

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.

CASE MANAGEMENT PLAN NO. 1

_____, 2011

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CASE MANAGEMENT PLAN NO. 1

The Special Master, based upon the proposed case management plan proposed jointly by the States and Amici Curiae and upon argument regarding remaining differences at a status conference held for this purpose, orders as follows:

I. Scope

This Case Management Plan No. 1 ("CMP") shall apply to and bind all States and Amici Curiae with respect to pretrial matters in the liability phase of the case. Additional case management plans governing subsequent proceedings may be adopted.

II. Bifurcation

The case is hereby bifurcated into two phases, a liability phase and a remedies phase. The liability phase will include a determination of whether Wyoming has violated the Yellowstone River Compact and the amount of any such violation. Matters pertaining to retrospective or prospective remedies are hereby reserved for the later remedies phase. [*Wyoming has not agreed to this section*].

III. States

The States in this case are the State of Montana, the State of Wyoming, and the State of North Dakota ("States").

IV. Amici Curiae

The Amici Curiae ("Amici") in this case are currently the United States, the Northern Cheyenne Tribe and Anadarko Petroleum Corporation. Any other person or entity may become an Amicus with the leave of the Special Master. The function of an Amicus in this case is solely to ensure full exposition of all factual and legal issues. As a friend of the court, an Amicus shall exercise its role in a circumspect and creative manner, avoiding the creation of delay, obstacles, paperwork, and duplicative effort in the development of this case. The participation of an Amicus shall be limited as set forth below, except as ordered by the Special Master upon motion for good cause shown.

The participation of an Amicus shall be as follows, subject to restriction, expansion or other modification from time to time by order of the Special Master:

A. Status Conferences. An Amicus shall receive notices of and may attend, status conferences of the States that the Special Master conducts. If the Special Master directs the States to prepare a proposed joint agenda for any status conference, an Amicus may participate in preparing the agenda if it so wishes.

B. Discovery. An Amicus shall be notified and kept informed on the same service schedule as the States of all discovery to be conducted, and the States shall serve on an Amicus copies of certificates of service of all discovery requests, including interrogatories, requests for admission, requests for production of documents, and notices of depositions, and responses to such requests. Copies of discovery documents will be made available on request to an Amicus and agreement to pay any associated costs. An Amicus may attend any deposition and may obtain copies of deposition transcripts upon its request and at its expense. Any documents, models or other tangible things that are subject to the confidentiality provisions set forth herein will not be provided to an Amicus, except upon order of the Special Master.

C. Briefs. According to briefing schedules set by the Special Master or this CMP, Amici may file briefs, pertaining to any factual or legal interests of the Amici, in response to any motion or brief pending before the Special Master or request for briefing by the Special Master.

D. Hearings. An Amicus may attend any hearing or part thereof. If the Special Master so allows, an Amicus may present oral argument before the Special Master.

V. Filing and Service Generally

Filings with the Special Master and service thereof shall conform to Case Management Order No. 1, which is updated with the distribution list attached hereto as Appendix A.

VI. Filing and Service of Discovery Materials

In order to keep the record free of discovery material that has not become evidence, no discovery requests or notices or responses thereto or deposition transcripts shall be filed with the Special Master unless to support or oppose a dispositive motion or request for a ruling on a discovery dispute. In such event, only those portions pertinent to the purpose shall be filed. All States shall file with the Special Master certificates of service regarding all discovery requests and discovery responses.

VII. Pre-Trial Schedule

A. Disclosure of Montana's Exhibits

Montana shall disclose its expert reports and other exhibits on _____.

B. Disclosure of Wyoming's Responsive Exhibits

The Special Master will convene a status conference at his earliest convenience after Montana has disclosed its expert reports and other exhibits. The purpose of this status conference will be to establish a date certain for Wyoming to disclose its responsive expert reports and other exhibits. The Special Master may postpone the establishment of such date certain pending Wyoming's completion of depositions of one or more of Montana's expert witnesses if he finds that such depositions are necessary before Wyoming can fairly be required to estimate the time period it needs to retain experts, have the experts complete their work, and disclose their responsive expert reports and testimony.

