
25 transcripts to you, if you thought that that would be

1 valuable. If you don't think that that would be valuable
2 to your determination, that's okay. But I think, you
3 know, at end of the day, this is the case about 2004 and
4 2006, and these remaining years, the evidence just isn't
5 in there, it's just not available to us.

6 And, of course, it makes all the sense in the
7 world that we have no trouble finding that a call was made
8 in 2004 and 2006 because Montana wrote a letter. There's
9 documentation of this event. And, you know, perhaps it
10 doesn't meet the standard, but you have to ask yourself,
11 if Montana really made a call in these other years,
12 wouldn't one of these employees have written it down
13 somewhere?

14 I mean, it strikes me as sort of outside the
15 bounds of reality that nobody working in the State of
16 Montana would have written that down anywhere. And I
17 think the sooner we get this case narrowed down to 2004
18 and 2006, the better off we'll all be.

19 And like I said, we can submit something in
20 writing and we can make more formal arguments to you if
21 you would like. I don't know whether we have much more to
22 say than what we said in our earlier pleadings, but I do
23 know that I'd very much like to get started on sending out
24 subpoenas to folks and knowing from you what years are
25 really going to be an issue going forward would be very

1 helpful to us and helpful to the folks that are going to
2 have to respond to these subpoenas.

3 SPECIAL MASTER THOMPSON: No, I understand the
4 desire to, well, narrow down the case, and the Summary
5 Judgment Motion is the appropriate way of doing that. At
6 the same time, I can't judge credibility in this
7 particular motion.

8 And so looking at the years from 2000 to 2003 at
9 this particular point in time, yeah, there's a number of
10 very explicit statements in Mr. Stults' declaration that,
11 for example, in 2002 and 2003 he did notify Wyoming
12 officials, including Pat Tyrrell and Sue Lowry of water
13 shortages, and he did that in May and June, and
14 statements, for example, earlier in Paragraph 15 with
15 respect to concerns about the irrigation methods
16 throughout the irrigation season, especially during the
17 drought years of 2000, 2001, 2002, and 2003.

18 I'm not sure what deposition statements from, for
19 example, Ms. Lowry and -- I'm sorry. Yeah, Ms. Lowry --
20 and I've now lost my place -- and Mr. Tyrrell, how that
21 can help me on the Summary Judgment Motion.

22 MR. KASTE: No, I understand completely, Your
23 Honor, that you're not being asked to weigh the
24 credibility at this phase of the litigation. And so
25 that's why I say if you want them, we can provide them to

1 you. If not, we're happy to go forward without doing that
2 and present their testimony at trial.

3 I guess the only other thing that I would say is,
4 you know, when you look at Mr. Stults' affidavit, he says
5 in Paragraph 20, "I notified Pat Tyrrell and Sue Lowry of
6 water shortages at a specific point in time."

7 And that's all well and good, but a call is more
8 than that. A call is a request for water. A call is
9 request for action by the State of Wyoming, and all he
10 says about that is, "My intent was to make a verbal
11 request for water."

12 And by the virtue of saying that was his intent,
13 he sort of admits that he didn't actually do it.

14 And that's the problem with Montana's evidence as
15 it relates to these years outside of 2004 and 2006 where
16 they actually made a specific request is that they have
17 indicated, Mr. Stults says, "Well, I intended to do it,"
18 and that's not good enough.

19 He actually has to do it in order to put us on
20 notice that they're making a call, and that's where their
21 allegations fall short.

22 And so I think you'd be perfectly within the
23 bounds of reason and within the law to throw out the years
24 2000, 2001, 2002, and 2003 based on this implicit
25 admission that the call wasn't made.

1 SPECIAL MASTER THOMPSON: Okay. So, Mr. Draper,
2 any response?

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

4 I think, Mr. Kaste's comment show the reason why
5 summary judgment is not appropriate here because it does
6 require weighing competing statements and competing
7 inferences for someone to take the position that when a
8 downstream water user tells an upstream water user that
9 they are out of water and need water, that that somehow
10 does not amount to notice sufficient to require them to
11 pass down whatever water they're obligated by law to do,
12 seems to be taking an inference, at the very least, in a
13 direction that is not appropriate for summary judgment.

