
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
FEBRUARY 25, 2013

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

1 TELEPHONIC APPEARANCES:

2
3 SPECIAL MASTER BARTON H. THOMPSON, JR.

4 STANFORD UNIVERSITY

5 JERRY YANG AND AKIKO YAMAZAKI

6 ENVIRONMENT & ENERGY BUILDING, MC-4205

7 473 Via Ortega, Mail Code 4205

8 Stanford, California 94305

9 605.721.1488

10 susan.carter@stanford.edu

11
12
13 FOR THE STATE OF MONTANA:

14 MONTGOMERY & ANDREWS, P.A.

15 BY: JEFFREY J. WECHSLER

16 ANN YATES

17 BRIAN BRAMLETT

18 SPECIAL ASSISTANT ATTORNEYS GENERAL

19 DONNA OMEROD, PARALEGAL

20 325 Paseo de Peralta

21 Santa Fe, New Mexico 87501

22 505.982.3873; Fax 505.982.4289

23 jdraper@montand.com

24 jwechsler@montand.com

25

1 TELEPHONIC APPEARANCES (CONTINUED)

2

3 FOR THE STATE OF MONTANA:

4 MONTANA ATTORNEY GENERAL'S OFFICE

5 BY: JENNIFER ANDERS

6 CORY SWANSON

7 ASSISTANT ATTORNEYS GENERAL

8 215 North Sanders

9 Helena, Montana 59620-1401

10 406.444.5894; Fax 406.444.3549

11

12 FOR THE STATE OF WYOMING:

13 WYOMING ATTORNEY GENERAL'S OFFICE

14 BY: PETER K. MICHAEL

15 CHIEF DEPUTY ATTORNEY GENERAL (Counsel of Record)

16 DAVID WILLMS

17 CHRISTOPHER M. BROWN

18 SENIOR ASSISTANT ATTORNEYS GENERAL

19 MATTHIAS SAYER

20 ASSISTANT ATTORNEY GENERAL

21 200 West 24th Street

22 123 Capitol Building

23 Cheyenne, Wyoming 82002

24 307.777.7841; Fax 307.777.6869

25

1 TELEPHONIC APPEARANCES (CONTINUED)

2

3 FOR THE STATE OF NORTH DAKOTA:

4 NORTH DAKOTA ATTORNEY GENERAL'S OFFICE

5 BY: JENNIFER VERLEGER

6 ASSISTANT ATTORNEY GENERAL

7 500 North Ninth Street

8 Bismarck, North Dakota 58501

9 710.328.2210

10 jverleger@nd.gov

11

12

13 FOR AMICUS THE UNITED STATES:

14 UNITED STATES DEPARTMENT OF JUSTICE

15 ENVIRONMENT & NATURAL RESOURCES

16 DIVISION OF NATURAL RESOURCES SECTION

17 JAMES J. DUBOIS, ESQUIRE

18 999 18Th Street, Suite 370 South Terrace

19 Denver, Colorado 80202

20 303.844.1375

21 james.dubois@usdoj.gov

22

23

24

25

1 TELEPHONIC APPEARANCES (CONTINUED)

2

3 FOR AMICUS NORTHERN CHEYENNE TRIBE:

4 WHITEING & SMITH

5 BY: JEANNE S. WHITEING, ESQUIRE

6 1628 5th Street

7 Boulder, Colorado 80302

8 jwhiteing@whiteingsmith.com

9

10

11 FOR AMICUS ANADARKO PETROLEUM COMPANY:

12 BINGHAM, McCUTCHEN, LLP

13 BY: MICHAEL B. WIGMORE, ESQUIRE

14 2020 K Street N.W.

15 Washington, D.C. 20006

16 202.373.6000

17 michael.wigmore@bingham.com

18

19

20 TELEPHONIC STATUS CONFERENCE HEARING,

21 reported by Kramm Court Reporting, San Diego, California

22 92101, commencing on Monday, February 25, 2013, at

23 11:02 a.m. before Antonia Sueoka, Certified Shorthand

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

25 California,

1 MONDAY, FEBRUARY 25, 2013, 11:02 A.M.

2 - - -

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

5 So this is a status conference in Original 9 --
6 I'm sorry, Original Number 137 in the Supreme Court of the
7 United States, State of Montana vs. State of Wyoming.

8 And we'll start, as always, with some brief
9 appearances by counsel. So why don't we start with
10 Plaintiff, State of Montana.

11 MR. WECHSLER: Good morning, or I guess good
12 afternoon where I am, Special Master. This is Jeff
13 Wechsler on behalf of the State of Montana from the law
14 firm of Montgomery & Andrews.

15 Also on the phone is our paralegal Donna Omerod
16 here with me in Rancho Santa Fe. And from Montana we have
17 Jennifer Anders, Cory Swanson, another attorney from the
18 Attorney General's Office, and then from the Montana DNRC,
19 we have Ann Yates and Brian Bramlett.

20 SPECIAL MASTER THOMPSON: Okay. Thank you very
21 much. I understand from your email that Mr. Draper is not
22 feeling well today.

23 MR. WECHSLER: Yes. Unfortunately he can't join
24 us today.

25 SPECIAL MASTER THOMPSON: Okay. Well, let him

1 know that we hope he feels better soon.

2 MR. WECHSLER: Thank you.

3 SPECIAL MASTER THOMPSON: Next, then, counsel for
4 Defendant State of Wyoming.

5 MR. MICHAEL: Your Honor, this is Peter Michael.
6 When you asked before, I wasn't sure whether Jennifer
7 Verleger was on from North Dakota. I hadn't heard her
8 voice.