C. Disclosure of Montana's Rebuttal Exhibits

The Special Master will convene a status conference at his earliest convenience after Wyoming has disclosed its responsive expert reports and other exhibits. The purpose of this status conference will be to establish a date certain for Montana to disclose its rebuttal expert reports and other exhibits. The Special Master may postpone the establishment of such date certain pending Montana's completion of depositions of one or more of Wyoming's expert witnesses if he finds that such depositions are necessary before Montana can fairly be required to estimate the time period it needs to retain experts, have the experts complete their work, and disclose their rebuttal expert reports and testimony.

D. Status Conferences In addition to the status conferences under this §VII, the Special Master, at his discretion, may convene status conferences for the purpose of receiving an update on the progress of discovery and resolving any discovery disputes that may have arisen.

VIII. Discovery

A. General. Only States may initiate discovery. Discovery shall proceed on all issues pursuant to Federal Rules of Civil Procedure 26-37 and 45, except as otherwise modified herein or by other order of the Special Master. Discovery will commence and be completed in accordance with the schedule stated herein.

B. Applicable Federal Rules of Civil Procedure 26-37 and 45. The Federal Rules of Civil Procedure applicable to discovery, as amended from time

to time, shall govern the proceedings before the Special Master with the following exceptions or as otherwise modified in this order:

1. Rule 26(a)(1). The disclosures required in Rule 26(a)(1) shall not apply. Instead States shall:

(a) Provide the name, address and telephone number of each individual, state, local and federal government agency, organization, political subdivision or other entity likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying separately the subjects of the information as to each person and entity listed.

(b) Provide the name of any person who may be used at trial to present evidence.

(c) Provide a copy of or a description by category and location of all documents, data compilations, and tangible things in the States' possession, custody, or control, that are relevant to disputed facts. When providing copies of documents as part of their disclosures, the States shall provide them in electronic form unless it is unduly burdensome or impossible to provide readable copies in electronic form. Documents not disclosed in electronic form shall be disclosed in paper form.

2. Rule 26(a)(2) - 26(a)(5). These portions of Rule 26 shall be applicable, except that (1) all time schedules and deadlines will be determined by the Special Master, and (2) the provisions of Rule 26(a)(4) requiring the filing of documents with the court shall not apply. The filing of all documents with the Special Master shall be governed by this CMP.

3. Rule 26(b)(5). Rule 26(b)(5) shall not apply because the substance and timing of privilege logs is covered by Section VIII.E of this CMP.

4. Rule 26(c). Rule 26(c) shall apply, except to the extent modified by Section VIII.E of this CMP, Resolution of Discovery Disputes and Motions to quash and Seek Protective Orders.

5. Rule 26(d). Rule 26(d) shall not apply. Unless the Special Master, for the convenience of the States and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a State is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other State's discovery.

6. Rule 26(f). Rule 26(f) shall not apply.

7. Rules 30(a)(2), Rule 31(a)(2), Rule 33 (a)(1). Each State is limited to ten depositions of North Dakota and ten depositions of each Amicus.

Montana and Wyoming are limited in the number of interrogatories that may be propounded to North Dakota as provided in Rule 33(a)(1). The number of depositions and interrogatories between Montana and Wyoming are not limited.

8. Rule 32(a)(4)(B). The 100-mile rule contained in Rule 32(a)(4)(B) shall not apply. See Rule 45, *infra*.

9. Rule 45. Rule 45 shall govern discovery from non-States other than the United States and shall apply with the exception that the subpoena power will not be limited geographically by the 100-mile rule in Rule 45(b)(2)(B). Requests for non-States other than the United States to produce documents or to permit inspection are governed by Rule 34(C) and Section VIII.C.1(d)(ii) of this CMP. Discovery from the United States is governed by Sections VIII.C.1(d)(i) and VIII.C.2 of this CMP. Counsel of Record for the States are authorized to issue subpoenas as provided in Rule 45(a) of the Federal Rules of Civil Procedure. The States and Amici will cooperate in securing the attendance of witnesses for deposition and will give reasonable notice if a witness will require a subpoena.

