
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

Monday, January 14, 2013

Reported by: Kathleen A. Powell, CSR No. 2778

TELEPHONIC APPEARANCES

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

SPECIAL MASTER:
STANFORD LAW SCHOOL
BY: HONORABLE BARTON H. THOMPSON, JR., ESQUIRE
559 Nathan Abbott Way
Stanford, California 94305-8610
PHONE: 655.723.2465
buzzt@standford.edu

FOR THE PLAINTIFF STATE OF MONTANA:
MONTGOMERY & ANDREWS, P.A.
BY: JOHN B. DRAPER
JEFFREY J. WECHSLER
DONNA OMEROD, PARALEGAL
325 Paseo de Peralta
Santa Fe, New Mexico 87501
PHONE: 505.982.3873

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

TELEPHONIC APPEARANCES (CONTINUED)

FOR THE PLAINTIFF STATE OF MONTANA:

MONTANA ATTORNEY GENERAL'S OFFICE

BY: JENNIFER ANDERS

215 North Sanders

Helena, Montana 59620-1401

PHONE: 406.444.5894

FOR DEFENDANT STATE OF WYOMING:

WYOMING ATTORNEY GENERAL'S OFFICE

BY: JAMES KASTE

PETER MICHAEL

CHRIS BROWN

MATTHAIS SAYER

200 West 24th Street

123 Capitol Building

Cheyenne, Wyoming 92002

PHONE: 307.777.7841

1 TELEPHONIC APPEARANCES (CONTINUED)

2

3 FOR DEFENDANT STATE OF NORTH DAKOTA:

4 NORTH DAKOTA ATTORNEY GENERAL'S OFFICE

5 BY: JENNIFER VERLERGER

6 500 North Ninth Street

7 Bismarck, North Dakota 58501

8 PHONE: 710.328.2210

9

10 FOR THE UNITED STATES AS AMICUS CURIAE:

11 UNITED STATES DEPARTMENT OF JUSTICE

12 ENVIRONMENTAL & NATURAL RESOURCES DIVISION

13 BY: JAMES DUBOIS

14 1961 Stout Street, 8th Floor

15 Denver, Colorado 80294

16 PHONE: 202.514.8976

17

18 FOR ANADARKO PETROLEUM COMPANY AS AMICUS CURIAE:

19 BINGHAM, MCCUTCHEN, LLP

20 BY: MICHAEL B. WIGMORE

21 2020 K Street NW

22 Washington, D.C. 20006

23 PHONE: 202.373.6000

24

25

1 REPORTER'S TRANSCRIPT OF PROCEEDINGS, taken
2 telephonically on Monday, January 14, 2013, before me,
3 Kathleen A. Powell, CSR No. 2778, beginning at the hour
4 of 10:30 a.m. in the city of San Diego, County of San
5 Diego, State of California.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 San Diego, CA, Monday, January 14, 2013, 10:30 a.m.

2

3 TRANSCRIPT OF TELEPHONIC PROCEEDINGS

4

5 SPECIAL MASTER THOMPSON: So this is a status
6 conference in Montana versus Wyoming, which is 137
7 Original in the Supreme Court of the United States and
8 so let's start out by quickly doing the introduction of
9 our counsel. So counsel from Montana?

10 MR. DRAPER: Good morning, Your Honor. This is
11 John Draper. I'm here in Santa Fe with Jeff Wechsler.
12 We also have Jennifer Anders on the phone and my
13 assistant, Donna Omerod, I believe.

14 SPECIAL MASTER THOMPSON: Great. Good morning
15 Mr. Wechsler and everybody else from Montana.

16 Ms. Anders, how cold is it in Montana?

17 MS. ANDERS: Quite frigid. We've seen subzero
18 temperatures, so be grateful you're by the ocean.

19 SPECIAL MASTER THOMPSON: We're all complaining
20 today that when we woke up, it was about 30 degrees. So
21 it's nice to know it's colder elsewhere.

22 Okay. So next, counsel from Wyoming, where
23 it's probably also cold.

24 MR. KASTE: When I got up this morning -- this
25 is James Kaste -- it was 10 below.

1 SPECIAL MASTER THOMPSON: We're feeling warmer
2 every second.

3 MR. KASTE: I think it's up to a balmy five
4 below. I'm here with Peter Michael, Chris Brown and
5 Matthais Sayer.

6 SPECIAL MASTER THOMPSON: Thank you. Good
7 morning to everybody.

8 And then counsel for the State of North Dakota.

9 MS. VERLERGER: This is Jennifer Verlerger,
10 Your Honor, and I'm in a balmy nine degrees, so it
11 sounds like I'm winning the contest.

12 MR. DRAPER: I simply assumed that North Dakota
13 is always colder because you're farther north, but
14 apparently that's not the case.

15 MS. VERLERGER: We're by the river as well.

16 SPECIAL MASTER THOMPSON: Then we have the
17 various amicus, so for the United States?

18 MR DUBOIS: This is James Dubois for the United
19 States, Your Honor.

20 SPECIAL MASTER THOMPSON: Okay. Thank you.
21 And then for Anadarko.

22 MR. WIGMORE: Yes, Your Honor. This is Michael
23 Wigmore with Bingham, McCutchen for Anadarko.

24 SPECIAL MASTER THOMPSON: Okay. Great. And I
25 believe that Ms. Whiteing had a death or illness in the

1 family and so she's not going to be able to join us this
2 morning.

3 Is there anyone I'm forgetting?

4 Okay. If not, then the one thing that I know
5 we need to discuss this morning is Montana's expedited
6 motion for a protective order. We'll also however want
7 to discuss the scheduling and my guess is that might end
8 up being relevant to the expedited motion for protective
9 order, so in addition to the expedited motion for
10 protective order and the various deadlines that are
11 coming up, is there anything else that people want to
12 discuss this morning?

13 MR. DRAPER: Your Honor this is John Draper. I
14 would like a status report on our provision of the
15 backup, which we're working on.

16 SPECIAL MASTER THOMPSON: Okay. That would be
17 great. I saw that the certificate of service went out
18 on that this morning, so yes, if you could bring me up
19 to date on that, that would be great.

20 But why don't we actually start out with the
21 expedited motion for a protective order.

22 So I did receive your motion this morning,
23 Mr. Draper, and I have had time to review it.

24 I would make a request in the future that when
25 people know ahead of time that they are likely to have

1 any type of a motion that they would like to have heard
2 at the -- at these status conferences, that on motions
3 of this nature, which are procedural, if people could
4 try to give three days, turn in the motion three days
5 early so that it gives the other side opportunity to
6 respond if they want to and also in the case of any
7 longer motion, to give me an opportunity to read it.

8 Again, that's not a problem this morning, but
9 that would be a general request that I would make in the
10 future.

11 This motion strikes me as pretty
12 straightforward so the first question, Mr. Draper, is
13 whether there is anything you want to add?