9 MS. VERLEGER: I am here.

10 MR. MICHAEL: She is. Okay, good.

11 Anyway, from Wyoming it's Peter Michael, Chris
12 Brown, David Willms, and Matthias Sayer.

13 SPECIAL MASTER THOMPSON: Okay. Thank you very
14 much, Mr. Michael.

15 And next, counsel for Defendant State of North
16 Dakota.

17 MS. VERLEGER: Jennifer Verleger for North
18 Dakota.

19 SPECIAL MASTER THOMPSON: Welcome.

20 And then next for various Amici. First of all,
21 is there anyone on the line from the United States?

22 MR. DUBOIS: This is Jim DuBois for the United
23 States, Your Honor.

24 SPECIAL MASTER THOMPSON: Thank you.

25 And next, Northern Cheyenne Tribe.

1 MS. WHITEING: This is Jeanne Whiteing, Your
2 Honor, for the Northern Cheyenne Tribe.

3 SPECIAL MASTER THOMPSON: Thank you.

4 And then, finally, anyone on the line from
5 Anadarko Petroleum.

6 MR. WIGMORE: Yes, Your Honor. This is Michael
7 Wigmore from Bingham for Anadarko.

8 SPECIAL MASTER THOMPSON: Thank you, again.

9 So there is always one thing that is specifically
10 on my calendar for this morning and that is the proposed
11 schedule. You all should have received this morning an
12 email from Ms. Carter that basically takes the proposed
13 schedule that Montana and Wyoming had discussed and
14 proposed earlier in the month and then builds on that.

15 And as you see, I basically took all of the
16 proposed dates through the July 3rd date for filing of
17 dispositive motions and then added in basically the
18 standard times for filing of opposition briefs and reply
19 briefs, provided two days for hearings on the dispositive
20 motions on August 29th and 30th, given that we don't
21 know --

22 (Joining the meeting, Michael Wigmore.)

23 SPECIAL MASTER THOMPSON: We must have lost you
24 quickly there.

25 MR. WIGMORE: Yeah. I hit the wrong button.

1 Four years of engineering school to waste.

2 SPECIAL MASTER THOMPSON: Welcome back.

3 Anyway, as I said, I have provided two days for
4 hearings on the dispositive motions. I figured that those
5 dispositive motions could be quite long, and so I wanted
6 to make sure that we had plenty of time for whatever
7 hearings were necessary on those motions, and might be
8 that we'll need less, but I figured it doesn't hurt to
9 provide for two days at the moment.

10 And then in thinking about how quickly I could
11 actually rule on those dispositive motions, as you can see
12 there I've allowed myself a little over two weeks to issue
13 a decision. That might not be a full memorandum opinion
14 on all the dispositive motions, but it would be a decision
15 on them, hopefully, with enough guidance to then prepare
16 for trial, and then basically a month between then and
17 trial, assuming that everything is not resolved on the
18 dispositive motions.

19 Looking at that, that struck me as all pretty
20 tight, but I think I could certainly meet that
21 September 16th deadline, and it then, as I say, provides
22 about a month for all of the various counsel to know what
23 is, therefore, an issue at the trial and get ready for the
24 trial. So that was my proposed schedule. And what I was
25 hoping was that I could get people's comments on whether

1 or not that looked workable to you.

2 And in addition to that, I've now gathered
3 there's also been some discussion between Wyoming and
4 Montana regarding the April 2 and June 4th deadlines,
5 particularly the June 4th deadline where, again, if I
6 understand, the one attachment that Wyoming sent me this
7 morning, Montana has asked for some additional time and
8 Wyoming has suggested that's not necessary.

9 So I would be interested, I think, both in the --
10 in that first question of just starting with this initial
11 schedule, whether it seems workable to people, and then in
12 addition to that, we can then talk about Wyoming's
13 request -- I'm sorry, Montana's request to Wyoming. And I
14 assume that the two people who have the most to say are
15 Mr. Wechsler and Mr. Michael.

16 And, actually, why don't I start with you,
17 Mr. Michael, since you'll probably be the one to argue for
18 keeping the current schedule.

19 MR. MICHAEL: Yes, Your Honor. This is Peter
20 Michael. By the way, James Kaste is trying a two-week
21 case in Lander, Wyoming, that's why he's not here.

22 SPECIAL MASTER THOMPSON: Okay.

23 MR. MICHAEL: The -- well, this is the schedule
24 we had agreed to back on January the 16th, and the letter
25 came in from Montana with our approval as this schedule.

1 What I see here that you've added makes -- I
2 don't see anything that is out of order there. The time
3 looks good. As you said, it was tight. And it does give
4 us the time to have, at least as you described it a moment
5 ago, a provisional order that we can rely on, at least for
6 the results without maybe all the reasoning, to prepare
7 for trial in that month's time, which I think is doable,
8 probably minimal. Cutting it any tighter than that I
9 think would be too difficult and not helpful enough to the
10 parties to prepare for trial properly. And so it really
11 looks like a good schedule. And, again, we were fine with
12 it back in January and don't see any reason to mess with
13 it.

14 I may have some other comments, but I guess we
15 just have to hear from Montana about what their -- why
16 they think it should be changed.

17 SPECIAL MASTER THOMPSON: Right.

18 And just to, again, explain what I'm hoping to do
19 on September 16th, as you point out provide -- as you
20 point out, it would be provisional until the final
21 memorandum opinion came down. But I would hope at that
22 point to be able to advise you how I plan to rule on the
23 various dispositive motions, what, therefore, still needs
24 to be tried, and to the degree that I believe that there
25 are particular legal issues, that I would be resolving as

1 part of those dispositive motions that would also be
2 relevant to the trial, try to give you at least a
3 preliminary sense of my views on those, with, again, the
4 notion that everyone would have a month to then determine
5 exactly how they're going to be preparing for trial and
6 get ready.

7 MR. MICHAEL: Your Honor, may I add something to
8 that because --

9 SPECIAL MASTER THOMPSON: Yes.

10 MR. MICHAEL: -- this is Pete Michael again -- is
11 that we have -- I know it's been probably over the last
12 year when we have been talking about trial dates and
13 stuff, I know it's come up and I think in several status
14 conferences we have talked about motions in limine. In
15 fact, I think it may be in the letter of January 16th.
16 But that adds to the issue about where we would be in
17 mid-September because that decision -- those provisional
18 decisions would be very important to help the parties
19 decide are there areas where they thought they might file
20 a motion in limine, it becomes unnecessary or vice versa.

