

No. 137, Original

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

STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants

OFFICE OF THE SPECIAL MASTER

CASE MANAGEMENT ORDER NO. 16

May 18, 2015

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As the Supreme Court of the United States noted in its Order of February 23, 2015, it is the “Court’s often expressed preference that, where possible, States settle their controversies by mutual accommodation and agreement.” *Arizona v. California*, 373 U.S. 546, 564 (1963) (internal quotation marks omitted).

In its February 23 Order, the Supreme Court of the United States encouraged me to “facilitate efforts to resolve the parties’ dispute *without the need for a damages proceeding*, including revisiting the arrangement for division of fees and expenses” (emphasis added). In this regard, the Court explicitly referenced Federal Rule of Civil Procedure 68.

Although the exceptions filed by Montana and Wyoming to my Second Interim Report of December 29, 2014 raise questions regarding the extent and character of the relief that Montana should receive, neither exception questions the extent of liability recommended in that Report or that Montana is entitled to damages and interest.

If the parties are ultimately unable to agree to a comprehensive settlement of this case, a partial settlement, agreeing on the amount of damages that should be awarded, would be beneficial because it would (1) avoid requiring the Court to decide whether to “craft a just monetary remedy” and, if it chooses to do so, craft such a remedy (Brief in Support of Wyoming’s Exception to the Second Interim Report of the Special Master (Liability Issues), p. 7), and (2) avoid the potential need, if the Court decides to remand the issue of damages to me, to hold a trial on the amount of damages and interest. For similar reasons, a partial settlement agreeing on the payment of costs to date would be beneficial.

Although the Rules of the United States Supreme Court provide that the Federal Rules of Civil Procedure should serve as guides in original jurisdiction actions, original actions are not bound by the specifics of the Rules except on the forms of motions and pleadings.

For the purposes of the proceedings before the Special Master, Federal Rule of Civil Procedure 68 is therefore adopted, as specifically modified in this order. **IT IS ORDERED THAT**

1. Offer of Judgment. On or before May 29, 2015, Wyoming may serve an offer in writing upon Montana to allow an award of damages and accompanying interest to be entered in accordance with the terms and conditions of the offer. By the same date, Wyoming may serve an offer in writing upon Montana to allow an award of any or all costs incurred by the parties to date. The offers shall not prevent either party from taking any position in this action regarding other forms of remedy or relief.

2. Meet and Confer. If requested by Wyoming, counsel for Montana and Wyoming shall meet and confer in good faith on or before May 22, 2015, to discuss whether any additional information can and should be shared or provided that would better enable Wyoming to make an offer under this order that is acceptable to Montana.

3. Acceptance of Offers. If, within 28 days after being served, Montana serves written notice accepting an offer of Wyoming under this order, the offer with proof of acceptance shall be filed, along with proof of service, with the Special Master who will advise the clerk of the Supreme Court and recommend that the Court's final entrance of judgment include the award of damages, interest, and/or costs contained in the accepted offer. The acceptance will constitute only a partial settlement to be incorporated into the ultimate judgment in the case and will not affect issues not addressed in the partial settlement.

4. Unaccepted Offers. An offer that is not accepted within 28 days is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in connection with the determination of costs.

5. Costs after an Unaccepted Offer. Wyoming may raise an unaccepted offer made pursuant to this Order in any proceeding to assign costs accrued after the offer was made and related to the subject of the offer. If an unaccepted offer by Wyoming of damages and interest is equal to or greater than the ultimate judgment of damages and interest, ignoring interest accrued after the date of the offer, the Special Master will recommend to the Court that Montana pay all costs incurred after the offer was made that are related to the determination of damages and interest. If an unaccepted offer by Wyoming of costs is equal to or greater than any ultimate award of costs to Montana for the period covered by the offer, the Special Master will similarly recommend to the Court that Montana pay all costs incurred after the offer was made that are related to the determination of the appropriate amount of costs to award to Montana for the period covered by the offer. The costs covered by this paragraph shall include only costs that are appropriate to award under the rules and precedents of the Supreme Court in original jurisdiction matters.

6. Extensions of Time. If either Montana or Wyoming believes at any point that the extension of any deadline set under this order would promote the partial settlement of either damages or costs incurred to date, that party may request the Special Master for a short extension. Montana and Wyoming shall meet and confer prior to any such request. The party making such a request shall provide an explanation for why the extension is needed and whether the other party supports the extension.

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Date: May 18, 2015

A handwritten signature in black ink, reading "Barton H. Thompson, Jr." The signature is stylized with a large initial "B" and a long, sweeping underline.

Barton H. Thompson, Jr.
Special Master

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