14 MR. DRAPER: Your Honor, this is John Draper.
15 I don't think there's too much to add to it. There was
16 simply some defects in the subpoenas once we get a
17 chance to look at them in the midst of providing our
18 expert report backup and so on and it seems as though
19 the Case Management Plan has been disregarded in many
20 important respects and I think we mentioned those
21 respects in the motion.

22 SPECIAL MASTER THOMPSON: Right. Also just --
23 and it's probably in here, but so that I can be
24 reminded, how many of the 75 subpoenas are being handled
25 through you right now versus having gone directly to the

1 persons or entities from which the documents are
2 requested?

3 MR. DRAPER: Wyoming agreed to our request to
4 handle all the subpoenas for seven of them, so I guess
5 that would leave 68 that are being done separately from
6 us.

7 SPECIAL MASTER THOMPSON: Right. Okay.
8 Thanks. And also I'm just curious for my own background
9 information, of the seven that you're handling, is there
10 something that differentiates them from the other 68?

11 MR. DRAPER: I think Wyoming can probably speak
12 more accurately to that. Some of these people have
13 worked as officials of the state at some point. That
14 may have been the reason. I'm not quite sure.

15 SPECIAL MASTER THOMPSON: Okay. That's fine.
16 So then Wyoming, Mr. Kaste, are you handling this
17 motion?

18 MR. KASTE: Yes. This is James Kaste. I can
19 tell you with regard to the differentiation between
20 service of the subpoenas upon counsel and service of the
21 subpoenas upon individual water users, the reason
22 there's a differentiation is that those served upon
23 counsel were identified in Montana's initial disclosures
24 as witnesses that could and should be contacted only
25 through counsel. We honored that request despite the

1 fact that I think that all of these -- none of those
2 folks are actually state of Montana employees. I am
3 forgetting, but Montana asserted that they were
4 witnesses over whom they had control and that contact
5 should be made directly through them. We honored that.

6 The remaining water users are just individual
7 Montana citizens and they were served by subpoena.

8 As you know, we've been not terribly thrilled
9 with the content of the State of Montana's discovery
10 responses so far in this case. In order to meet our
11 current schedule at the current -- or, you know, at the
12 earliest possible time once we determined what years
13 were in issue, as you know, we tried to wait long enough
14 to know what years were in issue so we didn't impose any
15 undue burden on individual water users throughout the
16 State of Montana, so once we nailed down what years were
17 in issue, Wyoming went straight to the individual water
18 users to get information about their water rights, what
19 they used during the periods in issue, what regulation
20 they were aware of or participated in during the period
21 in issue, what calls were made, if any, during the
22 periods in issue and what sharing of water resources was
23 going on between pre and post '50s rights during the
24 periods in issue.

25 Of course we asked all the of the water users

1 along the Tongue River to provide that information
2 because in response to our discovery requests all of the
3 water user with pre 1950 rights were identified as
4 people who were injured by Wyoming's conduct, according
5 to Montana, so we asked for the pre and post '50s to see
6 what was really going on out there and we asked for the
7 production of documents.

8 It's worth noting, and I suspect you did as you
9 read through Montana's motion, that there is no bit of
10 that motion that indicates Wyoming failed to comply with
11 the provisions of Rule 45 in serving these subpoenas. I
12 think we followed Rule 45 to a tee, including attaching
13 to every single subpoena the language from subsections I
14 think it's C, D and E of Rule 45 that outline the
15 various protections that are in place for people subject
16 to subpoena and outlined the process by which they can
17 seek protection from a subpoena.

18 So to the extent that there's a complaint that
19 these individuals are unaware of their rights to seek
20 protection from the subpoena, I think that's incorrect.
21 The provisions of Rule 45 adequately outline that.

22 In addition, those individuals who were served
23 with the subpoena, every single one of them got a letter
24 from me identifying myself, the reasons for the subpoena
25 and telling every single one of them what my phone

1 number was and to give me a call if they had any
2 questions or to contact their own attorney.

3 Thus far I've received absolutely zero phone
4 calls from anyone indicating they would have any
5 difficulty complying with the subpoena as issued,
6 indicating any concerns or confusion about the content
7 of the subpoenas. I haven't heard word one from a
8 Montana water user indicating that they have a problem
9 or concern about the content of the subpoena.

10 Now, with regard to provision of the Case
11 Management Plan as a defect in our service of the
12 subpoenas, first I'd note that at best, the Case
13 Management Plan clearly reads in a way that favors the
14 way in which we behaved. It says that the procedure
15 wherein we would provide the Case Management Plan in
16 whole to a water user is only invoked when one of the
17 people subject to the subpoena indicates a desire that
18 it would like to move to protect itself and that's not
19 occurred in this case and obviously the State of
20 Montana's counsel is not one of those people who has
21 been served by the subpoena.

22 So we're just not to a point yet where that
23 provision applies and, you know, even reading it as
24 favorably as one could toward the State of Montana's
25 provision it's more hortatory than anything else in that

1 it says we should provide a copy of the CMP when someone
2 indicates a desire that they would like to move for a
3 protective order.

4 So I don't think that it can be fairly read
5 into this Case Management Plan that the State of Wyoming
6 has an obligation to provide individual water users with
7 a 20-page document that is 19 and a half pages of
8 irrelevant things that's more likely to confuse them
9 about their obligations in response to the subpoena than
10 do anything beneficial for us. It would be a gigantic
11 waste of time and effort to send this to folks when they
12 have no idea what all these other provisions are about
13 that are unnecessary for these folks, given that they
14 have every opportunity to read the provisions of Rule
15 45.

16 Finally as it relates to the 60-day deadline in
17 the Case Management Plan with regard to the service of
18 subpoenas, that's just wildly unrealistic in light of
19 the realities of our current schedule. It can't be
20 done.

21 Our expert designation deadline currently is
22 February 1st. 60 days would extend beyond that
23 deadline. These materials would lose their value for
24 our expert witness. It just couldn't be accommodated in
25 60 days. Everybody knows that that's a wildly

1 unreasonable time frame to respond to a document
2 production and a subpoena.

3 The federal rules generally only get upset with
4 people when they allow less than two weeks. So all
5 these subpoenas provided for dates of compliance that
6 exceeded two weeks in duration. That's more than
7 reasonable and I think it bears noting that the State of
8 Montana has largely disregarded the deadlines during
9 the -- related to the Case Management Order to meet the
10 exigencies of this case and for example, noticing
11 depositions the day before they took place, and the
12 State of Wyoming understands these exigencies and what
13 did we do in response to that? We've worked our butt
14 off and bent over backwards to make sure the discovery
15 got done. We didn't complain. We called these
16 witnesses, none of them had been served with a subpoena.
17 And we got them there. We provided places for
18 depositions to occur. Heck, on one occasion we even set
19 up the court reporter for the State of Montana in order
20 to move this case along.