C. Substantive Discovery. Substantive discovery shall proceed promptly and will be concluded as expeditiously as reasonably practicable.

1. Written Discovery. Written discovery shall consist of the following and to the extent reasonably possible follow the schedule set forth herein.

(a) *Initial disclosures*. The States shall complete the initial disclosures as provided in Section VIII.B.1 above no later than _____ after entry of this order, unless otherwise agreed by the States.

(b) *Interrogatories*. Beginning _____ after the entry of this order, a State may serve interrogatories upon other States. Each State served with interrogatories shall have 60 days from the date of service to respond, unless otherwise agreed by the propounder and respondent.

(c) *Requests for Documents/Inspections to States*. Upon completion of all States' responses to the initial disclosures, each State may serve requests for production of documents/requests for inspections on any other State. Any State upon which requests for production of documents/requests for inspections are served shall have 60 days from the date of service within which to respond, unless otherwise agreed by the propounder and respondent.

(d) *Requests for Documents/Inspections to Non-States*.

(i) *Requests Made to Agencies of the United States*. Each State may serve on agencies of the United States requests for

production of documents/requests for inspections starting immediately upon the date of this CMP. The States shall obtain documents from agencies of the United States in accordance with the Freedom of Information Act and the agencies' regulations implementing that Act, provided that any dispute about the production of documents by an agency of the United States shall be submitted to the Special Master for informal, nonbinding mediation prior to filing an action in federal district court.

For document and inspection requests made to agencies of the United States, the States may confer with the United States for the purpose of developing a protocol to facilitate and coordinate production, avoid duplicative inquiries, and ensure that the States have equal access to information that is subject to disclosure. Unless and until such a protocol is adopted by the States and approved by the Special Master, requests for documents and inspections made of any agency of the United States shall be governed by the following procedures:

(1) The requesting State shall provide written notice of its request to review and copy documents to the agency and to the other States, with a copy to the designated representative of the United States, identifying the subject matter with sufficient specificity as to allow the agency to locate pertinent documents, and proposing a time and location to review the documents. The requesting State shall be responsible for coordinating the document review with the agency and the other States.

(2) The agency will make available documents in accordance with and to the extent provided by the Freedom of Information Act and applicable regulations implementing that Act, and may seek clarification of the request from the requesting State if there is some question about the subject matter or large volumes are involved.

(3) The requesting State and any other State desiring copies of particular documents shall make arrangements with the agency either to copy the documents in-house or to contract with a private, local firm to copy the documents, and will pay associated costs.

(4) At the option of the United States, an index or copy of each document copied by a State will be provided to the agency without charge so that it may have a record of what has been produced.

(ii) *Requests Made of Other Non-States.* After the States have provided their initial disclosures, each State may serve requests for production of documents/requests for inspection on non-States as provided for in Rules 34(c) and 45 of the Federal Rules of Civil Procedure and in this CMP. The provisions of Rule 45 shall govern production and inspections.

(e) *Requests to Admit.* After the States have provided their initial disclosures a State may serve requests for admission on another State. Responses to request for admission shall be served within 60 days of service of the request.

(f) *Written Discovery Deadline.* All written discovery shall be propounded no later than _____ after the entry of the CMP.

2. Deposition Discovery. Upon completion of all States' initial disclosures, deposition discovery may commence as provided herein. The States may take the depositions of non-States pursuant to Rule 45 of the Federal Rules of Civil Procedure, except that requests for the testimony of employees of the United States shall be made and processed in accordance with the applicable *Touhy* regulations of the relevant department or agency (for the Department of the Interior, 43 C.F.R. §§ 2.80 *et seq.*). Deposition guidelines are as follows:

(a) *Cooperation.* Counsel will cooperate with each other and exercise civility in all aspects of this litigation.

(b) *Waiver Stipulations.* Unless contrary to an order of the Special Master, the States (and when appropriate, a non-State witness) may stipulate, in a suitable writing, to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for any discovery beyond discovery cutoffs or deadlines set by the Special Master a not valid without approval of the Special Master.