21 So I think building in a month there is pretty
22 much critical because if parties decide then to file a
23 motion in limine, they're going to need a little bit of
24 time to prepare those or to throw them in the trash can,
25 as the case may be, and then -- so I don't see how you can

1 trim that really and still do -- and I know we have talked
2 about this, but I just wanted to add that.

3 SPECIAL MASTER THOMPSON: Okay. Thank you.

4 Mr. Wechsler.

5 MR. WECHSLER: Yes, Your Honor. Mr. Wechsler for
6 the State of Montana.

7 If it's okay with you, I'll first address the
8 current schedule; I'll then explain the reasons that we
9 sought additional time from Wyoming and feel like it's
10 necessary for us to have a fair opportunity to address the
11 expert reports, and then I'll explain how I think, given
12 your recent email, we might fit some more time into that
13 schedule.

14 So starting with the current schedule, I do agree
15 it is workable, and it is based on the agreement that was
16 set forth in the joint letter from Montana and from
17 Wyoming.

18 One thing Mr. Michael is correct that we
19 expressly reserved the ability to file motions in limine
20 and did not build that into the schedule. Mr. Kaste and I
21 talked about that about a month ago. We also talked about
22 the fact that it may be necessary to have a pretrial
23 conference schedule ahead of the trial in order to, one,
24 address the motions in limine and also finalize some sort
25 of pretrial order that would make clear what the witnesses

1 were, the final witnesses, and also what the exhibits were
2 because right now we don't have a deadline or a date built
3 in for identifying the trial witness -- I'm sorry, the
4 trial exhibits and the final trial witnesses. So I do
5 agree that motions in limine are an issue.

6 Now, that being said, as you saw, we did send an
7 exchange that had occurred at the end of last week having
8 to do with hoping to build in two more weeks of time in
9 the schedule.

10 And so in order to understand how that all came
11 about, I'll back up a little bit. And -- you know,
12 Wyoming had raised the concerns that the original schedule
13 that was set forth, and I think it's Case Management Order
14 Number 10, not provide sufficient time for them to
15 complete their expert reports. And Montana reviewed that
16 position, looked at the time that was built in there. And
17 while we didn't agree with all of their reasons, we were
18 attempting to be accommodating, and therefore, agreed to
19 provide an additional amount of time or to agree to that,
20 subject to Your Honor's decision.

21 Now, at the time we did communicate with our
22 experts before the joint letter was submitted, but
23 unfortunately we didn't -- maybe we didn't do as good a
24 job of communicating as we could have, and so certainly I
25 take some responsibility for that. But it came to our

1 attention really last week from Mr. Book that he has two
2 conflicts with the current schedule.

3 Under the current schedule, June 4th would be
4 Montana's rebuttal expert designation. But Mr. Books'
5 conflicts are two-fold. The first is professional, and
6 that is, I think as Your Honor is aware, Mr. Book also
7 works for the State of Kansas. Every year on April 1st,
8 there is an exchange of data between Kansas and Colorado,
9 and there is a period of roughly six weeks there where
10 Mr. Book is occupied addressing the data, evaluating
11 modeling runs, and looking at compliance under the
12 Arkansas Compact, and Mr. Book is responsible for
13 producing a report that is due on May 15th. That's the
14 first half of his conflict. The second half is that he
15 then is scheduled to be on vacation the last week of May.
16 So when you put those two things together, we have very,
17 very serious concerns about our ability to meet a June 4th
18 rebuttal expert designation deadline.

19 And so, as you see in the email, we suggested to
20 Wyoming that the fairest way to address that would be to
21 give -- we thought that two weeks would be the minimum
22 that would be necessary for Mr. Book to be able to do all
23 the work that would be necessary going into an expert
24 report. And we thought the fairest way to address that
25 would be to give Wyoming an additional week for its expert

1 disclosures and Montana would take one additional week
2 giving the full two weeks.

3 In general, we think that it would be unfair for
4 Montana to be punished for accommodating Wyoming's request
5 to extend the expert witness deadlines, and therefore, we
6 would request that we get until the middle of June in
7 order to file our rebuttal disclosures.

8 Now, looking at the current proposed schedule
9 from the email from Ms. Carter of today at 9 a.m. Mountain
10 Time, it strikes me that there -- we had originally
11 suggested to Wyoming that the final day for deposition --
12 or dispositive motions would be July 19th; that is in this
13 revised proposal that we sent around last week. Certainly
14 I think that their dispositive motions could probably be
15 held either on the -- could be either filed on July 12th
16 or the following date. That would cut some time out of
17 our proposal. It also strikes me that it might be
18 possible to -- right now we do have the full month built
19 in for responses to dispositive motions. It might be
20 possible to cut a week out of that.

21 And if all of that wasn't acceptable, then
22 potentially we could look at moving the October 14th
23 deadline for the beginning of trial in order to make sure
24 that Montana gets a full and fair opportunity to address
25 Wyoming's expert reports and that we are not prejudiced

1 for accommodating Wyoming's requests.

2 SPECIAL MASTER THOMPSON: So if I could have some
3 additional background information, since I have not seen,
4 obviously, the various expert designations that you made
5 at the beginning of January. So could you give me a
6 better sense of, quote, how many experts you've already
7 designated, recognizing that we're talking now about
8 rebuttals rather than the initial designation, and what
9 Mr. Book's role is?

10 MR. WECHSLER: I can. I believe that Montana has
11 designated five different experts, and those, off the top
12 of my head, are Kevin Smith, Chuck Dalby, Steve Larson,
13 Dale Book, and Rick Allen.

14 Now, Mr. Dalby and Mr. Smith are addressing
15 issues dealing with Montana water rights and with the
16 Tongue River Reservoir.

17 Mr. Allen is addressing metric, the use of
18 metric, and therefore, the use of water that was used in
19 Wyoming in 2004 and 2006.