21 We would expect the same kind of effort from
22 the State of Montana to accommodate the short deadlines
23 that are just the reality of this current schedule.

24 There is no benefit to going through this
25 process and there has been no need shown by the State of

1 Montana to require us to either re-serve or go back out
2 with some additional mailing to all these folks.

3 It bears noting that the State of Wyoming spent
4 a lot of money to make sure these people got served and
5 we've advised the State of Montana the minute we've
6 obtained materials from these individuals they'll be
7 numbered and they'll be provided with a copy. It seems
8 to me they'd be just as anxious as we are to get ahold
9 of these materials.

10 There is no good grounds and there is no good
11 reason, there's no good sense in filing a motion for
12 protective order in this case.

13 SPECIAL MASTER THOMPSON: Thanks. I guess one
14 just factual question because I've not gone back and
15 taken a look at what's been provided to me and I don't
16 think -- do I have copies of the full subpoenas that
17 have been served?

18 MR. KASTE: Yes, Your Honor. In compliance
19 with 445 and Rule 34, for every one of the subpoenas
20 that's been issued, although done in bulk, a notice of
21 issuance of production with the subpoenas attached has
22 been filed.

23 SPECIAL MASTER THOMPSON: Okay. I knew that
24 you had filed the documents. I just didn't know whether
25 it included everything that was attached. So I can go

1 back and take a look at that.

2 But in terms of what is actually provided from
3 the Case Management Plan, Mr. Draper, for example, notes
4 in his particular -- in the motion itself that it does
5 not provide all of the information regarding, for
6 example, the ability of the recipients to seek relief
7 from the Special Master.

8 So to your knowledge, is there portions of the
9 Case Management Plan that would be relevant and of use
10 to people who, of course, are non-lawyers, to know what
11 their rights are under the Case Management Plan?

12 MR. KASTE: No. I don't see how there is any
13 portion of the Case Management Plan that would advise
14 them of their rights in a way that's more effective than
15 the contents of Rule 45. If they believe that there is
16 a problem with the subpoena or they have a concern in
17 responding to it, they can contact me, which I've
18 invited them to do, and they have not. And they can
19 file a motion for protective order under the provisions
20 of Rule 45.

21 It's clear from the content of the subpoena
22 where this case is being handled. If any person called
23 and desired a copy of the Case Management Plan, I'd give
24 it to them. No one has done so, and I don't believe I'm
25 required to do so by the Case Management Plan until they

1 indicate their intention to move to quash. At that
2 point, I might be obligated to give them the Case
3 Management Plan and help them through the process of
4 filing their motion to quash given that these proceeding
5 are not in the courthouse down the street for these
6 individuals. But that situation has not yet arisen and
7 there's nothing helpful to these folks about sending
8 them any portion of the Case Management Plan at this
9 time.

10 SPECIAL MASTER THOMPSON: Okay. Mr. Draper?

11 MR. DRAPER: Your Honor, this is John Draper.
12 First of all, we never got a copy of the letter that
13 Mr. Kaste is referring to and so I don't think it's been
14 provided to you either, because I think we would have
15 gotten it if that were the case. We were not aware of
16 it until Mr. Kaste just mentioned it.

17 As far as the utility of attaching parts of the
18 Case Management Plan, I think it would be helpful.
19 First of all, whether it's helpful is kind of a
20 secondary question. The CMP specifically requires it.
21 If someone feels that it's inappropriate to follow the
22 letter of the CMP at some point, then it's a matter of
23 going to you and seeking relief and permission to go
24 about it in a way that is inconsistent with the CMP.

25 On page 17 in the subsection entitled

1 Subpoenaed Entities or Persons who are not states, it's
2 stated directly in --

3 SPECIAL MASTER THOMPSON: I have it right in
4 front of me.

5 MR. DRAPER: As you can see there, it says
6 "When States subpoena a person or entity that is not a
7 state, the state issuing the subpoena should serve upon
8 the subpoenaed person or entity along with the subpoena
9 a copy of this CMP."

10 That's the requirement that we were focusing on
11 with regard to that point. There's no exception. It
12 refers to the full CMP.

13 As you suggest, Your Honor, that it might be
14 appropriate to select certain parts with your
15 permission, your explicit permission, but that has not
16 been sought or granted. Another -- so that portion
17 would be particularly helpful, of course.

18 And the section on page 10 which is the
19 paragraph -- I think it's 8(c)(1)(e) double ii, in that
20 complicated outlining, on page 10 there, entitled
21 Requests made of other nonstates, that's other than the
22 United States, there it states that any non-state upon
23 which a request for production of documents request for
24 inspection is served shall have 30 days within which to
25 make objections. And 60 days from the date of service

1 within which to complete full production subject to
2 unresolved objections unless otherwise agreed by the
3 propounder and the respondent.

4 And I would point out that in order to
5 accommodate the schedule, we have, by agreement,
6 modified normal times between the parties where it did
7 not affect -- it did not contradict the Case Management
8 Plan, such as issuing those subpoenas and Wyoming has
9 been helpful and cooperative, as we intend to be and
10 have been in a number of depositions they've taken.

11 But here where there is a specific time line
12 set out in your Case Management Plan, it would be, I
13 think, the appropriate thing to do if that is thought to
14 be unworkable, that the states should confer about that
15 and if they agree or depending on the degree of
16 disagreement, approach you about amending that
17 requirement.

18 But absent that, these dates I think would
19 hold. And the dates, as you may have noticed, in the
20 subpoenas are wildly inconsistent with that.

21 And as we also mentioned in our motion, I
22 think, that the place of production does not need --
23 does not need to be in Mr. Kaste's office but can be the
24 location of the documents.

25 So there are many matters on which the

1 recipients of these notices are being misled and it's
2 our hope that that situation can be remedied.

3 MR. KASTE: If I might respond just briefly.
4 None of those folks are here complaining and I think
5 that that's really important to put this thing in light.
6 You know, a motion for protective order is designed to
7 protect people from prejudice. None of them seem to be
8 believe they're being prejudiced and I don't either. I
9 mean we've given these people nearly 30 days to respond.
10 It's quite typical for document production subpoenas to
11 identify the place where you can mail it. If any of
12 those folks believe that their pile of documents that is
13 responsive is too big, they can give me a call and we'll
14 work it out. We'll work something out. It happens in
15 litigation all the time.

16 I just think the important thing to recall is
17 whether or not someone is being prejudiced in light of
18 these subpoenas and no one is. In the absence of
19 prejudice to anyone, a motion for protective order is
20 not well-founded. It just isn't and we've got a short
21 time frame to work on. We're all trying to get quite a
22 lot done and, you know, it seems to me that this is -- I
23 can't even beginning to put into words what a gigantic
24 waste of time this is in light of the absence of
25 complaint by a particular water user. I'm not exactly

1 sure why Montana would be bringing this up and
2 complaining about it at all, particularly unprompted by
3 water users.

