

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

May 12, 2015

Reported by: Lauren N. Cadish, CSR 14004

TELEPHONIC APPEARANCES

SPECIAL MASTER:

STANFORD LAW SCHOOL

HON. BARTON H. THOMPSON JR., ESQ.

559 Nathan Abbott Way

Stanford, California 94305-8610

655.723.2465

ASSISTANT TO SPECIAL MASTER:

STANFORD UNIVERSITY

SUSAN M. CARTER

473 Via Ortega, Suite 225

Mail Code 4205

Stanford, California 94305

650.721.1488

1                   TELEPHONIC APPEARANCES (continued)

2   FOR PLAINTIFF STATE OF MONTANA:

3   MONTGOMERY & ANDREWS PA

4   BY: JOHN B. DRAPER, ESQ.

5   BY: JEFFREY WECHSLER, ESQ.

6   325 Paseo de Peralta

7   Santa Fe, New Mexico 87501

8   505.982.3873

9

10   MONTANA ATTORNEY GENERAL'S OFFICE

11   BY: ALAN JOSCELYN, DEPUTY ATTORNEY GENERAL

12   215 North Sanders

13   Helena, Montana 59620-1401

14   406.444.5894

15

16   FOR DEFENDANT STATE OF WYOMING:

17   WYOMING ATTORNEY GENERAL'S OFFICE

18   BY: JAMES KASTE, ESQ.

19   BY: PETER MICHAEL, ATTORNEY GENERAL

20   BY: JOHN KNEPPER, CHIEF DEPUTY ATTORNEY GENERAL

21   200 West 24th Street

22   123 Capitol Building

23   Cheyenne, Wyoming 92002

24   307.777.7841

25

1 TELEPHONIC APPEARANCES (continued)

2 FOR STATE OF NORTH DAKOTA:

3 OFFICE OF ATTORNEY GENERAL, STATE OF NORTH DAKOTA

4 BY: JENNIFER L. VERLEGER, ESQ.

5 500 North 9th Street

6 Bismarck, North Dakota 58501-4509

7 701.328.3640

8

9 DEPARTMENT OF NATURAL RESOURCES & CONSERVATION OF

10 MONTANA

11 ANNE YATES, ESQ.

12 1625 11th Avenue

13 Helena, Montana 59601

14 202.514.8976

15

16

17

18

19

20 \* \* \*

21 TRANSCRIPT OF TELEPHONIC PROCEEDINGS

22 taken at 450 West A Street, Suite 750, San Diego,

23 California 92101, commencing on May 12, 2015 at

24 9:30 a.m., before Lauren Cadish, Certified Shorthand

25 Reporter 14004.

1 SAN DIEGO, CALIFORNIA, MAY 12, 2015, 9:30 A.M.

2 SPECIAL MASTER THOMPSON: This is a status  
3 conference in Montana vs. Wyoming before the  
4 United States Supreme Court, and I just want to  
5 apologize to everyone to begin with that I had  
6 to postpone the hearing this morning for half  
7 an hour, but in South Africa because they don't  
8 seem to be capable at the moment of actually  
9 producing sufficient power to meet all of the  
10 needs, we occasionally have load shedding, and  
11 furthermore, load shedding is frequently  
12 announced at the last moment.

13 So I got back to my apartment about 5:30  
14 my time to find I didn't have any power, and I  
15 knew I wouldn't have any until 6:30 my time, or  
16 7:30 most of your time, and so I got on the  
17 line with Ms. Carter, and I'm glad she was able  
18 to reach all of you. I hope she was able to  
19 reach all of you so you didn't have to sit on  
20 the line for half an hour.

21 So again, apologies for having to postpone  
22 the meeting. I hope that was not too much of a  
23 hardship for everybody.

24 So let's begin, as always, with  
25 identification of counsel for the parties. So

1           why don't we begin with Montana.

2           MR. DRAPER: Good morning, or good  
3 evening, Your Honor. This is John Draper for  
4 Montana. We did get the message from Ms.  
5 Carter, so it was not any great inconvenience  
6 you postponed the call. And with me on the  
7 phone are Alan Joscelyn, Anne Yates, and Jeff  
8 Wechsler for Montana.

9           SPECIAL MASTER THOMPSON: Okay. Thank  
10 you, and welcome everybody.

11           So next, counsel for Wyoming.

12           MR. MICHAEL: Your Honor, Peter Michael  
13 here with James Kaste and John Knepper.

14           SPECIAL MASTER THOMPSON: Okay. Attorney  
15 General Michael, welcome, and welcome to all of  
16 your co-counsel.

17           And then finally for the great state of  
18 North Dakota.

19           MS. VERLEGER: Jennifer Verleger for North  
20 Dakota, Your Honor.

21           SPECIAL MASTER THOMPSON: Okay. And Good  
22 morning to you also.

23           Is there anyone else on the line who has  
24 not been identified so far? Okay. Then if  
25 not, let's -- I'm going to -- I'm hoping that

1           this phonecall actually will be relatively  
2           short, so let me begin, though, by going off  
3           the record for a minute or two.