20 Mr. Larson is our groundwater expert, and he's
21 addressing groundwater issues, but Mr. Book is really our
22 central expert witness, and he is addressing the amount of
23 water necessary to satisfy Montana's pre-1950 uses, water
24 uses and regulation in Wyoming, the issues related to the
25 Tongue River Reservoir. Really each of the other expert

1 reports revolve around Mr. Book and his expert testimony,
2 and that is why it's so critical for Montana to have his
3 full participation because none of the other expert
4 witnesses is addressing the same subject matter.

5 SPECIAL MASTER THOMPSON: And to what degree can
6 they be decoupled?

7 So here's the question: Are we talking basically
8 about a need for additional time just for Mr. Book or are
9 we talking about a need for additional time for all of
10 your rebuttal experts?

11 MR. WECHSLER: I think it really is we're talking
12 about an amount of -- an extra amount of time for
13 Mr. Book. My concern is if we had two different
14 deadlines, I would be a little bit concerned that
15 issues -- as Mr. Book got into his analysis, he'd realize,
16 for example, there was a groundwater issue that he needed
17 some input from Mr. Larson or a metric issue that he
18 needed some input from Mr. Allen. And so I would be
19 concerned if there were two separate deadlines because
20 that might prevent that kind of coordination.

21 SPECIAL MASTER THOMPSON: And could you also give
22 me a better sense of the exchange of information in the --
23 between is it Kansas and Colorado?

24 MR. WECHSLER: It is between Kansas and Colorado.
25 As I understand it, it's a significant amount of data that

1 is exchanged having to do with water use in both states,
2 stream flows, groundwater pumping, and there's first a
3 whole process that goes through with identifying the
4 proper data, working with the data, trying to correct any
5 errors in that data, and then, as I said, it's a matter of
6 working through the decree and also with the model runs
7 that are done as a part of a compliance effort. And as I
8 understand it, it very much occupies Mr. Book's time for
9 that six-week period from roughly April 1st until
10 May 15th.

11 SPECIAL MASTER THOMPSON: And do you know whether
12 or not there are specific deadlines in the -- that are
13 either by contact or court decree in that particular case?

14 Here's why I'm asking, which is, one of the
15 reasons we're in the situation we're in right now is that
16 we took some time out of the schedule last summer to
17 permit -- you know, to permit another case to go by. And
18 I guess what I'm wondering is whether or not we can get
19 reciprocity here.

20 MR. WECHSLER: I under -- I don't know for
21 certain the answer to your question, but I believe that
22 there is a date built into the decree between Colorado and
23 Kansas, but without looking, I can't tell you that for
24 certain.

25 SPECIAL MASTER THOMPSON: Okay. So, Mr. Michael,

1 your thoughts on this particular question. And I'll --
2 it's not going to come as a surprise to anyone that, you
3 know, I am worried already that the schedule is already
4 tight. At the same time, to the degree that there's
5 something that we can do to accommodate Montana with
6 respect to Mr. Book, would like to do that, but I am very
7 worried on what the implications of that are for the
8 schedule.

9 MR. MICHAEL: Yes, Your Honor. This is Peter
10 Michael.

11 There's another implication I think we need to be
12 worried about, and this goes to -- it fits into the timing
13 we're talking about here and how much time, and that
14 implication is what kind of a rebuttal response are we
15 going to get?

16 I mean, you asked a question about experts, and
17 we hear Montana say that they're going to be putting
18 together reports from various experts, so forth and so on.
19 Well, they've already done that. And what we had worked
20 in originally in this case was a rebuttal period of I
21 think of about 20 days, time for them to prepare rebuttal
22 responses.

23 Now, on January 16th on follow-up from the status
24 conference we last had, which I attended on the phone, we
25 had built in the extra 60 days that we asked for, and we

1 told you, we're not going to ask for more than we need,
2 and that's what we need and we're sticking to it. But at
3 that time by rebuilding the schedule, Montana got a fairly
4 significant expansion. I think it was triple the amount
5 of time for their rebuttal disclosure.

6 So I ask the question: Are we looking to get a
7 rebuttal here or are we looking to get some kind of a
8 brand new opinion? Because we're going to be screaming
9 bloody murder, I can guarantee you, if we end up with some
10 brand-new report.

11 And the reason I say that is, Your Honor, you
12 haven't seen the reports, but Montana has identified a
13 very small amount of water at issue in this case on the
14 Tongue River, and that's the only river left. So we
15 certainly hope that there isn't some move afoot to do that
16 because I think that would be an improper use of this
17 extension of time. So I did want to raise that issue as a
18 concern that we have, and I think it's an honest concern.

19 The other thing I think I've pointed out some of
20 the details about where we were. You know, we already had
21 Montana with 20 days originally, and now they've had a
22 lot -- a nice expansion to two months. And it seems to
23 me -- now, I can't speak for Mr. Book's vacation, which
24 apparently starts on May 15th, from what I just heard from
25 Mr. Wechsler, and goes to the end of May, because his

1 original deadline would be June 4th under your schedule
2 and the one you proposed today and the one we proposed
3 back in January, and so what goes on between May 15th and
4 the end of the month, I don't know. Presumably it's the
5 two-week vacation.

6 The other thing is -- let me see. I have another
7 note here, something I wanted to raise.

8 By the way, Your Honor, we have deposed all of
9 Montana's experts. The last one we took last week was
10 Allen, but they've all been deposed. So we're trying to
11 meet our schedule, and I think we're going to be
12 successful. We're not asking for any more.

13 And I would point out also that the proposal here
14 of Montana -- Wyoming's expert designation being moved to
15 April 9th is not our proposal; that's Montana's proposal.
16 And you received an email from them today attaching our
17 response to them this morning, because they proposed this
18 on Friday for the first time. But we're not asking for
19 seven days ourselves from April 2nd to April 9th. So I
20 guess I have some doubts and questions about what the
21 point is.

22 Now, there is one concern on scheduling, aside
23 from those questions, but -- and that is, if Montana were
24 to have another two weeks for Mr. Book after he gets back
25 from vacation to go to the middle of June, then we have

1 Montana giving us their rebuttal reports within a couple
2 weeks of the dispositive motion deadline if we're going to
3 hold the schedule, which is July 3rd. And I think that's
4 tight. When we are deciding whether to file dispositive
5 motion here, which may be based on expert testimony, some
6 parts of the motion will probably be based on expert
7 testimony, and we don't have their final rebuttal until
8 two weeks before the motion is due. That's problematic.
9 And I think that is where you end up here if you do that.