14 So I would -- and this is -- as I mentioned
15 earlier, this is all done in the context that it's well
16 known when water users in Montana start taking water from
17 Tongue River Reservoir and that means that their direct
18 flow rights are not being satisfied. And for them to say,
19 "Oh, well, we are" -- "under these" -- "in this context
20 and getting specific additional statements from Montana
21 officials is not sufficient to put us on notice," it seems
22 to me that it's inappropriate to rule in favor of Wyoming
23 under summary judgment under those circumstances.

24 SPECIAL MASTER THOMPSON: Okay. So I think at
25 this stage, I note both side's positions and the arguments

1 in favor of it. What time is your meeting tomorrow
2 morning?

3 MR. KASTE: Your Honor, this is Mr. Kaste, and
4 it's tomorrow afternoon.

5 SPECIAL MASTER THOMPSON: Okay.

6 MR. KASTE: And I think Mr. Wechsler might be
7 traveling, and so he was going to tell me what time worked
8 best for him, so we haven't set a particular time tomorrow
9 for our conference.

10 SPECIAL MASTER THOMPSON: Okay. Well, what I
11 will do is I will notify all the parties by tomorrow
12 morning what my final ruling is on these particular years
13 so then when you do have that conference discussion,
14 you'll know which years you're talking about.

15 MR. KASTE: Great. Thank you, Your Honor.

16 MR. MICHAEL: Your Honor, this is Peter Michael.
17 I wanted to throw my two cents in on an issue that Wyoming
18 actually hasn't responded to Mr. Draper about.

19 SPECIAL MASTER THOMPSON: Feel free to do so.

20 MR. MICHAEL: It was the distinction between
21 liability and damages?

22 SPECIAL MASTER THOMPSON: Yes.

23 MR. MICHAEL: My understanding from way back,
24 because I have discussed this with Mr. Draper many times,
25 and my understanding throughout this case up to this point

1 has been that when we -- the reason, for example, I
2 understood you to put on claim for damages in your -- on
3 this issue of a call was because we were referring to what
4 happened in the past. But surely, you know, to me the
5 damage part of this case has been bifurcated and set aside
6 for later proceedings. What we're talking about is
7 quantifying damages.

8 The idea that -- you know, I see this maybe the
9 camel's nose coming under the tent, where Montana at some
10 point here is going to say, we don't have to prove in our
11 liability case that there's a causation of some effect in
12 Montana, that we can wait to do that as damages.

13 I don't think that's correct. I think the
14 liability phase, you know, begins with, you know, there
15 has to be some kind of violation that leads to, you know,
16 a lack of water, and then they can go ahead and prove, you
17 know, what they ought to get in monetary compensation in
18 the bifurcated part of this case, but I don't think they
19 get to walk away from in the first part of the case of
20 proving causation of things that may have been done in
21 Wyoming would have actually affected somebody in Montana.

22 And that's the way I've looked at it throughout.
23 I wanted to put that on that marker for Wyoming that
24 that's the way we see it, and I didn't want to leave that
25 unresponded to.

1 SPECIAL MASTER THOMPSON: Mr. Draper, did you
2 want to say anything at this point?

3 MR. DRAPER: Yes, Your Honor. Thank you.

4 I think the distinction here is between a Compact
5 violation and the damages arising from that violation.
6 Those are two quite distinct considerations. And Your
7 Honor has ruled that in order to get damages for a
8 violation, there had to be a call or a form of notice as
9 you described in your memorandum decision. But that goes
10 to the damages, whether they might be in monetary terms or
11 what should be paid back in -- in response to those
12 violations. That's a different consideration than whether
13 the Compact was violated and by how much in terms of
14 water.

15 So there is a -- there is a bit of a point that
16 we do need to ultimately be clear on, but we are not
17 anticipating addressing those remedy issues of damages in
18 this first phase of trial. And it's the first phase that
19 we're involved in here is were there violations, and if
20 so, by how much?

21 So I think the way Mr. Michael described it was a
22 little bit more responsive or expansive than that, and to
23 the extent that it is, we wish to agree with him on
24 that.

25 SPECIAL MASTER THOMPSON: So let me just see if I

1 understand.

2 Mr. Michael, if I understand your concern, it is
3 the possibility that in this initial liability stage that
4 Montana might come forward and argue that they can show
5 liability on the part of Wyoming, and particularly that
6 Wyoming has violated the Compact, without ever having to
7 show whether or not there was insufficient water to
8 actually meet the needs of any pre-1950 appropriators in
9 Montana. Is that your concern?

