

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.

Before the Honorable Barton H. Thompson, Jr.
Special Master

**JOINT MEMORANDUM REGARDING ISSUES, PROCEDURE,
AND PROPOSED SCHEDULE FOR REMEDIES PHASE**

April 25, 2016

Pursuant to the March 21, 2016 Order of the Supreme Court, and the direction of the Special Master, the States of Montana and Wyoming (“States”) hereby submit the following Joint Memorandum Regarding the Issues, Procedure, and Proposed Schedule for Remedies Phase.

I. STATEMENT OF ISSUES TO BE RESOLVED IN THE REMEDIES PHASE

A. Joint Statement of Issues

The States have conferred, and agree that the following issues should be resolved in the Remedies Phase:

1. The amount of damages to which Montana is entitled based on Wyoming’s liability for 2004 and 2006.
2. How should costs be allocated in this proceeding?
3. Should the Court issue affirmative relief, and if so, what should it be?

B. Montana’s Statement of Issues

Montana identifies the following additional issues that it contends should be resolved in the Remedies Phase:

1. Damages:
 - a. Should damages be paid in water or money?
 - b. Should damages be measured by Montana’s losses or by Wyoming’s gains? *See Kansas v. Nebraska*, 135 S.Ct. 1042 (2015).
 - c. If Montana is entitled to secondary damages, what is the appropriate amount? *See Kansas v. Nebraska*, 135 S.Ct. 1042 (2015).
 - d. What is the appropriate amount of pre-judgment interest?

2. Prospective Relief:

Declaratory Relief:

- e. Should the Court order declaratory relief as part of its final order and judgment?
- f. Should the Court declare Montana's rights to appropriate and store waters of the Tongue River pursuant to the Compact, and specifically the amount to which Montana is entitled for the Tongue River Reservoir?
- g. What is the full extent of Montana's right to store water in the Tongue River Reservoir under the Compact?
- h. Montana has explained that its primary motivation for bringing this original action was to obtain a workable set of rules to ensure that each State receives its share of water under the Compact. The Second Interim Report (SIR) makes significant progress toward this goal. Neither State took exception to the substantive principles established in the SIR, and the relative responsibilities of the States should be declared by the Court for future guidance. For example, the declaratory relief should set out, in prospective terms, principles concerning the following subjects:
 - i. The form, content, recipient, and timing of calls by Montana;
 - ii. Wyoming's responsibilities in responding to a call, including curtailment actions, timing and documentation;
 - iii. Winter bypass flows at Tongue River Reservoir.
- i. In addition, the following issues were not fully addressed in the SIR, but should be clarified as part of the declaratory relief:
 - iv. How long Wyoming has to curtail post-Compact rights once a call is made.
 - v. Wyoming's obligation in the event of a winter call by Montana.

- vi. The SIR held that Wyoming bears the burden of proving an affirmative defense to a call. Is Wyoming required to honor Montana's call while it pursues its affirmative defense?
- vii. What documentation is necessary for either State related to a call?
- viii. Reporting requirements, including groundwater use.

Injunctive Relief:

- j. Given that a Compact is both a statute and a contract, what is the standard for injunctive relief in a Compact enforcement action before the Supreme Court?
- k. Should the Court issue targeted injunctive relief to ensure compliance with the Compact and avoid future original actions?

3. Issues Related to Costs:

- l. Is Montana the prevailing party for purposes of costs?
- m. If Montana is entitled to costs, what is the appropriate amount?

C. Wyoming's Statement of Issues

Wyoming does not agree that the additional issues identified by Montana under the heading declaratory relief can or should be addressed again in the remedies phase of these proceedings. As set forth in detail in Wyoming's response to Montana's exception to the Second Interim Report, the specific claims raised by Montana in this litigation have been resolved with the exception of the three joint issues set forth above, and Montana has obtained all the declaratory relief to which it is entitled. What Montana seeks under the guise of declaratory relief is revision of the Second Interim Report to include rulings that the Special Master purposefully declined to include. The remedies phase is not an appeal and not an opportunity for a second bite at the apple.