10 And so, I guess, I would just say this: Based on
11 what I have heard so far -- I know we were told last
12 summer when the stay issue was argued then that good cause
13 shown would have to be presented. And I guess -- I don't
14 know. I know our experts are working hard. And I respect
15 the fact that people take vacations, but if we were
16 talking about the same scenario we had originally in this
17 case which was a rebuttal expert taking three weeks, I see
18 most of that as being taken up by Mr. Book's vacation.
19 And I don't know where his vacation is or when he is
20 scheduled or whatever, but -- and I don't -- we don't know
21 the answer to that, obviously. This has first come up
22 today, and we don't have anything in front of us.

23 Thank you.

24 SPECIAL MASTER THOMPSON: Okay. Thanks.

25 So my inclination is to keep the schedule as I've

1 laid it out --

2 MR. WECHSLER: Your Honor, may I address some of
3 the issues raised by Mr. Michael?

4 SPECIAL MASTER THOMPSON: Yes, you can.

5 MR. WECHSLER: Thank you.

6 First of all, the original proposal, and actually
7 this came from Wyoming, in the draft CMP did not call for
8 20 days for rebuttal, rather it was an undetermined amount
9 of time, as identified by Mr. Michael.

10 As for whether or not any rebuttal or what
11 Montana's rebuttal will look like, we, of course, do not
12 know at this point. We have asked a series of discovery
13 questions of Wyoming about their positions and their
14 defenses in this case, and they have refused to take a
15 position at this point. And so we really won't know until
16 we see their expert disclosures what their case looks
17 like. And so that's one of the reasons that the
18 additional amount of time is necessary.

19 And then I'll -- Mr. Michael seems to be focused
20 on Montana showing good cause why the schedule should be
21 changed, but really we're talking about a request from
22 Wyoming to change the rebuttal designations. As of right
23 now, the current CMO Number 10 has Wyoming having their
24 expert disclosures due on April -- I'm sorry,
25 February 1st.

1 Now, I certainly recognize that that date is no
2 longer valid, and we had agreed to have some sort of
3 extension, but that's all we have right now on the table.
4 And the only reason that an extension was necessary was
5 because Wyoming was asking for an additional 60 days,
6 which I feel like Montana has been very, very reasonable
7 and accommodating in not opposing that request and would
8 be extremely frustrating from the -- to the State of
9 Montana if in accommodating that request from Wyoming, we
10 were then punished by taking away enough time for us to
11 actually address the expert report.

12 Now, moving to Mr. Book's vacation. It is not
13 two weeks. It's just a single week, but this is a
14 vacation that Mr. Book has had scheduled for quite some
15 time. And I don't think it's appropriate -- inappropriate
16 for, you know, for a professional to be taking a one-week
17 vacation. At the time he scheduled it, the expert
18 disclosure was on February 1st.

19 And, again, it does strike me that there would be
20 ways to build in some time to the schedule. The most
21 obvious one, if Mr. Michael is concerned about the total
22 amount of time, will be simply to move back the trial date
23 by a week or two in order to make sure that Montana has a
24 full and fair opportunity to address and provide its
25 rebuttal report.

1 SPECIAL MASTER THOMPSON: Okay. Thank you,
2 Mr. Wechsler. I appreciate those thoughts.

3 What I'm inclined to do, however, is to stick
4 with the proposed schedule as I've set out in the email
5 that Susan Carter sent around this morning. And at the
6 moment, although I understand Mr. Book's area of
7 responsibilities that you've set out for the report due on
8 May 15th and that he also plans to take a one-week
9 vacation after that particular date, based on, you know,
10 what I know right now and without knowing what the expert
11 designations are going to be for Wyoming, maybe I'm
12 optimistic, but I have confidence that Mr. Book working
13 with your other experts can figure out how in a two-month
14 period of time to do the work that is necessary in order
15 to file whatever rebuttal designations are necessary. My
16 hope would be that there's enough of a window in that
17 two-month period of time to be able to get that work
18 accomplished.

19 Now, as I said at the time that we postponed
20 various deadlines last year, that put us on a much tighter
21 schedule. And as a result of that, I'm only going to be
22 willing to make changes to the degree that there is good
23 cause shown.

24 If at the time that Wyoming makes its
25 designations, the testimony is of such nature and Mr. Book

1 is unable to make any adjustments to his schedule in order
2 not to be able to get everything finalized by June 4th,
3 Montana is free to certainly make an argument at that
4 point, but I would want at that stage to have a
5 declaration from Mr. Book, and I would want that
6 declaration to absolutely show that there is no way that
7 he has been able to adjust to his schedule in order to
8 meet the requirements here. And even in that case, it
9 wouldn't be a full two weeks that I would be willing to
10 grant. But -- but that's what I would expect to see.
11 Because, as I said, a two-month period of time strikes me
12 as sufficient -- a sufficiently long period of time that
13 hopefully there's some flexibility in there in Mr. Book's
14 schedule that would permit Mr. Book to develop whatever
15 rebuttal testimony is necessary.

16 MR. WECHSLER: Well, I understand. Then if it
17 does become necessary, then we'll go ahead and submit that
18 motion.

19 SPECIAL MASTER THOMPSON: Okay. Again, I hope
20 not. And I hope that Mr. Book can, you know, do whatever
21 work he might be able to do before that designation on
22 some of Kansas' work, have help from one of his
23 assistants, or figure out another way to get this done.
24 Because, as I say, the schedule is tight, and, you know, I
25 realize that in this new deadline that we've extended both

1 Wyoming's expert designation in order to give them
2 additional time, but also Montana some additional time.
3 So I'm hoping that this can all be worked out. And,
4 again, it looks like it's a long enough period of time
5 that somehow it should be managed.

6 Certainly when I was in -- a trial attorney
7 myself, two-month period of time we were always able to
8 figure out some way of getting the schedule to work, so
9 I'm hoping that's the case.

