
NO. 137, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,)
)
 Plaintiff,)
)
 vs.) No. 220137 ORG
)
 STATE OF WYOMING and STATE OF)
)
 NORTH DAKOTA,)
)
 Defendants.)

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TRANSCRIPT OF TELEPHONIC PROCEEDINGS

Wednesday, August 14, 2013

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

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21 REPORTER'S TRANSCRIPT OF PROCEEDINGS, taken
22 telephonically on Wednesday, August 14, 2013, before me,
23 Kathleen A. Powell, CSR No. 2778, beginning at the hour
24 of 11:33 a.m. in the City of San Diego, County of San
25 Diego, State of California.

1 San Diego, CA, Wednesday, August 14, 2013, 11:33 a.m.

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3 TRANSCRIPT OF TELEPHONIC PROCEEDINGS

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5 SPECIAL MASTER THOMPSON: This is a status
6 conference in number 134 Original, which is -- I'm
7 sorry, not 134. What number are we?

8 MR. KASTE: 137.

9 SPECIAL MASTER THOMPSON: Number 137, which is
10 an original action in the United States Supreme Court,
11 which is Montana versus Wyoming and so why don't we at
12 this stage have the counsel identify themselves. We'll
13 start out with counsel for Montana.

14 MR. DRAPER: Thank you, Your Honor. This is
15 John Draper, counsel of record for Montana. Also on the
16 phone for this call are Cory Swanson, Deputy Attorney
17 General of Montana, Jeffrey Wechsler from our office and
18 Donna Ormerod from our office.

19 SPECIAL MASTER THOMPSON: Okay. Thank you. So
20 welcome all. And next, counsel for Wyoming.

21 MR. KASTE: Morning, Your Honor. This is James
22 Kaste for the State of Wyoming. I'm here with Chris
23 Brown and Andrew Kuhlman.

24 SPECIAL MASTER THOMPSON: Good morning. Then
25 do we have counsel for North Dakota on the line?

1 MS. VERLERGER: Yes, Your Honor. Jennifer
2 Verlerger for North Dakota.

3 SPECIAL MASTER THOMPSON: Okay. Excellent.
4 Thank you very much. Is there anybody else on the line?

5 Okay. So you hopefully got my list of trial
6 options that I had Ms. Carter send out earlier in the
7 week. I think that Ms. Carter has checked on every --
8 virtually every potential location where the trial could
9 be. We even checked Salt Lake. And I think these are
10 the three best options.

11 Just to -- just some quick perceptions of my
12 own, first is that I thought the courtroom in Billings
13 was excellent and, in fact, virtually everything about
14 the building's location is good except for the risk that
15 there may be a couple of days when we are thrown out
16 because all the four judges in the area are interested
17 in holding some type of proceeding.

18 I think, however, that that is a relatively
19 remote possibility, so although it obviously means that
20 it's not the perfect location, it doesn't undercut the
21 value of that location.

22 You know, I checked on Denver with the
23 possibility that, you know, maybe we could just have a
24 dedicated courtroom and we won't ever have to worry
25 about being knocked out, but the problem is that the

1 Tenth Circuit is holding a number of hearings that week
2 of November 18, so we basically lose that entire week if
3 we do it in Denver.

4 And so just looking at this, the two options
5 that look the best to me were the first or the second.
6 Obviously the disadvantage of the second is that we're
7 starting in one place and then moving. The advantage,
8 though, is that, you know, we start out with -- we can
9 start out with an actual week in trial whereas I'd
10 forgotten entirely that October 14th is Columbus Day and
11 therefore all federal buildings are probably closed and
12 furthermore for those of you who are in the state
13 attorneys general offices, it probably is even a holiday
14 for you. So we can't have the courtroom on October the
15 14th so it means that in any federal courtroom we'll
16 start on October 15th and I'll also tell you that the
17 end of that week is homecoming and reunion week at
18 Stanford, so that's why I have to end that particular
19 week a day early in order to come back for that.

20 So I just wanted to get counsel's thoughts on
21 those first two options or if somebody wants to argue
22 for the third one, feel free to do it.