(c) *Scheduling.* Except in extraordinary circumstances, noticing counsel shall consult in advance with counsel for the deponent, if any, and with opposing counsel, so as to schedule depositions at mutually convenient times and places.

(d) *Attendance.*

Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a State for purposes of the deposition, the States or the representative of a State, including counsel from the offices of the respective attorneys general, Amici or the representatives of Amici, counsel for the deponent, and expert consultants or witnesses. During examination of a deponent about any document stamped "Confidential – S.Ct. 137" or its confidential contents, persons to whom disclosure is not authorized under section VIII.F of this CMP shall be excluded.

(e) *Conduct.*

(i) *Examination.* Ordinarily, each State should designate one attorney to conduct the principal examination of the deponent. Examination by other attorneys should be limited to situations where designated counsel must leave before the deposition is completed or is otherwise incapacitated. Counsel for the States are not limited in the scope of their questions at a deposition by the scope of the questions propounded by the counsel for the State that requested the deposition. Counsel for Amici may not examine a deponent unless agreed by counsel for the States in attendance at the deposition.

(ii) *Objections and Directions Not to Answer.* Counsel shall comply with Fed. R. Civ. P. 30(d)(1). When a claim of privilege is made, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, including the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

(iii) *Time Limitations.* Depositions must be concluded within a reasonable time limit. At the time of notification, the noticing State will estimate the reasonable amount of time needed for the deposition. In the event any other State considers the proposed amount of time to be unreasonable, the dispute, if unresolved, may be referred to the Special Master pursuant to section VIII.C.1.c or .b of this CMP. Except with prior agreement of counsel or written approval of the Special Master, no deposition may last longer than three (3) eight (8) hour days, provided that no such agreement of counsel may extend any discovery deadline.

(iv) *Continuation of Deposition.* If a deposition is not finished by the end of the business day, it will continue on the following business day and each business day thereafter, subject to the availability of the witness and time limitations otherwise set by agreement or order of the Special Master. The States may agree to continue or suspend a deposition until a mutually agreed upon later date, provided that the later date is within any discovery deadline set by the Special Master.

(f) *Documents.*

(i) *Production of Documents.* If a non-State witness is believed to have documents not previously produced, a subpoena to produce documents should be served at least thirty (30) days before the scheduled deposition. Arrangements should be made to permit inspection of the documents by all States before the deposition begins. Any documents produced in such a manner should be Bates numbered pursuant to section VIII.D of the CMP.

(ii) *Copies.* Extra copies of documents about which counsel expects to question the deponent shall be provided to opposing counsel and the deponent at the time of the deposition.

(g) *Videotaped Depositions.* By request in its notice of a deposition, a State may record the deposition as permitted under Fed. R. Civ. P. 30(b)(2) and (3).

(i) *Video Operator.* The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

(ii) *Attendance.* Each witness and each examining attorney shall be identified on camera at the commencement of the deposition. All others present at the deposition shall be identified off-camera. Thereafter, generally speaking, only the deponent (and demonstrative materials used during the deposition) will be videotaped.

(iii) *Standards.* The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box other than when reviewing or presenting demonstrative materials for which a change in position is needed. The deposition should be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angles, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibit and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. No eating or smoking by deponents or counsel should occur during the deposition.

(iv) *Interruptions.* The videotape shall run continuously throughout the active conduct of the deposition. Videotape recording will be suspended during agreed “off the record” discussions.

(v) *Index.* The videotape operator shall use a counter on the recording equipment and, after completion of the deposition shall prepare a log, cross-referenced to counter numbers. The log shall identify on the tape where: examination by different counsel begins and ends; objections are made and examination resumes; record certifications are requested; exhibits are identified; any interruption of continuous tape recording occurs, and the reason for the interruption, whether for recesses, “off the record” discussion, mechanical failure, or otherwise.

(vi) *Filing.* The operator shall send the original videotape in its original condition to the deposing State in a sealed envelope. No part of a videotaped deposition shall be released or made available to any member of the public or to any unauthorized person, whether marked “Confidential” or not.