10 MR. WECHSLER: I hope so, too.

11 SPECIAL MASTER THOMPSON: Okay. So any other
12 additional thoughts on the schedule at this stage?

13 MR. MICHAEL: Your Honor, this is Pete Michael.
14 I will add one thing.

15 I think we will absolutely make every effort we
16 can to provide instantaneously with our designations all
17 of our backup that we have. I mean, I think most of our
18 model runs and that sort of thing are being done based on
19 what Montana did. So I don't think there's going to be
20 all that much new there. But we will make every effort to
21 do that because we believe in the schedule, and we're
22 going to work to -- so that Montana has everything they
23 need from April 2nd to -- for Mr. Book to work with.

24 SPECIAL MASTER THOMPSON: Okay. That would be
25 appreciated, Mr. Michael. And obviously, you know, to the

1 degree that you're not able to do that, that can -- that
2 might give Montana additional argument as to why they need
3 more time. To the degree that you can actually speed it
4 up and provide anything before the April 2 deadline, that
5 presumably would make it even less likely that Montana
6 could come forward and request more time, but I realize
7 that you might not be able to do it ahead of that
8 deadline, and the deadline right now is April 2.

9 MR. MICHAEL: Thank you, Your Honor.

10 SPECIAL MASTER THOMPSON: So is there any reason
11 at this stage that we need to talk any more about the
12 motions in limine and the scheduling of pretrial
13 proceedings between September 16th and October 14th?

14 What I'll tell you is I'm keeping that entire
15 period open, and so my expectation would be that as that
16 date gets closer and we have a better sense of how the
17 schedule is developing that we can then set the deadlines
18 for any type of pretrial conferences and additional
19 pretrial deadlines at that stage.

20 MR. MICHAEL: Your Honor, this is Pete Michael.
21 I have a few thoughts.

22 I think we're built in now with the current
23 schedule for nonexpert witness disclosures on June 11th,
24 and so that really helps a lot. I think if you have that,
25 then I think it's more -- as you get close to trial, it's

1 more a question of, you know, who do the plaintiff's
2 expect to call in the first several weeks so we can
3 prepare for cross-examination and that sort of thing. So
4 I think that will really help us a lot to have that
5 included in the schedule on June 11th.

6 MR. WECHSLER: Your Honor, this is Jeff Wechsler.

7 As long as that period is open for motions in
8 limine and it's addressing pretrial matters, such as final
9 exhibit list, final witness list, I think that that is
10 sufficient. I don't think it needs more definiteness at
11 this period.

12 SPECIAL MASTER THOMPSON: Okay. Great.

13 So any other issues that -- other than schedule
14 that we need to discuss today?

15 MR. WECHSLER: Your Honor, this is Jeff Wechsler.

16 We do have one matter that we just wanted to
17 bring to your attention, and that is, Jennifer Anders,
18 unfortunately, will be taking a new position. She has
19 been appointed by the Governor of Montana to be one of two
20 members of the Northwest Power Planning Council pending
21 approval by the Montana legislature, which we all expect
22 will happen.

23 And so Mr. Swanson, Cory Swanson, who I
24 introduced earlier, will be stepping in for Ms. Anders on
25 behalf of the Montana Attorney General. We'll definitely

1 miss her, but we'll file the appropriate papers to make
2 adjustments to the CMP in the coming days.

3 SPECIAL MASTER THOMPSON: Okay. That's great.
4 And congratulations are clearly in order, Ms. Anders.
5 That's great news.

6 MS. ANDERS: Thank you very much. It's been a
7 pleasure to work on this case, and I'll miss everyone
8 involved.

9 SPECIAL MASTER THOMPSON: Well, you're welcome
10 back any time you want.

11 MS. ANDERS: Thank you very much.

12 SPECIAL MASTER THOMPSON: Okay. And we welcome
13 Cory Swanson.

14 MR. SWANSON: Thank you, Your Honor.

15 SPECIAL MASTER THOMPSON: I guess one other thing
16 that I was just curious about. I assume that after our
17 last pretrial conference that any issues with respect to
18 the subpoenas to Montana land owners have been worked out
19 between those land owners and the State of Wyoming?

20 MR. WECHSLER: Your Honor, this is Jeff Wechsler,
21 and I'll go at it first, if that's okay, Mr. Michael, and
22 then you can respond.

23 From our perspective, I think that there have
24 been very few issues. We have got a few complaints from
25 water users, but I think those have largely been

1 addressed. There was one issue; I think a letter was
2 written concerning payment for copying documents, but if I
3 understand correctly -- and I think maybe Mr. Michael can
4 address this -- I believe that Wyoming did compensate that
5 particular individual for the copying -- for the copies
6 that were made of the documents.

7 There are a number of depositions that the State
8 of Wyoming is seeking to take of Montana water users; if I
9 understand, it's upwards of 30 different water users which
10 will be coming up in March. And while certainly Montana
11 understands that Wyoming should have an opportunity to
12 gather, within reason, the information they think is
13 necessary, the depositions of 30 different water users in
14 Montana strikes us as a concern because of the time and
15 expense involved in that relative to what we consider to
16 be probably marginal information that will be gained from
17 those individuals.

18 We offered to allow Wyoming to do Rule 31 written
19 deposition questions; they refused that. At this point,
20 we're not asking for a protective order, but we wanted to
21 bring that to your attention just in case that process got
22 out of hand or we started looking at another 20 or another
23 30 water users in which case it strikes me as
24 unreasonable.

25 SPECIAL MASTER THOMPSON: Okay. Thank you.

1 And Mr. Michael.

2 MR. MICHAEL: Yes, Your Honor. We are actually
3 in the process right now of calling land owners. We've
4 gotten pretty good compliance on our document subpoenas;
5 we have worked with them. I don't know, maybe James Kaste
6 knows the answer to this, if there's any kind of a billing
7 problem, I'm sure we will take care of document expense.
8 If we haven't done it, I would be surprised.