4 So nobody is prejudiced. There's nothing to be
5 gained. The Case Management Order provision cited to
6 you by Mr. Draper is only invoked, as it states clearly
7 in the introductory clause there, that provision is only
8 to be employed in situations where noticed or subpoenaed
9 persons or entities desire to move to quash the
10 deposition notice or subpoena. No such person has
11 indicated any such desire. So I just don't see what the
12 problem is.

13 MR. DRAPER: Your Honor, if I may respond on
14 that. This is John Draper.

15 SPECIAL MASTER THOMPSON: Yes.

16 MR. DRAPER: Thank you. With respect to no one
17 complaining, Mr. Kaste's point, I think it's -- if
18 you're a non-lawyer and a rancher out in rural areas of
19 the western part of the state and you receive a document
20 with the caption of the Supreme Court of the United
21 States on it demanding certain action by a certain date
22 which has not passed yet, this is likely to be very
23 intimidating and we have an interest as the State of
24 Montana in protecting our citizens from abuse under the
25 CMP that's been adopted by you by failing to follow it.

1 There are procedures in there which were agreed
2 to by Wyoming. We jointly proposed these requirements
3 to you. The requirements are flatly stated of attaching
4 the CMP, so that a person who receives such a subpoena
5 has at least the opportunity to figure it out and also
6 knows what the real requirements are and I think in the
7 body of the subpoena, they're entitled not to be misled
8 about when the due date is for them to produce or the
9 place where they can produce it.

10 And we feel that it's quite appropriate that
11 we, the state parens patriae, who are involved in this
12 case and who are trying to be helpful and facilitate
13 this objective of Wyoming to serve many, many people, to
14 help that process go more smoothly. They have rejected
15 our offers of help and now they have simply gone ahead
16 in blatant disregard of the CMP.

17 SPECIAL MASTER THOMPSON: Let me just ask one
18 quick question, Mr. Draper. So have you or anyone in
19 the Montana attorney general's office or any Montana
20 employees heard from any of the subpoenaed individuals
21 yet?

22 MR. DRAPER: Well, Your Honor, this is John
23 Draper. I can tell you that Mr. Wechsler and I have
24 not. Ms. Anders is on the phone and she could perhaps
25 indicate whether any have been received by her office,

1 the attorney general. There is no immediate reason that
2 they would know who to contact, but perhaps Ms. Anders
3 has some further information for us.

4 MS. ANDERS: Your Honor, this is Jennifer
5 Anders. I actually have received several email
6 inquiries from people that I recognize have been served
7 with subpoenas. The Attorney General's office maintains
8 a general contact DOJ website address and email and I've
9 received one or two inquiries from water users asking
10 what they're supposed to do, but that's the extent of
11 it.

12 SPECIAL MASTER THOMPSON: Okay. Thanks. So
13 let me give you my initial reaction.

14 So first of all, as a general matter, I think
15 it's incredibly important to be more protective and
16 cautious with respect to nonparties than of the states
17 and their employees and as a general matter, when we're
18 dealing with nonparties, I would hope in the future if
19 either state wishes to vary from the Case Management
20 Plan, that they either get an agreement from the other
21 state with respect to that particular process ahead of
22 time or come to me. Because as I said, I think it's
23 very important that we be as protective of them as
24 possible recognizing that they don't have the resources
25 of the states and that frequently they have no clear

1 notion of the law or what their rights might be in
2 response to a subpoena of this nature.

3 Turning to this particular motion, though, if I
4 would divide it into three different parts; the first is
5 timing; the second is the place of production and then
6 the third is any other relevant provisions that are
7 contained in the Case Management Plan.

8 On the timing, you know, it's quite clear in
9 the Case Management Plan that nonparties are to have 60
10 days from the date of service within which to complete
11 full production, 30 days to make objections.

12 But that is a long period of time. Earlier in
13 the proceeding and when this Case Management Plan was
14 produced, that seemed fair. But at this stage, I'm
15 again worried about the total amount of time and if this
16 had been brought to me as a motion by Wyoming to shorten
17 the period of time, I would have looked favorably on
18 that and so I guess one of the questions is whether or
19 not we could come to an agreement as to how much time
20 the parties should have and I'd appreciate both sides'
21 views on what a reasonable time is. Obviously Wyoming
22 thinks the time they permitted is reasonable, but I
23 would be interested in Montana's views on that. So
24 that's with respect to the timing.

25 Second of all, with respect to the place of

1 production, so I understand Mr. Kaste's views that
2 frequently in these cases it's not going to be a lot of
3 material and therefore it's probably something that
4 could easily be sent to Wyoming rather than actually
5 produced in a particular location.

6 But again, I don't know how much in the way of
7 material any particular recipient might have and I also
8 have no idea what the overall cost is going to be to
9 that recipient to make copies of it, to send it to
10 Wyoming rather than having it actually produced by
11 Wyoming.

12 On the flip side, though, I don't want Wyoming
13 to have to travel from ranch to ranch and home to home
14 if avoidable to actually review whatever materials are
15 actually produced.

16 So on that front, I'm wondering whether or not
17 the parties could come to an agreement as to an approach
18 that we might take with respect to what options the
19 parties have with respect to production.

20 And then third of all, with respect to the
21 provisions of the Case Management Plan as to the
22 inclusion of it with the subpoenas, the Section 3 on
23 page 17 appears to be vague to me, at least it appears
24 to be vague in that it does start out by talking about
25 the fact that the procedures are to be employed in

1 situations where a noticed or subpoenaed person or
2 entity desires to move to quash a deposition notice or
3 subpoena or seeks a protective order. That seems to be
4 pretty straightforward.

5 But then when you get to Subpart B and it says
6 "When a state subpoenas a person or entity that is not a
7 state, the state issuing the subpoena should serve upon
8 the subpoenaed person or entity along with the subpoena
9 a copy of this CMP." That doesn't make any sense if, in
10 fact, that's only to be done if somebody actually seeks
11 a protective order from the demand of the subpoena
12 because they presumably would have gotten the subpoena
13 before they would want to seek a protective order and
14 yet the CMP is supposed to be provided at the time that
15 the subpoena is issued.

16 So that strikes me as not the clearest language
17 that we've probably all written and the more specific
18 question would be subpart B that would suggest that it
19 goes along with the subpoena itself.

20 So again, in this particular case, my initial
21 view would be that again, we probably don't have to send
22 this entire CMP to every single party, but to the degree
23 there are some specific provisions that Montana believes
24 are of importance to the recipients, as I mentioned,
25 they are not lawyers and I think it's useful that they

1 do have a sense of what their rights are. Of course,
2 telling them that makes it more likely this thing gets
3 delayed, but I think it's more important that they know
4 their rights than that we have all the documents exactly
5 on time.