(vii) *Objections.* Requests for pretrial ruling on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. Each issue will be separately submitted. If needed for a ruling, a copy of the videotape and equipment for viewing the tape (if necessary) shall also be made available to the Special Master.

(h) *Telephonic Depositions.* By stating in the deposition notice that it wants to conduct the deposition by telephone, a State shall be deemed to have moved for an order under Fed. R. Civ. P. 30(b)(7). Notice of a telephonic deposition shall be served at least thirty (30) days before the deposition. Unless an objection is filed and served at least twenty (20) days before the deposition, the motion shall be deemed to have been granted. Other States may examine the deponent telephonically or in person. All persons present with the deponent shall be identified in the deposition and shall not by word, or otherwise, coach or suggest answers to the deponent.

(i) *Use.* Under the conditions prescribed in Fed. R. Civ. P. 32(a)(1) to (4), as otherwise permitted by the Federal Rules of Evidence, or as agreed to by the States with approval of the Special Master, depositions may be used against any State.

(j) *Supplemental Depositions.* To the extent a deponent acquires new information, forms new opinions, or grounds to support previous opinions, any State may move for a supplemental deposition. Such motion shall be made for good cause shown within thirty (30) days of a State’s learning of the new information, opinion or grounds from supplemental discovery responses provided under section 8(h) of this CMP or any other source. If permitted, the supplemental deposition shall be treated as the resumption of the deposition previously taken, but shall not exceed one (1) eight (8) hour day in length. Supplemental depositions shall not be repetitive of prior examination and repetition of substantially the same examination as previously conducted may result in imposition of monetary and other sanctions.

(k) *Rulings.* Rulings on objections made during a deposition will be resolved according to the procedure set forth in section 8(g)(II) of the CMP.

3. Expert Reports.

(a) The State of Montana shall provide a disclosure of expert testimony of its expert witnesses, containing the elements set forth in Rule 26(a)(2) of the Federal Rules of Civil Procedure, on the date provided above. The State of Wyoming shall not seek such information through prior discovery. The State of Montana may, in its own discretion, provide such disclosure at an earlier time. On or before [a date certain 45 days following the prior date certain], Wyoming shall file with the Special Master its objections, if any, to the adequacy of Montana's expert witness disclosures.

(b) Upon resolution of any Wyoming objections, or upon the passing of [the date certain 45 days following the prior date certain] if there are no objections, the Special Master shall at his convenience hold a supplemental case management conference as described in Section VII. B. of the CMP to establish a date certain for Wyoming to disclose the testimony of its expert witnesses. The State of Montana shall not seek the content of Wyoming's disclosure through discovery prior to [such date certain]. The State of Wyoming may, in its own discretion, provide such disclosure at an earlier time. On or before [date certain 45 days following prior date certain], Montana shall file with the Special Master its objections, if any, to the adequacy of Wyoming's expert witness disclosures.

(c) Upon resolution of any Montana objections, or upon the passing of [date certain 45 days following prior date certain] if there are no objections, the Special Master shall at his convenience hold a supplemental case management conference as described in Section VII. C. of the CMP to establish a date certain for Montana to disclose the rebuttal testimony of its existing expert witnesses or additional expert witnesses. On or before [a date certain 45 days following the prior date certain], Wyoming shall file with the Special Master its objections, if any, to the adequacy of Montana's rebuttal expert witness disclosures.

(d) Draft expert reports shall not be discoverable.

D. Bates Numbering System. All documents produced by the States shall bear a distinctive Bates Number. Each State shall begin each Bates number with the two letter abbreviation for the state as designated by the United States Postal Service. For example, a Montana Bates-numbered document will begin MT 000000. All documents produced by non-States shall state the identity of the non-State by proper name or recognized abbreviation before the Bates number. No State shall use at a deposition any document that has not been Bates-numbered and produced, except for impeachment or other good cause shown.

E. Privilege Logs. If a State withholds any written information (in hard copy or electronic form) on the ground of privilege, it shall provide a privilege log to opposing counsel. These privilege logs shall set forth the following information: (1) author's name, place of employment and job title; (2)

site of document; (3) addressee's name, place of employment and job title; (4) recipient's name, place of employment and job title, if different than that of addressee; (5) general subject matter of document; and (6) nature of privilege claimed. Thereafter, any privilege log shall be supplemented to include any documents that are subsequently designated privileged by counsel.

