

**No. 137, Original**

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**In the  
Supreme Court of the United States**

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**STATE OF MONTANA, Plaintiff**

**v.**

**STATE OF WYOMING**

**and**

**STATE OF NORTH DAKOTA, Defendants**

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**OFFICE OF THE SPECIAL MASTER**

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**CASE MANAGEMENT ORDER NO. 14**

**December 31, 2013**

**CASE MANAGEMENT ORDER NO. 14**

For the purposes of the proceedings before the Special Master, IT IS HEREBY ORDERED THAT Case Management Plan No. 1 (“CMP”) is supplemented as follows:

**1. Post-Trial Briefs**

The States of Montana and Wyoming shall file post-trial briefs on or before March 18, 2014. The briefs should address the issues outlined in Appendix A to this Order, as well as any additional issues that the States believe are relevant to the resolution of liability in this case. The issues need not be addressed in the order that they are listed in Appendix A. The States are not required to provide suggested findings of fact, but should provide references to those specific portions of the record that they believe support their argument and are free to suggest particular findings of fact where relevant. The States need not repeat legal arguments made in prior briefs, but can reference prior briefs on questions of law that they believe have been adequately briefed already.

**2. Post-Trial Reply Briefs**

The States of Montana and Wyoming shall file replies to the Post-Trial Briefs on or before April 11, 2014.

**3. Post-Trial Hearing**

A post-trial hearing will be set for the week of either April 14 or April 21, 2014, in Stanford, California.

**8. Requests for Modification or Supplementation**

Any requests for modification or supplementation of this Case Management Order should be submitted to the Special Master on or before Friday, January 10, 2014.

Date: December 31, 2013



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Barton H. Thompson, Jr.  
Special Master

Woods Institute  
Jerry Yang & Akiko Yamazaki Environment  
& Energy Building – MC 4205  
473 Via Ortega  
Stanford, California 94305

## **Appendix A**

### **Issues to Be Addressed in Post-Trial Briefs**

Post-trial briefs should address the issues outlined below, as well as other issues that counsel believe to be relevant to the resolution of liability. Counsel can organize briefs however they feel appropriate and need not address issues in the order that they are set out below. Counsel also should not feel bound by the specific phrasing of the issues as set out below, but should phrase the issues as they believe to be appropriate given relevant law. The purpose of this list is to indicate the issues on which I would appreciate guidance and not to predetermine legal or factual issues not already decided. Some issues may not be relevant to the ultimate liability determination. Some of the issues also are overlapping.

#### **I. Notice**

In what years did Montana provide adequate notice to Wyoming under Article V of the Compact? In years in which adequate notice was provided, when was notice provided? Can Wyoming be held liable in those years for any failure to curtail water use prior to notice and, if so, for what periods of time? Are there any years in which Montana should be excused from providing notice?

#### **II. Post-1950 Water Use in Wyoming**

##### **A. Reservoirs**

Did Wyoming store post-1950 water during periods when liability is appropriately at issue? If so, what was the quantum impact on water in the Tongue River system?

##### **B. Post-1950 Irrigation**

Did Wyoming surface-water users divert and consume post-1950 water during periods when liability is appropriately at issue? If so, what was the quantum impact on water in the Tongue River system?

##### **C. CBM Water Production**

What is the appropriate standard for showing a violation of the Compact as a result of groundwater extraction, and has Montana met that standard? Can the 2002 BLM model form the basis for a liability determination in this case? If so, what are the appropriate variables and assumptions in running the model, and

how should the Supreme Court deal with the inevitable uncertainty in groundwater modeling? Who has the burden of proof regarding how much of the groundwater extracted ultimately returned to the Tongue River system in years in question through groundwater recharge, direct discharge into the Tongue River system, return flow from irrigation use, or other routes?

### **III. Shortages in Pre-1950 Water Rights in Montana**

#### **A. Tongue River Reservoir**

What reservoir-related rights are protected by Article V(A) of the Compact? Has Montana shown that these rights were not satisfied during periods when liability is appropriately at issue? If so, what was the amount of the shortage? What is the relevance to Montana's claims of (1) the expansion of the reservoir, (2) the negotiated settlement with the Cheyenne Indian Tribe, (3) changes in the contract with the Tongue River Water Users Association, and (4) winter releases from the reservoir?

#### **B. Direct Diversion Rights**

What must Montana show to establish that its pre-1950 direct diversion rights were not satisfied during periods when liability is appropriately at issue, and has Montana met its burden? If so, what was the amount of the shortage?

#### **C. Post-1950 Water Use**

Could Montana have met any pre-1950 shortages by curtailing any post-1950 Montana uses? If so, is there any evidence by how much? Who has the burden of proof on this issue?

#### **D. Waste**

Did Montana waste any pre-1950 water? If so, is there any evidence by how much? Who has the burden of proof on this issue?

#### **E. Administration of Water Uses in Montana**

What intrastate regulatory obligations does the Compact impose on Montana (e.g., to ensure that water it claims for pre-1950 uses is needed for a reasonable and beneficial use, is not wasted, and/or is not going to post-1950 uses)? Did Montana satisfy any such obligations during the periods at issue? If not, what is the impact of that failure on the issue of liability? Who has the burden of proof on this issue?

## **IV. Liability**

### **A. Direct Causation**

Did post-1950 storage or use in Wyoming cause any pre-1950 shortages in Montana?

### **B. Futility**

What, if any, role does the doctrine of futility play in the resolution of this case?

### **C. Partial Years**

If the Court decides that Wyoming was required to curtail post-1950 uses for only part of an irrigation season (e.g., because Wyoming did not receive notice until the middle of an irrigation season), how can the Court determine liability for that period alone? In addressing earlier issues (e.g., impact of post-1950 direct diversions in Wyoming), counsel should discuss whether it is possible to determine liability for just part of the irrigation season given the evidence that was presented. If it is not possible, what should the Court do?

## **V. Materiality of any Liability**

If the Supreme Court finds liability in this case, should the Court proceed to take evidence on and determine an appropriate remedy? Is there a level of materiality in the quantum of liability below which the Court should decline to impose any remedy? If so, what is that level? (I earlier addressed this issue in deciding whether this matter should proceed to trial. The question here is what the Court should do regarding remedy if it determines that Wyoming is liable, but the amount of liability is small.)