6 So those are my -- those are sort of my initial
7 views. So I guess what I'm aiming for is seeing whether
8 we could agree on the question of the time that's
9 permitted people and perhaps a short document that would
10 provide for the production process and any other
11 provisions of value to the recipients that would go out
12 to each individual recipient.

13 MR. KASTE: This is Mr. Kaste. I can address
14 each of those I think in a fairly straightforward way.

15 With regard to timing, the provisions that are
16 already in the subpoenas are more than reasonable. And
17 trying to send people a new date is just going to
18 confuse them. It makes no sense in the absence of a
19 complaint by one of these people that they can't meet
20 the deadline to upset the deadline in the subpoena
21 currently. And it's well more than folks would get if
22 this was being handled in any other court.

23 I understand these are private parties, but
24 private parties get served subpoenas from courts all the
25 time and they rely on the provisions set forth in Rule

1 45 to address them.

2 I'd also point out I have never met a rancher
3 who doesn't have a lawyer on staff and so the idea that
4 these are these wilting violets out there who will
5 cringe and cower at the subpoena is sort of silly.

6 With regard to the place of production, the
7 subpoena says mail copies to me, and for 10 pages or a
8 hundred pages, that might make all kinds of good sense
9 and it has a provision from Rule 45 in it that says if
10 you're subjected to undue burden, you can seek a
11 protective order. And I don't know that I've ever been
12 in a case where somebody didn't call me up and say "Hey,
13 I got 10 boxes of junk. Do I really have to mail that
14 to you?" And I say no, and we find a different place
15 and time for the production of documents.

16 So for the average user, production in
17 conformity with the subpoena as it's written makes
18 perfect sense and is perfectly allowable. If we are
19 contacted by anyone with exceptional circumstances I
20 believe we can work with that water user to fix the
21 problem. If that means having to go out to their ranch
22 and take look, we'll do that. But until those
23 circumstances arise, there is no reason to deviate from
24 common practice and just have them mail me the
25 documents, until we know that that exposes them to an

1 undue burden.

2 With regard to sending them some portion of the
3 CMP, the idea with regard to the CMP is to protect these
4 people and let them know they have a right to
5 protection. Well, I already sent them something short
6 that outlines that for them. I sent them the provisions
7 of Rule 45 (c), (d) and (e) which tells them they can be
8 protected from the subpoena and outlines the process by
9 which they seek protection and are granted it.

10 Giving them anything more than that would
11 superfluous, confusing, unnecessary and an absolute
12 waste of time.

13 The most important thing we can do is get the
14 answers to these things, so we can move forward in this
15 litigation. There is no compelling reason to deviate
16 from the procedure that's in the subpoenas.

17 SPECIAL MASTER THOMPSON: Mr. Draper?

18 MR. DRAPER: Yes. Thank you, Your Honor. This
19 is John Draper.

20 First of all, just briefly on the points that
21 Mr. Kaste mentioned, the timing is clearly unreasonable
22 as set out in those subpoenas. It's less than 30 days.
23 It's less than the normal time and it's less than half
24 of what the CMP mandates. So to rely on those dates,
25 not only is it less than 30 days, it's less than 30 days

1 from -- its even less from the time of service, which is
2 really the time when those time frames begin to run.
3 And the provisions that are in the CMP are helpful.
4 They are supplementary to Rule 45 and I don't think they
5 should be denigrated in the way Mr. Kaste has done.

6 My proposal, given these various
7 considerations, we are quite willing again to discuss
8 this with Wyoming and work out a proposed schedule and
9 if we -- if we're successful, as I think we might be, in
10 working out a revised schedule on these subpoenas and a
11 revised provision of materials, that we notify you and
12 if there's some aspect we can't work out, of course we
13 would come to you.

14 But I think given the various considerations
15 that Your Honor has pointed out and both parties have
16 pointed out, I think we have a very good chance of
17 resolving this in a way that we could then provide to
18 you.

19 But I think as far as the parties are
20 concerned, we might be very likely come to a resolution
21 of these issues.

22 MR. KASTE: I disagree. I'm not interested in
23 agreeing to anything other than having these folks
24 comply with the subpoenas as issued. There is nothing
25 unreasonable about them. And throwing off the schedule

1 is just ridiculous at this point. We need this
2 information. I understand Montana doesn't want us to
3 have it, that seems to be the motivation here, but we
4 need it, we want it and we're entitled to it and there's
5 no reason to mess with what we've done here in this case
6 to get this information from these folks.

7 I don't believe I'm required to use Montana as
8 my intermediary between myself and these water users to
9 get at this information and so sending them the
10 subpoenas directly is the right thing to do. They got
11 well more than 14 days, which is what the federal rules
12 say is patently unreasonable if it's less than that, and
13 more than that is generally considered to be reasonable.

14 This is just an utter waste of our time. Let's
15 get the answers from these folks and let's get
16 complaints from individual users if they have some
17 special circumstances that preclude them from complying
18 and we'll address those one at a time if they come up.

19 SPECIAL MASTER THOMPSON: Okay. Let me go on
20 just for a second and see what is happening on
21 scheduling.

22 So Mr. Draper, I know Montana sent a disclosure
23 to Wyoming on January 4th and could you, for my benefit,
24 and you had offered to do this earlier, talk about the
25 posting of expert backup and designation of confidential

1 documents?

2 MR. DRAPER: Yes. This is John Draper. We did
3 provide our expert report on January 4th as required as
4 we stated then that the notice that we had submitted at
5 the same time that we would be providing the backup a
6 week later, this past Friday. And we have been putting
7 that since Thursday to a site to make it accessible to
8 Wyoming and the other parties.

9 We have run into some technical difficulties
10 and so we're still working on that and we've been
11 working on it all through the weekend, our technical
12 people, to finalize. Some parts of it are final, but
13 not all parts yet, and we're working hard on that as we
14 speak.

15 The parts that are not fully uploaded at the
16 moment are currently being uploaded and we're trying to
17 find ways to speed up that process. So that's where
18 we're at. We have had a little bit of a struggle there.
19 We are working to find faster ways to get that remaining
20 material accessible and so that's the status as we
21 speak.

22 SPECIAL MASTER THOMPSON: And so Mr. Kaste, I
23 don't know whether you're handling this portion of the
24 conference call also, but do you want to address
25 scheduling?

1 MR. DRAPER: Your Honor, this is John Draper.
2 There is one other aspect which I neglected to mention.
3 That was the confidentiality aspect and I should just
4 say a word about that, if I may.