F. Confidentiality. All documents, models or other tangible things containing a trade secret or other information made confidential by law may be designated "Confidential," so long as the confidentiality of such documents has not been earlier waived. Such documents or portions of documents will be designated, after review by counsel for the producing person or entity, by stamping "Confidential - S.Ct. 137" on each page. Any State may contest the designation of a document as "Confidential," or request that a document not otherwise covered by this CMP be considered confidential, by applying to the Special Master for a ruling. In either event, counsel shall first make a good faith effort to resolve the issue. The person or entity requesting confidentiality shall have the burden of showing that such designation is appropriate. Upon pretrial deposition, or within ten (10) business days after receipt of the transcript, a person or entity may designate as confidential any appropriate information and such designation shall be served on all counsel. No confidentiality objection need be made at a deposition and shall not be a ground for a direction or refusal to answer, but counsel may indicate such designation at the time and the States shall govern themselves accordingly. Depositions and transcripts will be considered to be confidential until expiration of the ten (10)-day period and thereafter as to any part or all so designated. Any individual not authorized by this CMP to be a recipient of confidential information may be excluded from a deposition while such information is being elicited.

Confidential documents or information subject to this CMP may not be disclosed to or used by anyone except those hereby authorized and by them only in the context of this case. Such individuals shall include counsel, the States' specifically authorized employees, experts, and fact witnesses, together with such others as are approved by the Special Master. Each individual who is permitted to see such confidential documents, or given access to such confidential information, shall be bound to observe the provisions of this CMP with respect to all documents and information produced through these proceedings by signing a Non-Disclosure Agreement in a form agreed upon by the States or approved by the Special Master if the States cannot agree. The Non-Disclosure Agreement shall include an agreement to submit to the Special Master's jurisdiction for enforcement of this portion of the CMP and to return all such designated documents and information promptly at the end of the litigation.

G. Discovery Disputes. Before bringing a discovery dispute to the attention of the Special Master, concerned persons or entities shall confer in an

attempt to resolve the dispute. If the conferences do not resolve the dispute, the procedure for resolving the discovery dispute shall be as follows:

1. Written discovery disputes.

(a) *Failure to timely respond to written discovery requests.* In the event that timely responses to written interrogatories or document requests are not forthcoming, the proponent of the discovery should promptly file a motion to compel, which shall set forth the date the discovery was served and the due date for the responses, together with an averment of the default.

(b) *Disputes regarding discovery objections or adequacy of responses.* In the event of a discovery dispute - in contrast to a default -- arising by reason of the respondent's objections or concerning the adequacy of responses to interrogatories, document requests, requests to inspect, or requests to admit, the States shall promptly and in good faith exert every reasonable effort to resolve the differences. Where objections are made, the objecting State shall provide all other discovery that such State does not consider to be objectionable. As a last resort, any unresolved dispute shall be submitted to the Special Master by filing a motion to compel.

2. Deposition disputes.

(a) *General Procedures.* Except as is expressly provided in paragraph (b) below, discovery disputes that arise during a deposition shall be resolved by submission to the Special Master, according to the same procedure set forth in paragraph VIII.G.1.b governing disputes in regard to the adequacy of responses to written discovery.

(b) *Disputes That Require Immediate Resolution.* Where a dispute arises at a deposition and a State believes an immediate resolution is necessary to avoid the rescheduling of the deposition or a significant disruption of the discovery schedule, the Special Master must be telephoned.

(i) If the Special Master is available and a telephone conference is held, the ruling of the Special Master shall be recorded in the deposition. The deposition shall proceed according to such ruling or direction. If the ruling or direction is that a witness must answer a question or questions despite an objection based upon claim of privilege or work product, the objecting State shall not be deemed to have withdrawn or waived its objection.