4                       (Discussion off the record)

5           SPECIAL MASTER THOMPSON:  Let's go back on  
6           the record, and let me just -- at this point,  
7           the discussion is going to focus on my proposed  
8           Case Management Order No. 16, which I  
9           circulated to all of the parties, and per  
10          instructions, got answers or got comments back  
11          from both Montana and Wyoming, and I just want  
12          to go through the various points that the  
13          parties raised and make sure there's agreement  
14          on these points, more that I understand the  
15          position the party's on.

16          So first of all, as to the addition to the  
17          elements of the offer that it would include  
18          costs to the date of the offer, since my  
19          understanding is that that would be Montana's  
20          proposal and that Wyoming is not opposed to it,  
21          I will include costs to the date of the offer.  
22          So that's point number one.

23          Point number two is that, as I understand  
24          Montana's position, they would suggest  
25          eliminating the bilateral character that I

1 added to what would normally be the normal  
2 process in the Federal Rules of Civil  
3 Procedure. My understanding is that because  
4 Montana believes that it would be entitled to  
5 costs in any case unless they are shifted, and  
6 since I added that in for the benefit of  
7 Montana, I will take that out per the proposed  
8 language that I had in my order.

9 So again, I will add in costs to the date  
10 of the offer. I will eliminate the bilateral  
11 language. That will basically make it very  
12 similar to the Federal Rules of Civil  
13 Procedure.

14 I agree with the parties that that does  
15 have the benefit to the degree that there is  
16 any necessary implication of the order at a  
17 later date that presumably we won't be able to  
18 utilize the jurisprudence that has grown up  
19 around the Federal Rules of Civil Procedure.  
20 So those are the first two points.

21 The third point was that Montana requested  
22 that the period of time needed for deciding  
23 whether or not to accept the offer be extended  
24 from 14 days to 28 days, and so I guess my  
25 question is does Wyoming have any objection to



1 extending it by two weeks?

2 MR. MICHAEL: No, Your Honor. We have no  
3 objection, Your Honor.

4 SPECIAL MASTER THOMPSON: Okay. So then I  
5 will extend that 14 days to 28 days, and since  
6 there has been a delay in my issuance of the  
7 proposed order -- and sorry about that. It's  
8 just difficult not having -- working from South  
9 Africa. I would propose changing the date by  
10 which Wyoming has to make an offer from what  
11 was originally May the 18th. My thought was  
12 extending that a week to May 25th. So with --  
13 does that give Wyoming sufficient time?

14 MR. MICHAEL: That's fine, Your Honor.

15 SPECIAL MASTER THOMPSON: Okay. Then I  
16 will extend -- thank you. So I will extend  
17 then the date for the offer from May 18th to  
18 May 25th. I'll extend the period of time for  
19 Montana to respond from 14 days to 28 days.

20 And then Wyoming made several points in  
21 its comments on the proposed order. Number one  
22 was that I clarify that what would be proposed  
23 here is just a partial judgment rather than a  
24 completed full judgment. That was certainly my  
25 intent, and I will clarify that point in the

1 case management order.

2 Second of all, Wyoming has suggested that  
3 I further clarify the language which I had in  
4 the proposed order taking into account the  
5 accrual of additional interest over time.

6 Wyoming is correct that the reason I added  
7 that in was to reflect the fact that,  
8 obviously, if the offer were rejected and if --  
9 went on -- the case went on to some later point  
10 where I had to determine damages that, of  
11 course, there would be additional interest over  
12 that period of time, and that should not count  
13 against the offer that Wyoming would have made.

14 So if it turns out that Montana gets  
15 additional interest because of the fact that  
16 there's an additional year, year and a half in  
17 between, that should not count towards whether  
18 or not the final determination of damages is  
19 less than the offer that Wyoming made. So I  
20 will, again, clarify that particular language  
21 to make sure that that is clear in the proposed  
22 order.

23 And then the final thing that Wyoming  
24 asked was that I clarify the language "All  
25 costs incurred" does not include every single

1 cost imaginable but only includes those costs  
2 appropriately awarded, and the only difference  
3 here is that I think Wyoming's language was  
4 something of the nature of authorized by law or  
5 the Federal Rules of Civil Procedure. And what  
6 I would propose instead would be that it  
7 basically be all costs, you know, incurred and  
8 authorized by law or by the rules and practice  
9 of the Supreme Court because technically, we're  
10 not under the Federal Rules of Civil Procedure  
11 but instead under the rules and decisions of  
12 the Supreme Court. But I will make it clear  
13 that it's not all costs incurred, but instead,  
14 the costs that the Supreme Court has concluded  
15 in the past legitimate to award.

16 So does that sound fine to everybody, or  
17 does anybody have anything they would like to  
18 add or suggest I change there?