23 And Mr. Kaste, I'll start out with you only
24 because you're probably the simplest. I assume you
25 prefer option one and always feel strongly about it.

1 MR. KASTE: That is entirely correct, amazingly
2 enough, I have a strong preference for option one. I do
3 want to disavow you of the notion that we get holidays
4 in state government. At least I don't. Some of the
5 attorneys around here do, but it's not me.

6 I do, again, think Billings is the best
7 possible location for this. I'd just point out that two
8 things that occur to me in looking at schedule. One is
9 that the starting in California and then ending on
10 October 18th and then we would be moving back out to
11 Billings October 21st, that's an awfully quick
12 turnaround time to pack everything up in the Bay Area
13 and get it out to Billings and get it set up and
14 continue with the trial prep that goes on over the
15 course of any weekend when you're in trial. So that
16 logistically is going to put a big burden I think on
17 everybody, since it will be taken up with moving instead
18 of preparing for the next week -- week's worth of
19 testimony.

20 And then I guess I'd preemptively say that I
21 continue to believe that Billings is probably the most
22 convenient place even for Montana's expert witnesses
23 given that Mr. Acock (phonetic) lives there, Mr. Smith
24 and Mr. Dalby (phonetic) live in Helena, so it's a quick
25 drive for them, relatively speaking. In Montana/Wyoming

1 terms a couple hours is a quick drive. And then for the
2 other experts for Montana it's a plane ride no matter
3 what. So Billings is just as easy to get to as anywhere
4 and otherwise I strongly, of course, urge that we choose
5 option one.

6 I think there are adequate trial days in that
7 schedule for us to complete this trial in Billings.

8 SPECIAL MASTER THOMPSON: Okay. Thank you.
9 And then Mr. Draper, your views on this? Again, what
10 I'm trying to do is be solicitous of everyone and I'm
11 going to have to go to Billings anyway and so at this
12 stage, there's no reason to consider, you know, what my
13 theoretical preference is. I'm really just interested
14 in how the parties feel and so I'm just curious as to
15 your thoughts.

16 MR. DRAPER: Thank you, Your Honor. This is
17 John Draper. Thank you very much for your sensitivity
18 to the parties' desires here. I appreciate it very
19 much. And I don't disagree with a lot of what Mr. Kaste
20 says. Some of our experts are going to have to travel
21 long distances in any event. And so our recommendation
22 to you is that we choose option number one, having the
23 entire trial in Billings.

24 SPECIAL MASTER THOMPSON: Okay, great. Then
25 that has simplified the decision and so why don't we go

1 ahead then and I will finalize option number one and as
2 part of that, one of the things that I'm going to ask
3 Ms. Carter, who just walked in, is that she stay in
4 close contact with the District Court clerk in Billings
5 and to the degree it looks like there is any potential
6 date ruling where we might not be able to hold the trial
7 that day, that we notify all of you so that at least
8 you'll have sort of a sense of whether or not there is
9 any type of a conflict coming up.

10 As I said, you know, I wasn't too worried after
11 talking to her and then I talked to some of the judges
12 up there and they've given me more reason to believe
13 that it's an unlikely occurrence when not only do all
14 the judges decide to have proceedings, but then the
15 proceedings actually move forward.

16 So then as I said, you know, there is no way we
17 can do the -- anything up there on October the 14th and
18 I would prefer not to have to fly up there just for one
19 day the prior week, so as you see in the option one,
20 what we'll do is we'll have the final pretrial
21 conference on October the 15th and then we'll actually
22 start the trial on October 16. That of course all
23 assumes that we still need trial after the various
24 summary judgment motions.

25 Again, I have not taken a look at those and

1 will turn my attention to those starting next week. I
2 will also now that we have this part finalized, I will
3 turn my attention back to case management order number
4 11 and finalize that.

5 So is there any other matter?

6 MR. KASTE: Your Honor, this is James Kaste. I
7 don't know that we ever finalized the discussion we had
8 during the tour about the summary judgment hearing. I
9 know you asked us if we had a preference for which of
10 those two days the hearing occur. Mr. Draper had a
11 preference for, I believe, October 29th because he had
12 another thing potentially scheduled for the 30th.