5 There is a certain part of the backup it turns
6 out that is confidential, trade-secret type information
7 and we are following the section of the CMP that
8 discusses confidential information and are in the
9 process of finalizing a proposed nondisclosure agreement
10 for that aspect of the backup, if Wyoming or any of the
11 other parties wish to see that confidential part of the
12 backup.

13 SPECIAL MASTER THOMPSON: Okay. Thanks. So
14 Mr. Kaste?

15 MR. KASTE: Well, first, with regard to the
16 confidentiality or the confidential materials identified
17 by Montana, we agree that those materials are
18 proprietary and we ought to go through that process and
19 we ought to ensure that those materials don't see the
20 light of date outside this litigation. We have no
21 concerns about that. But obviously we haven't obtained
22 those materials yet.

23 We got a portion of the backup materials on
24 Saturday. There is some technical issues with the
25 remaining portion of the backup materials Montana is

1 providing.

2 In addition, we put together a list of
3 materials prior to seeing the backup materials and
4 knowing what was in there.

5 I think it's fair to say that some of the
6 materials that we had on our list that we need to see
7 and our experts would like to see in order to evaluate
8 the conclusions and the methodology of plaintiff's
9 experts, some of them are in that backup information and
10 some of them are not.

11 Montana has committed to providing those
12 materials to us in general and I think that there's
13 going to be a period of a few more, probably a week or
14 two before we get to the point at least where we're --
15 maybe longer than that, I don't know -- where we get to
16 the point where we have everything.

17 Obviously the expert designation from Montana
18 was January 4th and these other materials are pretty
19 integral to the work our experts need to do.

20 As it relates to scheduling in the future, you
21 know, we all knew that this was coming. We knew about
22 this in November. We were talking about the State of
23 Wyoming's dissatisfaction with Montana's discovery
24 responses, but the State of Wyoming would be in a
25 situation where we'd be coming to the court and asking

1 for relief from the expert designation deadline of
2 February 1st.

3 We've taken a good, hard look at what we need
4 to do in this case and where we are and that includes
5 having an opportunity to review these materials that
6 we're getting now and will get in the future. It
7 includes the opportunity to depose Montana's expert
8 witnesses which we have two dates in mid February for
9 two of those experts. One is really more of a fact
10 witness, but an identified expert, Mr. Smith is being
11 deposed this week in Helena. The other basically fact
12 witness that's identified as an expert, Mr. Dalby, will
13 be deposed two weeks from now in Helena and then the
14 third specially retained expert, the date we're looking
15 at to depose that individual is in late February and I
16 can't remember off the top of my head what date we
17 discussed with Jeff yesterday. But I believe it was
18 very late February.

19 So what we're looking at is getting the
20 materials, probably completing that by January, deposing
21 plaintiff's experts throughout the month of February and
22 then we need the month of March sort of to digest those
23 depositions and to let our experts convert what they've
24 learned into opinions and conclusions on a piece of
25 paper.

1 And so we -- if necessary, we'll go through the
2 formal process of making a motion, if that's what is
3 required, but ultimately what we would seek is a 60-day
4 extension of the State of Wyoming's expert designation
5 deadline until April 1st from February 1st. And I think
6 it's April 2nd is the weekday that would be most
7 appropriate there.

8 Now, we've had some back and forth with the
9 counsel for the State of Montana and I think they may
10 interested in obtaining a similar extension of their
11 rebuttal expert designation deadline up to potentially
12 60 days. The State of Wyoming wouldn't have an
13 objection to an extension of the State of Montana's
14 rebuttal deadline, but of course, that puts us into I
15 think June 1 is the date that would be about 60 days for
16 the rebuttal experts and that puts us into the early
17 summer finishing up our expert designations and I'll let
18 Montana speak to what they believe they would need in
19 response to Wyoming, but we need 60 days and I'm not
20 telling you 60 because I need 30. I really need 60 days
21 to designate our experts and do a proper job in this
22 case.

23 SPECIAL MASTER THOMPSON: Mr. Draper?

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

25 We have had discussions about whether the present

1 deadlines for Wyoming should be extended in the view of
2 the parties and although Wyoming has vigorously opposed
3 our efforts not to have our expert reports due
4 immediately after the holidays and we had to work
5 through the holidays to do that, we are amenable with
6 some of the points that Mr. Kaste makes.

7 We think that, as we discussed, there may be an
8 opportunity for settlement discussions now that we've
9 got our expert reports in. A little bit of loosening of
10 the time from that point of view would give us some
11 opportunity in that regard.

12 We believe that if Wyoming is allowed to double
13 or triple the time it's allowed, that the same doubling
14 and tripling in fairness needs to be granted to us in
15 doing our rebuttal expert reports.

16 While we were initially resistant to at least
17 this three-month extension or extension to three months,
18 we do not oppose it on the condition that we're accorded
19 the same tripling of time and we think that it might be
20 helpful for the overall conduct of the case if there was
21 some loosening along those lines.

22 SPECIAL MASTER THOMPSON: Okay. Hold on just
23 one second.

24 So help me on understanding the dates. If we
25 were to extend both of them by 60 days, at the moment

1 I'm saying that hypothetically, but if we were to extend
2 both of those deadlines by 60 days, has either side
3 taken a look at the current date of -- the current last
4 dates for written discovery depositions and motions? Is
5 there any opportunity to recover time in there?

6 MR. DRAPER: Your Honor, this is John Draper.
7 We do recognize that some adjustment can be made there.
8 We haven't gotten down to discussing exactly what those
9 adjustments might be, but we would certainly be looking
10 at those and some adjustments would have to be made in
11 order to accommodate this proposal.

12 SPECIAL MASTER THOMPSON: And Mr. Kaste?

13 MR. KASTE: Yeah, I'm looking at the case
14 management plan number 10, and what it indicates is the
15 last day for propounding written discovery is currently
16 March 8, last day for depositions is currently April 12
17 and the final day for motions is May 10th.

18 I think each of those would have to be bumped a
19 little bit to accommodate these kind of extensions,
20 particularly the last day for motions, but I don't know
21 that there are other current deadlines that would have
22 to be moved with these.

23 SPECIAL MASTER THOMPSON: Okay. I know it's
24 difficult to predict at this point in time, but I assume
25 that probably both sides anticipate summary judgment

1 motions.

2 MR. KASTE: Well, speaking on behalf of the
3 State of Wyoming, this is Mr. Kaste, the answer is an
4 emphatic yes. We got the expert reports on January 4th
5 and I think they raise a number of different issues that
6 are going to be amenable to resolution by summary
7 judgment proceedings. There are a number of issues
8 there that we think are pretty darn favorable and I
9 guess that leads me to a point I did want to make.