19 MR. DRAPER: Your Honor, this is John  
20 Draper. There was one point that occurred to  
21 us since we submitted our response to you, and  
22 that is that you might want to consider  
23 providing that the damages and cost offers be  
24 separate so that they could be separately  
25 either accepted or rejected. It might come

1 closer to what we understand to be your  
2 purposes to allow -- to encourage settlement  
3 where settlement can occur, and if it were  
4 provided that those would be separated and  
5 could be either rejected or accepted  
6 separately, that might facilitate things. So,  
7 anyway, I wanted to mention that.

8 SPECIAL MASTER THOMPSON: Yeah, I thought  
9 about that also. That would certainly be my  
10 own preference because again, I could imagine  
11 in a proposal that damages might be fairly  
12 easy, but particularly given Wyoming's view in  
13 its exceptions, there could be a significant  
14 difference in what Wyoming thinks would be a  
15 reasonable settlement offer and what Montana  
16 would be -- would consider to be a reasonable  
17 settlement offer with respect to costs. So  
18 that's why I was trying to separate them out.

19 MR. DRAPER: Well, that would be fine from  
20 our point of view.

21 SPECIAL MASTER THOMPSON: And General  
22 Michael?

23 MR. MICHAEL: That would be all right as  
24 well. If that's the direction you wanted to  
25 go, Your Honor, we're okay with it.

1           SPECIAL MASTER THOMPSON: Yeah, okay.  
2           Then I will go ahead and make that change that  
3           the -- basically, treat it as two partial  
4           judgments, one with respect to damages, and the  
5           other with respect costs to the date of the  
6           offer.

7           Okay. With that, is there any other  
8           matter to discuss because otherwise, I think we  
9           can end early this evening. I guess, actually,  
10          one other matter which I would -- we should  
11          probably bring up is the scheduling of another  
12          status conference.

13          At this stage, I would think that probably  
14          the most logical one, unless people would like  
15          something earlier, would probably be after the  
16          28 days as expired under the case management  
17          order, which would make it some time in late  
18          June. Does anyone have any reason that they  
19          would like to have a status conference  
20          scheduled before then?

21          MR. DRAPER: That sounds fine to us from  
22          Montana, Your Honor.

23          MR. MICHAEL: And that would be good as  
24          well. Pete Michael here.

25          SPECIAL MASTER THOMPSON: Yeah, I see no

1 reason to waste your time, and I think that  
2 before then, hopefully, you will be having  
3 detailed discussions with respect to  
4 settlement, but I don't think that having a  
5 phonecall with me is necessarily going to help  
6 you on that front.

7 So, Ms. Carter, if you could take the  
8 date, May 25th, and count 28 days after that,  
9 and let's see here. I can actually go in, I  
10 think, to my calendar here. So if we take the  
11 date of May 25th, then that would suggest we  
12 set a status conference for some time the week  
13 of June 22nd.

14 MS. CARTER: Okay.

15 SPECIAL MASTER THOMPSON: So go ahead and  
16 do that. I'll be back, so that will make it a  
17 lot easier to schedule at that point.  
18 Obviously, if the parties for any reason they  
19 would like to get me on the telephone before  
20 then, please just let me know, and we can  
21 schedule that very quickly.

22 And I will -- I'm actually headed out to  
23 dinner right now, but as soon as I get back  
24 from dinner, I'll make the modifications to the  
25 case management order that I suggested, send it

1 to Ms. Carter so Ms. Carter can get it out  
2 either today as it comes in in time.  
3 Otherwise, tomorrow, but you can assume that  
4 the dated proposed offer would be May 25th, and  
5 again, there would be 28 days to respond after  
6 that. So anything else to discuss on this  
7 telephone call?

8 MR. DRAPER: No.

9 SPECIAL MASTER THOMPSON: Well, if not,  
10 then I hope everyone has a great day today, and  
11 I've been reading all of the various briefs so  
12 far, and I wish both sides good luck on their  
13 drafting of the surreplies. I look forward to  
14 reading them also.

15 So with that we can officially adjourn  
16 this particular status conference.

17 MR. DRAPER: Thank you, Your Honor.

18 SPECIAL MASTER THOMPSON: Okay. Thank you  
19 to all of you.

20 MR. MICHAEL: Thank you, Your Honor.

21 SPECIAL MASTER THOMPSON: Bye, bye.

22 (Proceedings concluded at 9:51 a.m.)  
23  
24  
25

1 STATE OF CALIFORNIA )  
 : SS.  
2 COUNTY OF SAN DIEGO )

3 I, Lauren Cadish, Certified Shorthand  
4 Reporter licensed in the State of California,  
5 License No. 14004, hereby certify I reported in  
6 machine shorthand the proceedings had in the  
7 above-entitled cause, and that the foregoing  
8 transcript, consisting of pages numbered 1-15,  
9 inclusive, is a full, true, and correct transcript  
10 of said proceedings held on May 12, 2015.

11

12

13

14 DATED this 18th day of May, 2015, in San Diego,  
15 California.

16

17

*Lauren Cadish*  
\_\_\_\_\_  
Lauren Cadish  
CSR No. 14004

18

19

20

21

22

23

24

25