9 But as far as depositions, we're taking -- these
10 are all Tongue River users that we would take the
11 depositions. The idea here is to take -- we're planning
12 to do three in a day, I think, and that's -- or six in a
13 day. So we're giving the witnesses a whole week when we
14 talk to them on the telephone, if there's any day this
15 week that you could fit in. So they have a nice variety
16 of schedules to choose. And we're scheduling the ones
17 either in Miles City or Sheridan, depending on which is
18 closest for the witness, whichever place they want to go
19 to. And, of course, we're doing subpoenas and paying the
20 witness fee and their travel expenses.

21 So it's just ordinary discovery, fact witness
22 discovery. We do want to get them done in March because
23 our expert witnesses are coming up April 2nd. So if some
24 of the information we glean is important to the expert
25 witnesses, we want to have that in hand, and that includes

1 several nonindividuals. There are some corporate entities
2 that also -- especially when you're talking about the big
3 coal mine up there and some of those that could have some
4 important information. So that's what we're doing. It's
5 just basically our choice of the means and method of
6 discovery that we want to do.

7 And I can tell you, way back when in one of my
8 first trials, I had two ranchers on each side of the case
9 in trial, and it turned out they were both hard of
10 hearing. And even in the same room it was difficult to
11 actually get the testimony on the record. I think the
12 trial lasted a day; it should have been half a day because
13 nobody could hear anybody else.

14 So I just think it's really vital when we take
15 these depositions, that we have somebody there in person.
16 It's our expense, our choice. Of course, we have always
17 worked with Montana in this case to the extent they want
18 to be on a -- on a -- we like to call -- cut their expense
19 down and be on either the telephone or by video. I'm not
20 sure what -- we can definitely have video facilities in
21 Sheridan as needed. I'm not sure about Miles City; that's
22 a little more tricky. It's a smaller town, so -- and it's
23 not under our control. It's in Montana.

24 But we would do everything we can to make it as
25 cost effective as Montana -- as it could be. And I know

1 Mr. Wechsler has attended many depositions by either
2 telephone or by video, and it's worked very well. But I
3 know when you start talking to fact witnesses that may be
4 pushing 70, 80 years old, it's nice to be in the same
5 room, and that's why we're doing it that way, Your
6 Honor.

7 SPECIAL MASTER THOMPSON: Okay. Thank you.

8 We did receive one email, as Mr. Wechsler
9 suggested, from one of the land owners in Montana --
10 actually, Mrs. Carter is giving it to me right now.

11 So this is -- there was a letter that was
12 received on February 4th, 2013, from Sonderby Consulting,
13 LLC. And it basically encloses correspondence between
14 Mr. Sonderby, S-o-n-d-e-r-b-y, and the State of Wyoming.
15 And their question is whether or not there is any relief
16 to the client for undue burdens placed on them by costs
17 they incurred as a result of what they allege is State of
18 Wyoming's noncompliance with Case Management Plan Number 1
19 and general law with regard to the production of
20 documents. And I want to make sure that we do follow up
21 and reply on that.

22 So, Mr. Michael, if you're not aware of whether
23 or not Mr. Kaste and Mr. Sonderby ultimately were able to
24 resolve whatever the issue was there, if you could ask
25 Mr. Kaste to follow up with a letter to me letting me know

1 what the resolution was.

2 MR. MICHAEL: Your Honor, does that letter show
3 it was copied to our office?

4 SPECIAL MASTER THOMPSON: This particular -- so
5 the enclosed correspondence is between Mr. Kaste and
6 Mr. Sonderby, but it looks like the only copy shown on
7 here is to Darlene Reiter of the Reiter Law Offices of
8 Sheridan, Wyoming. So it's possible you were not copied
9 on this. Would you like me to have a PDF made of this and
10 sent to you?

11 MR. MICHAEL: Well, let's explore this a little
12 further, Your Honor, because Matthias Sayer is here. I
13 just moved the microphone next to him. He knows a little
14 bit about this.

15 SPECIAL MASTER THOMPSON: Okay.

16 MR. MICHAEL: He's been taking depositions in
17 Montana lately, and I'll let him just tell you what he
18 knows, and then we'll decide whether we need a copy of
19 that letter.

20 SPECIAL MASTER THOMPSON: Okay.

21 MR. SAYER: Your Honor, this is Matthias Sayer.

22 I know that Mr. Sonderby is a part of or a
23 representative from one of the water users, Paradox is
24 that entity. And Mr. Kaste was in communication with
25 Mr. Sonderby. And I believe Mr. Kaste is -- well, he is

1 now in communication with Mr. Sonderby's attorney, and
2 they are working out the particulars of compensation for
3 the copying expenses.

4 SPECIAL MASTER THOMPSON: Okay.

5 MR. MICHAEL: So, actually, Your Honor, I don't
6 think we need that letter because if they're talking it
7 out with the attorney, I'm sure we'll work it out with
8 them, the compensation for the copy expense.

9 SPECIAL MASTER THOMPSON: Okay. It looks like if
10 they're asking for probably more than what would qualify
11 as a typical reimbursable copying expenses. So I think I
12 should probably respond, and I will copy everybody,
13 basically letting them know that they should try to work
14 out any disagreement with Wyoming and that they are free
15 to come back if they believe that there is any legal issue
16 that is unresolved at that point.

17 MR. MICHAEL: And I think if there's an attorney
18 involved for Paradox, I think that should really help to
19 get it resolved; if not, then they know what to do.

20 SPECIAL MASTER THOMPSON: Yeah. Okay. Okay.
21 Thank you.

22 So thank you, Mr. Wechsler, for bringing to my
23 attention the depositions and the fact that Montana has
24 some concerns here. It sounds to me Mr. Wechsler is --
25 I'm sorry, Mr. Michael, as if you are trying to be as --

1 trying to help reduce the burden on both the parties that
2 you're subpoenaing and also Montana, as you can be, given
3 your desire to have these -- the oral depositions. And I
4 appreciate that. And I assume the parties will work out
5 any concerns here. And if not, you're obviously free to
6 come back to -- well, to me at any point.