10 Currently under the schedule, objections to
11 plaintiff's experts' reports would be due January 18th
12 and I'll just tell you now, the State of Wyoming is not
13 going to file an objection to the plaintiff's experts'
14 reports. Obviously we have maybe different expectations
15 about the level of specificity than the expert reports
16 contain, but honestly the quantity of water referenced
17 in those reports is -- couldn't make us happier.

18 Ultimately at end of the day when you look at
19 the quantity, we're talking about a foot of water when
20 we apply the call dates and the end of the irrigation
21 year to the amount of water that is spread out over the
22 whole year, we're looking about a foot of water that
23 we're fighting about over a couple of different years.
24 So I guess in some sense we couldn't be happier with the
25 expert reports. We're not going to file an objection.

1 MR. DRAPER: Your Honor, you asked both of us
2 about summary judgment motions.

3 SPECIAL MASTER THOMPSON: Yes.

4 MR. DRAPER: And our answer is yes, at this
5 point we are planning to.

6 SPECIAL MASTER THOMPSON: Okay. Okay. Any
7 other -- I'm not forgetting the expedited motion for
8 protective orders, but any other matters that either
9 side wanted to bring before me today?

10 MR. KASTE: Well, this is James on behalf of
11 the State of Wyoming, no.

12 MR. DRAPER: And Your Honor, this is John
13 Draper, nothing further for Montana.

14 SPECIAL MASTER THOMPSON: Okay. So Mr. Draper,
15 let me just ask you one more question with respect to
16 the expedited motion.

17 So again, Wyoming did not comply with the Case
18 Management Order and I understand their sort of
19 equitable waiver argument that well, not everyone has
20 complied with it in all situations. But they clearly
21 didn't comply and they should have and I'm irritated in
22 this particular situation that they didn't at least pass
23 that by you or seek some sort of relief from me, but at
24 the same time, Mr. Kaste points out although they didn't
25 provide 60 days, they provided close to a month and is

1 there any reason why that's an unreasonable amount of
2 time in this particular case other than the fact that
3 the Case Management Plan provided otherwise?

4 MR. DRAPER: Your Honor, this is John Draper.
5 Yes. The Rules of Civil Procedure, Rule 45, sets the
6 normal time at 30 days and to -- and that is to run from
7 the date of service, which is later than the dates in
8 the notices that were sent to us. So it's scoped down
9 to well under 30 days. And I think a minimum of 30 days
10 is reasonable, especially when you're making a demand of
11 somebody who is not up to speed on this case, not up to
12 speed on what the powers of the Supreme Court are, what
13 the powers of an attorney from Wyoming are, and what
14 their rights are.

15 All this has to be explained by somebody and
16 that, plus getting the documents together, seems to me
17 that 30 days is normal time, but actually should be a
18 minimum here, and it's half of what we considered was
19 the norm in this particular case.

20 SPECIAL MASTER THOMPSON: Okay. And Mr. Kaste,
21 any additional points on this other than your earlier
22 comments and the fact that obviously you were close to
23 30 days, but off by, I guess, a week, right? You're
24 giving like 21 days?

25 MR. KASTE: Well, it varies. We tried to give

1 people as much time as we could possibly afford. You
2 know, I have Rule 45 right in front of me and it doesn't
3 say anything about 30 days. That's ridiculous. Go read
4 the rule. It doesn't say that. In fact, what it says
5 is -- the only time frame mentioned in there is 14 days,
6 for God's sake.

7 You know, I've been in litigation for a long
8 time and seen two-week subpoenas and not heard a whisper
9 of complaint. That's ridiculous. That's not in the
10 rule. There's more than adequate time and until
11 somebody says "I can't meet the time set out in the
12 subpoena," there is no reason to deviate.

13 SPECIAL MASTER THOMPSON: Okay. Go ahead,
14 Mr. Draper. Last comment.

15 MR. DRAPER: Thank you. The -- the proper time
16 for production in Rule 45 is under the rule for
17 production, which is 30 days. And that's where the 30
18 days literally appears and for us to go below that I
19 think is unreasonable as I stated earlier.

20 SPECIAL MASTER THOMPSON: I'm going to take
21 this motion under submission, because I want to go back
22 and take a look actually at the subpoenas themselves
23 which I have not done so far. But I will do a short
24 order on this sometime this evening and have Ms. Carter
25 send it out when she gets in tomorrow morning. So you

1 should have something -- yes?

2 MR. KASTE: This is Mr. Kaste. I want to make
3 an offer. With regard to the letter I sent to the water
4 users, if it would be helpful to folks, would you like
5 to see a copy of what they received from me? It's a
6 short, four or five --

7 SPECIAL MASTER THOMPSON: That would be useful.

8 MR. KASTE: I'll give that to everybody. I
9 don't think I'm required to give that to counsel for
10 Montana when I served the subpoenas, but I'm happy to do
11 that if it helps everyone understand the information
12 that they got.

13 SPECIAL MASTER THOMPSON: Yes, that would be
14 useful if you could send me a copy also.

15 MR. DRAPER: Your Honor, I think they are
16 required to do that and I'm glad to hear they're now
17 going to do it. And I would ask that the time frame we
18 set be from the date of service by the sheriff. That's
19 the normal when whatever time we adopt begins to run.

20 And we will need to be answering questions and
21 coordinating as well as we can under the circumstances
22 to meet whatever deadline you set.

23 SPECIAL MASTER THOMPSON: Okay. Great. So as
24 I said, I will do that so that it can be sent out
25 tomorrow morning, so you'll have an order on that.

1 And then with respect to calendar, I would
2 appreciate it if the two sides could discuss this. I
3 don't think this will take a lot of effort. If the two
4 sides could discuss this and by, for example, let's say
5 Wednesday of this week, just send me a short letter with
6 what hopefully the two sides can agree on this what
7 would be a proposed schedule, including the last days
8 for written discovery depositions and motions and also
9 recognizing that there are likely to be summary judgment
10 motions, what your expectations are as to when that
11 might mean that the trial could begin.

12 I realize that last thing is speculation, but
13 I'd appreciate your speculation on it.

14 And if you could just send me that, if it could
15 be a joint letter, tremendous. If there is any
16 disagreement, two separate letters is fine. I will then
17 take a look at that and see if I can, based on that, set
18 a new set of dates, recognizing that I might not agree
19 with your dates if it seems to me that we're pushing
20 dates too far down the line.

21 MR. DRAPER: Very good, Your Honor.

22 SPECIAL MASTER THOMPSON: Mr. Kaste, is that
23 fine with you?

24 MR. KASTE: That's great, yes.

25 SPECIAL MASTER THOMPSON: So let's do that and

1 then do people know when we're talking again? It sounds
2 like according to Ms. Carter it's late February.

3 What I will do is I will, based on what you
4 submit to me and then my examination of that and
5 thoughts on that, I will then send back out a proposed
6 Case Management Order revising the schedule and if my
7 dates are any different than yours, I'll give you an
8 opportunity to respond to that. But I'll try and do
9 that so we can resolve all of that this month and not
10 have to wait for the next status conference. Okay?
11 Does that sound fine as far as procedure?