10 MR. MICHAEL: That's correct, Your Honor. And
11 that kind of pulls in what we were talking about earlier
12 today which, you know, that calls would be part -- a
13 precondition of Montana showing liability. A call -- and
14 also, again, if somebody was ready, willing, and able to
15 use the water; some things that we talked about back in
16 2011 when we were talking about some of the meanings of
17 the difference between a mass delivery concept and any
18 prior appropriation concept. We think all that, what you
19 just said, and then the other things, the calls and futile
20 calls, all that is part of the liability -- part of the
21 liability case.

22 SPECIAL MASTER THOMPSON: And again, this has not
23 been briefed and there's no motion in front of me, so I'm
24 not in any way making a ruling at this point, but I will
25 state that as I see this case at the moment that it -- you

1 know, that what Wyoming's obligation is to provide water
2 so that pre-1950 appropriate rights in Montana can be met,
3 and that would suggest that as part of the liability phase
4 that there would be a showing that, in fact, there was
5 inadequate water in Montana as a result of Wyoming actions
6 violative of the Compact that has presented 1950
7 appropriate rights being fulfilled in Montana.

8 So does that help you, Mr. Wechsler --
9 Mr. Michael?

10 MR. MICHAEL: Yes, Your Honor. Thank you very
11 much. I think that really cleared the air nicely.

12 SPECIAL MASTER THOMPSON: Okay. Anything else?
13 Today, again, I appreciate the parties' time,
14 talking about the Renewed Summary Judgment Motion.

15 MR. KASTE: Nothing from the State of Wyoming,
16 Your Honor.

17 MR. DRAPER: Nothing from the State of Montana,
18 Your Honor.

19 SPECIAL MASTER THOMPSON: Okay. So the only
20 other thing I mentioned is I will be putting in a fee
21 request. I said last time I hadn't put in a fee request
22 because it just didn't seem like there were enough hours
23 to -- well, to justify it, but I think it's probably
24 appropriate for me to do it. And so I'll be doing it
25 probably in the next week or two.

1 The second reason I want to do it is that it's
2 the easiest way of keeping all members of the U.S. Supreme
3 Court informed as to the status of the case; I'll also use
4 it to talk about where we are at the moment.

5 Okay?

6 So unless there is anything else from any of the
7 various parties or amicus, then I think we can adjourn
8 this particular status conference call.

9 MR. DRAPER: This is, John Draper. Thank you
10 very much, Your Honor.

11 SPECIAL MASTER THOMPSON: Okay. Thank you all.
12 And so I think our next -- one final thing is I believe
13 our next call is set for January the 14th. Unfortunately,
14 my computer just went to sleep, so I can't -- it takes
15 forever to pull it back up.

16 UNIDENTIFIED SPEAKER: That's right, Your Honor.

17 SPECIAL MASTER THOMPSON: So, again, January the
18 14th, but, as I said, you can contact Ms. Carter through,
19 well, next Friday if you need to talk to me before then,
20 and then after that, I'll have Ms. Carter send my e-mail
21 around and you can use that, I think, through the first
22 week in January the university is closed. So she'll give
23 you the exact dates when you should just contact me
24 directly if you need to schedule a phone call.

25 MR. MICHAEL: Your Honor, this is Peter Michael.

1 There's one more thing. I'm sorry, you're about to sign
2 off, and I hate to bring it up belatedly, but it occurred
3 to me that -- I just want to make sure we're very clear.
4 You know, it was a fairly succinct comment Mr. Draper made
5 about the Powder River, and I just want to make sure that
6 we're very clear so that we really know where we're going
7 on the Powder River. There's a tributary to the Powder
8 that enters the Powder in Montana called the Little Powder
9 River. I assume that's included, but I'm not sure whether
10 Montana intends to also drop any claims related to that.

11 MR. DRAPER: Your Honor, I can clarify that.
12 This is John Draper.

13 Yes, it included -- it included issues on the
14 Little Powder.

15 MR. MICHAEL: Okay. Very good. Thank you.

16 SPECIAL MASTER THOMPSON: Okay. So again, thank
17 you all very much. If I don't talk to you before the end
18 of the year have a great holiday season with your
19 families, to the degree that you have the time, and have a
20 great New Year's.

21 VARIOUS SPEAKERS: Thank you, Your Honor.

22 - - -

23 (End of proceedings at 11:51 A.M.)

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