(ii) If the Special Master is not available by telephone during the deposition, the dispute shall be noted for the record and the deposition shall proceed with respect to all other issues. Thereafter, the dispute

shall be presented to the Special Master as provided in paragraph VIII.G.I.b above.

(c) *Disputes Not to End Deposition.* Under no circumstances shall any person or entity refuse to continue with a deposition with respect to other subjects because of the unavailability of the Special Master to resolve a dispute telephonically.

3. Motions to Quash or for Protective Orders. The following procedures are to be employed in situations where noticed or subpoenaed persons or entities desire to move to quash a deposition notice or subpoena or seek a protective order from the demand of a subpoena.

(a) *Subpoenaed entities or persons that are States.* If the subpoenaed entity or person is a State or the employee of a State, then the entity or person must seek appropriate relief from the Special Master by written motion.

(b) *Subpoenaed entities or persons who are not States.* When a State subpoenas a person or entity that is not a State, the State issuing the subpoena should serve upon the subpoenaed person or entity, along with the subpoena, a copy of this CMP. The subpoenaed person or entity may seek relief under this CMP, by submitting the dispute to the Special Master by written motion.

H. Supplementing Discovery. Recognizing that any State is under a duty to amend a prior response to an interrogatory, request for production or inspection, or request for admission if the State learns that the response is in some material respect incomplete or incorrect, the States shall undertake a regularly scheduled supplementation of discovery responses three (3) months from the original due date of each discovery request and at each three (3) month period thereafter. It will satisfy the duty of supplementation if the State identifies only those specific responses that are supplemented. It is not necessary to restate each discovery response if there is no information to supplement, amend or modify. Supplementation of written discovery will not be required to the extent the same information has been provided by subsequent deposition, but the fact of supplementation should be noted at the time of the deposition. Supplementation of expert reports pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure is required to the extent that an expert has formed additional opinions or additional grounds to support previous opinions that have not been provided by way of expert report or deposition testimony. The duty to supplement expert reports includes opinions or grounds to support previous opinions formed after an expert has been deposed. Supplementation of deposition testimony of any witness other than an expert is not required. If there is no need to supplement, there is no need to file negative reports at a three month interval.

IX. Motions

Unless otherwise ordered by the Special Master, responses to dispositive motions shall be served within 30 days and replies shall be served within 15 days of service of responses. Responses to non-dispositive motions shall be served within 15 days, and replies shall be served within 15 days of service of responses. Dispositive motions may be filed at any time up to and until 60 days after the completion of deposition discovery.

An Amicus shall file any response on or before the due date for responses, whether supporting or opposing the motion. If an Amicus, at the time a response is due, files a brief in support of a motion, the responding State shall be allowed 15 days to respond to the Amicus brief, or the responding State may earlier waive such response. The movant State's reply to the respondent State and the Amicus shall be due 15 days after the responding State's response to the Amicus brief is due, or a waiver is served, whichever is earlier.

X. Pretrial Conferences and Pretrial Orders

To expedite the resolution of this case, to improve the quality of the trial through more thorough preparation, and to address issues as set forth in Rule 16 of the Federal Rules of Civil Procedure, pretrial status conferences shall be held regularly as scheduled by the Special Master. Unless otherwise ordered by the Special Master, pretrial status conferences shall be held by telephone. The Special Master will issue case management orders following the status conferences and at such other times as he deems appropriate. A final pretrial order will be issued following the completion of all discovery and resolution of any pending dispositive motions, whichever is later. The final pretrial order will contain the information required by Rule 16 of the Federal Rules of Civil Procedure.

XI. Modifications

This CMP may be modified only by order of the Special Master. However, the States and Amici, or any subset of them, may modify the application of any of the provisions of the CMP unless the CMP specifically bars such modification. Any such modification shall apply only to the particular matter and shall not modify the CMP's applicability to any other matter. Such modification shall bind only the States and Amici agreeing to it, and shall not bind any other States or Amici. Notice of the modification shall be provided to the Special Master and the other States and Amici as soon as reasonably convenient.

Barton H. Thompson, Jr.

Special Master

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Appendix A
Montana v. Wyoming & North Dakota, No. 137, Orig.
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