12 MR. KASTE: That sound great and from our point
13 of view, we really have to fix it this month, since our
14 deadline is February 1st.

15 SPECIAL MASTER THOMPSON: Understood entirely.
16 But my hope is we can get all the various dates set.
17 But I can tell you right now, Mr. Kaste, that you will
18 get additional time.

19 MR. KASTE: Okay. Thank you.

20 SPECIAL MASTER THOMPSON: The question is
21 simply how much.

22 MR. KASTE: Well, with regard to the trial
23 date, Your Honor, I think it would be beneficial to us
24 as the parties to know, you know, what your preference
25 is in that regard and maybe work backwards a little bit

1 from the date that is most workable for you. I
2 understand this trial is going to fit into a lot of
3 other things that you have going on and require a lot
4 from you and it's going to make a difference for the
5 dates that we might propose if your expectation is
6 August 1 trial date or October 1 trial date.

7 SPECIAL MASTER THOMPSON: I think that's a fair
8 question. My view at the moment is that I think an
9 August 1 trial date is going to be difficult. I would
10 still like to have this case tried in the fall. I
11 realize again that this is a -- that we haven't actually
12 determined how long the trial is going to be.

13 As we've moved along, however, I think that the
14 likely length of the trial is going to be hopefully at
15 the shorter end of the total number of days rather than
16 at the longer end and certainly what everyone has said
17 so far is consistent with that.

18 I should tell people I've also given some
19 thought to the location. We actually haven't checked on
20 where we could potentially hold it in Billings, if
21 that's where we decided to hold it. If the case is only
22 going to take a few weeks, then that's a possibility.
23 The longer, however, the case is scheduled to take, the
24 more likely I would be to then hold it here at Stanford
25 and have inquired about the moot courtroom here and it

1 is available during the entire fall quarter, so it would
2 be available through the end of this calendar year.

3 Recognizing that there could be some witnesses
4 that would still be in Montana or Wyoming that you might
5 not want to have to fly all the way here, if there were
6 witnesses of -- if there were a significant number of
7 witnesses of that nature, then I would also be willing
8 to consider alternative ways of not requiring those
9 witnesses to fly here. One possibility would be to have
10 a week or so of trial in Billings or a location that
11 people would -- both sides would agree to where those
12 witnesses could be heard.

13 Another possibility is is that the moot
14 courtroom here is fully equipped with video equipment by
15 which we could actually present some witnesses by video
16 where at least some of us would be here and others could
17 be somewhere else.

18 I know neither of those is going to be probably
19 your first choice, but my hope would be we could figure
20 out a way if the trial were here so if that was a
21 consideration that we could address that.

22 My hope would be at the next status conference
23 we could begin talking about that.

24 But in answer to your particular question,
25 Mr. Kaste, my hope would be that we could get the case

1 tried this year. And not force Montana to have to work
2 over the holiday season again.

3 MR. KASTE: No, no, no. I'm going to propose a
4 December 24th start date. And of course I would point
5 out that, you know, the case has been going for six
6 years. We didn't have to wait until the last minute.
7 That's not my fault.

8 SPECIAL MASTER THOMPSON: Okay. So does that
9 answer your question, Mr. Kaste?

10 MR. KASTE: Well, in a roundabout way, no. It
11 sounds --

12 SPECIAL MASTER THOMPSON: What more can I tell
13 you that would be helpful? I mean for me part of it is
14 still the question of how long the trial would last.

15 MR. KASTE: Well, as is my habit, I keep asking
16 for specific dates and so, you know, if you want us to
17 shoot for October 1, November 1, December 1, recognizing
18 that that's not set in stone, but just as a target date,
19 that gives us something to work back on better than
20 maybe a three or four-month period.

21 SPECIAL MASTER THOMPSON: Understood. Under
22 those circumstances, I think that we should plan to
23 start this no later than October 1.

24 MR. KASTE: Okay. Very good.

25 SPECIAL MASTER THOMPSON: Because that assures

1 that I think even in my worst vision, I think if we
2 started by October 1, we could finish before the end of
3 the calendar year. My hope would be we would be
4 finished long before that.

5 MR. KASTE: I think that's a reasonable
6 assessment given the nature of the case at this time.

7 SPECIAL MASTER THOMPSON: At the same time,
8 although I would love to say we would start on August 1
9 particularly with summary judgment motions, that strikes
10 me as totally unrealistic and so that's why I'm
11 suggesting October 1 is I think a date that provides us
12 with some leeway in terms of the length of the trial,
13 but at the same time would hopefully provide some time
14 for resolution of summary judgment motions before then.

15 MR. KASTE: Thank you, Your Honor. That will
16 help us as we set the dates an appropriate amount of
17 time back from October 1.

18 SPECIAL MASTER THOMPSON: Okay. That would be
19 great. And I guess the other thing to add with respect
20 to the dates is that if -- particularly if we're going
21 to permit, you know, somewhere up to 60 days for the
22 additional expert designations and reports and we --
23 that's going to really cram together those later dates
24 and so this is going to have to be a schedule that
25 sticks and I realize that, you know, I'm very

1 sympathetic to Wyoming's request for additional time
2 because they've been working largely in the dark and I
3 realize those 30-day periods were short to begin with,
4 that was shortened from the original Case Management
5 Plan that both sides submitted, so I'm certainly
6 sympathetic to Wyoming's request, but at the same time,
7 I want to make sure that we set dates that both sides
8 feel comfortable we can keep.

9 MR. KASTE: Well, for Wyoming I think we can do
10 that and we'll get you a letter and I'm almost certain
11 it will be a joint letter, probably by the end of the
12 day or tomorrow.

13 SPECIAL MASTER THOMPSON: Okay. That sounds
14 fine. Mr. Draper, any final questions?

15 MR. DRAPER: Nothing further, Your Honor.

16 SPECIAL MASTER THOMPSON: Okay. Great. And I
17 will get you all something by tomorrow morning on the
18 expedited motion.

19 MR. KASTE: Thank you very much.

20 MR. DRAPER: Thank you.

21 SPECIAL MASTER THOMPSON: Have great days.
22 Thank you all. Stay warm.

23 (The proceedings ended at 11:50 a.m. PST.)
24
25

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

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

I, Kathleen A. Powell, CSR No. 2778, hereby certify that I reported in shorthand the above telephonic proceedings on Monday, January 14, 2013, in the City of San Diego, County of San Diego, State of California; and I do further certify that the above and foregoing pages, numbered from 6 to 51, inclusive, contain a true and correct transcript of all said proceedings.

DATED: January 18, 2012

KATHLEEN A. POWELL
 CSR NO. 2778