7 MR. WECHSLER: Your Honor, this is Jeff Wechsler.
8 I think that that sounds very reasonable.

9 One thing that I would just like to bring to your
10 attention, one or two of the water users have contacted us
11 and complained that they were being questioned on the
12 phone, and while I don't know that there is anything
13 inappropriate at all that was said, we would appreciate it
14 if Wyoming would confine those conversations to scheduling
15 purposes, and they can save their substantive questions
16 for the deposition.

17 MR. MICHAEL: Your Honor, may I respond to that?
18 This is Pete Michael.

19 SPECIAL MASTER THOMPSON: Yes.

20 MR. MICHAEL: These are witnesses. If we take --
21 if we want to talk to a witness and interview them before
22 we take their deposition to confirm their testimony, these
23 are just fact witnesses. I don't understand that.

24 MR. WECHSLER: Your Honor --

25 MR. MICHAEL: At least in the State of Montana,

1 we have never done that with employees of the State of
2 Montana, but these are just fact witnesses, so --

3 MR. WECHSLER: Your Honor --

4 THE REPORTER: One at a time, please.

5 SPECIAL MASTER THOMPSON: I'm sorry. I'm trying
6 to keep order here, too.

7 So, Mr. Wechsler, next.

8 MR. WECHSLER: Thank you, Your Honor.

9 We are responding to concerns that were raised by
10 those particular individuals. While it is true they are
11 fact witnesses, they are citizens of the state of Montana,
12 and we're all aware of the apparent patriotic doctrine
13 which says that the State of Montana represents all of its
14 water users in this instant matter, and so we certainly
15 feel responsible for those water users. And it doesn't
16 strike me as a problem for Wyoming to simply wait until
17 they have those individuals under oath and they can ask
18 them whatever questions they want.

19 SPECIAL MASTER THOMPSON: So let me respond.

20 So, first of all, I agree with Mr. Michael that
21 these are witnesses, unless they are employed by the State
22 of Montana, I see no legal reason why they cannot ask them
23 if they would be willing to answer questions and
24 presumably some of them have been. To the degree that
25 there are any concerns, however, that are raised, that

1 they are raised through Wyoming, I hope and assume that
2 Wyoming responds to those concerns and doesn't do anything
3 that any of the land owners consider to be belligerent in
4 any fashion.

5 And similarly, Mr. Wechsler, you know, if you
6 hear of any concerns, I think you should pass those on to
7 Mr. Michael. And if there's any type of issue that you
8 think needs a protective order response, bring it to my
9 attention. But I agree with Mr. Michael that as long as
10 they're just private land owners in Montana, that they're
11 certainly welcome to ask them questions as they would
12 anyone else that they're considering as potential
13 witnesses.

14 MR. WECHSLER: I understand.

15 SPECIAL MASTER THOMPSON: Okay. Anything else?

16 Okay. If not, then I believe we have another
17 status conference scheduled for -- I'm looking over to
18 Ms. Carter.

19 When is it?

20 MS. CARTER: I don't know.

21 SPECIAL MASTER THOMPSON: You don't know. Okay.
22 Anyone else?

23 MS. VERLEGER: This is Jennifer Verleger. I
24 believe it's March 29th.

25 SPECIAL MASTER THOMPSON: Yes. That is right.

1 At 10 a.m. Pacific Time on March 29th.

2 MS. VERLEGER: Which is also Good Friday, if no
3 one realized when we made it.

4 SPECIAL MASTER THOMPSON: Would people like me to
5 try to reschedule that? If that is a concern for anyone,
6 I will work on rescheduling.

7 MS. VERLEGER: It's fine for me.

8 SPECIAL MASTER THOMPSON: Okay. So without any
9 concerns, then I will keep it on that particular date.

10 And just to also let people know, I am going to
11 be in Central America on work starting on March 8th and
12 running through March 22nd. So during that period of time
13 it will be very difficult to reach me by phone, although
14 in an emergency, you can do it. I will just be on a boat
15 for part of that time and so you'll have to get me by
16 satellite phone.

17 But what I would suggest is if you -- if you
18 anticipate something coming up, then think about raising
19 the issue either before March 8th or after March 22nd.
20 And if something does come up during that period of time,
21 then get a hold of Ms. Carter and she'll figure out how we
22 can resolve this. And I might try to resolve it initially
23 by email, because I think I will have fairly good email
24 connections for that. Again, we'll have a satellite
25 connection, and if necessary, we'll also set up a

1 telephone conference by satellite. Okay?

2 So if there is nothing else, then I think that we
3 are through for the day, and I wish you all great weeks.

4 MR. MICHAEL: Your Honor, are you still there?

5 SPECIAL MASTER THOMPSON: Yes, I am here.

6 MR. MICHAEL: This is Pete Michael.

7 I just had one other question. You had indicated
8 earlier today that you had not received the expert reports
9 from Montana. The certificates of service indicated that
10 they were included or available. I don't want to submit
11 our expert reports to you if you think we shouldn't be
12 doing that. I'm not sure what the -- we have to give you
13 a designation of the experts, I guess, but I'm just -- I
14 guess I have to -- I ought to maybe raise that issue right
15 now. I don't want to make that mistake.

16 SPECIAL MASTER THOMPSON: Yeah. No, at this
17 stage I don't need them.

18 MR. MICHAEL: Okay.

19 SPECIAL MASTER THOMPSON: The only reason why I
20 was asking the question was I was trying to get a better
21 sense of where Mr. Book fell within the overall set of
22 experts that Montana designated so far.

23 MR. MICHAEL: Okay. So I guess you get pretty
24 much a bare pleading from us, it doesn't really contain
25 too much, just a list.

1 SPECIAL MASTER THOMPSON: That's fine.

2 MR. MICHAEL: Okay. Very good.

3 SPECIAL MASTER THOMPSON: I assume I will be
4 probably reading those sooner than later.

5 MR. MICHAEL: Yes, Your Honor.

6 SPECIAL MASTER THOMPSON: Okay.

7 Okay. Thank you very much, everybody.

8 - - -

9 (End of proceedings at 11:58 A.M.)

10 - - -

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