13 I just want to make sure that we are set now
14 for that oral argument in Denver just on the 29th.

15 SPECIAL MASTER THOMPSON: That is correct, and
16 I'm sorry if we didn't send out notice to everyone on
17 that, but I did check, I was fine to do that on my
18 calendar. We also checked with the Tenth Circuit to
19 confirm that we have the room that day. So at the
20 moment we will be doing it on Thursday, August 29th.
21 Thursday, correct? We didn't give up any day, did we?

22 Okay. So we'll do it August 29th. That was
23 your preference, right, Mr. Draper?

24 MR. DRAPER: Yes, it was, Your Honor, and we'd
25 be starting at 9:00 a.m. that morning?

1 SPECIAL MASTER THOMPSON: That's correct, we'll
2 start at 9:00 a.m. that morning and I have not -- I've
3 obviously not reviewed the motions and all I saw was the
4 large stack of exhibits that arrived. What I would
5 suggest at the moment is that unless both of -- well,
6 actually let me ask this: My assumption was that we
7 should, you know, plan to stay that day recognizing that
8 we have two motions as well as probably an hour that we
9 want to set aside just for talking about any other
10 pretrial matters that come up.

11 And so I think that the question for me, I'm
12 perfectly happy to basically spend the day there or we
13 could go through until 1:00 or 1:30 and break.

14 So Mr. Draper and Mr. Kaste, you're probably in
15 the best position to have a sense of how long the actual
16 oral argument is going to take on the two motions.

17 MR. DRAPER: Your Honor, this is John Draper.
18 I think it's safe to preserve the day as you have been
19 doing. We've cut it in half from the two days, but I
20 think having the flexibility to be there the full day if
21 necessary is good.

22 MR. KASTE: Yeah, this is Mr. Kaste. I think I
23 would agree. Let's set aside 8:00 to 5:00 with a lunch
24 break, and have that time available to us. I really
25 don't think it should take that long to deal with the

1 motions that are before the court. But if we need the
2 time, then we have it set aside and nobody's hustling to
3 get on a plane because they anticipated getting out of
4 there much earlier.

5 SPECIAL MASTER THOMPSON: Okay. Excellent. So
6 we'll start then at 9:00 a.m., Thursday August 29. The
7 hearing will be in the Byron White Courthouse in Denver.
8 We'll get you the courtroom number as soon as we know
9 it. And as I say, we'll plan to start at 9:00. We will
10 take an appropriate break and then come back in the
11 afternoon, if necessary, and once I've had an
12 opportunity to review all of the papers, I can give you
13 a better sense from my own perspective of how I'll
14 probably schedule things on that day. Okay?

15 So Ms. Carter is telling me there is a call
16 this coming Wednesday?

17 MS. CARTER: No, the Wednesday before.

18 SPECIAL MASTER THOMPSON: That's right. There
19 is a status call scheduled right now for Wednesday,
20 August 28th at 10:00 a.m. Pacific Coast Time. I would
21 suggest we cancel that.

22 MR. DRAPER: Your Honor, this is John Draper.
23 I would second that thought.

24 MR. KASTE: This is Mr. Kaste. Me too.

25 SPECIAL MASTER THOMPSON: Okay. Excellent. So

1 that is all that is on my agenda and I will look forward
2 to -- I'll look forward to seeing all of you on
3 Thursday, August 29th.

4 MR. DRAPER: This is John Draper. Thank you
5 very much, Your Honor.

6 MR. KASTE: This is Mr. Kaste. We have nothing
7 further. Thank you so much.

8 SPECIAL MASTER THOMPSON: Excellent. Hope all
9 of you have great days.

10 MR. DRAPER: Thank you.

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12 (Proceedings ended at 11:50 a.m.)

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1 STATE OF CALIFORNIA)
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I, Kathleen A. Powell, CSR No. 2778, hereby certify that I reported in shorthand the above proceedings on Wednesday, August 14, 2013 at 2333 Third Avenue, 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 5 to 15, inclusive, contain a true and correct transcript of all said proceedings.

DATED: August 18, 2013

KATHLEEN A. POWELL
 CSR NO. 2778