D. The States reserve the right to raise additional issues.

II. PROCEDURE

A. Montana

Montana anticipates the following procedural components to the Remedies Phase:

1. Settlement Discussions: Montana concurs with the Court and the Special Master that settlement of this matter would produce the best possible resolution. Montana intends to continue to pursue settlement discussions on all or some of the relevant issues as the Remedies Phase proceeds.
2. Adoption of Case Management Plan No. 2: Montana recommends adopting a Case Management Plan (CMP) No. 2 to govern the Remedies Phase. The States should confer and agree to the extent possible upon the contents of CMP No. 2, which can be adapted from CMP No. 1. Montana believes that the form of CMP No. 1, which deals at length with discovery issues, can be shortened for use in producing CMP No. 2.
3. Identification of Issues Appropriate for Early Resolution by Briefing Without the Need for Discovery: Montana recommends that the States jointly propose a list of issues appropriate for resolution by briefing. Because the rulings on those issues will help guide the remainder of the Remedies Phase, Montana recommends that this be the first step in the Remedies Phase. At this juncture, Montana believes the following may be examples of issues appropriate for early resolution by briefing:
 - a. Whether Montana is the prevailing party for purposes of awarding of costs.
 - b. The standard for injunctive relief in a Compact enforcement action before the Supreme Court.
4. Limited Discovery: Montana is mindful of the Special Master's stated intention to make the Remedies Phase as efficient as possible. While the record from the Liability Phase will provide important information for the Remedies Phase, there are likely issues that will require limited discovery in the Remedies Phase. Montana therefore recommends a limited discovery period to be governed by CMP No. 2.
5. Expert Reports: Montana anticipates one or both parties may wish to provide expert reports in connection with the Remedies Phase.

6. Summary Judgment Motions: Following discovery and expert reports, additional issues may be resolved by summary judgment.
7. Trial: A short trial may be necessary.

B. Wyoming

Wyoming believes that all three joint issues can be addressed summarily at the outset of this phase. Instead of embracing Montana's assumption that further proceedings need to start from scratch, however, Wyoming proposes that the Special Master simply decide the three joint issues immediately. The most efficient and cost effective mechanism for addressing the joint issues would be for the Special Master to consider the substantive arguments made by the parties in the briefs submitted on Wyoming's exception to the Second Interim Report. Those exception briefs address whether the cost of replacement water is the appropriate measure of damages, whether costs are properly awarded to either party, and whether injunctive relief should issue. The briefs are complete, the issues are simple and do not require oral argument, and neither state will have to spend any additional time or money presenting these arguments to the Special Master. If Wyoming prevails on these issues, then the Special Master can award an appropriate amount of damages and the case is over. If Montana prevails in whole or in part, then the parties can adopt a schedule to resolve whatever issues remain.

Alternatively, if the parties must proceed without resolving the joint issues at the outset of this phase, then Wyoming believes that the procedure must follow the ordinary course. That means a full and fair opportunity for discovery related to Montana's claims, followed by summary judgment proceedings, and if necessary, trial. Based on the additional issues Montana is attempting to raise, discovery is unlikely to be limited as Montana suggests. Wyoming will need to depose and seek documents from any farmer in Montana who claims to have been damaged from Wyoming's actions in 2004 and 2006. Moreover, the need for multiple experts is

a certainty, rather than a mere possibility as Montana suggests above. Similarly, if the additional issues raised by Montana survive until trial, Wyoming disagrees that the trial is likely to be short. Accordingly, Wyoming proposes a schedule below that follows the ordinary course and provides sufficient time to complete all necessary pretrial activities.

Wyoming disagrees that a new case management plan adapted from CMP No. 1 is necessary. CMP No. 1 should remain in effect, and the next case management plan need only set the deadlines proposed by Wyoming below beginning with a deadline for Montana to fulfill its obligations under Rule 26(a)(1) with regard to its claims for damage and other relief. Orderly discovery can begin as soon as Montana identifies with specificity the documents, witnesses, and computations supporting its claims in this phase of the litigation.

III. PROPOSED SCHEDULE

A. Montana

| Deadline | Proposed Date |
|---|------------------|
| Adoption of CMP No. 2 | May 16, 2016 |
| Identification of issues appropriate for early resolution by briefing without discovery | May 23, 2016 |
| Initial Briefs on early resolution issues | June 23, 2016 |
| Initial Expert Reports | October 14, 2016 |
| Close of discovery | January 30, 2017 |
| Summary Judgment motions or <i>Daubert</i> motions | January 31, 2017 |
| Trial | April 1, 2017 |

B. Wyoming

| Deadline | Proposed Date |
|--|------------------------------|
| Decide the joint issues without further briefing | May 16, 2016 |
| Or: | |
| Montana's Rule 26(a)(1) disclosures | May 16, 2016 |
| Wyoming's Rule 26(a)(1) disclosures | June 6, 2016 |
| Written discovery and fact depositions | Beginning after May 16, 2016 |
| Montana designates its experts | December 1, 2016 |
| Wyoming designates its experts | January 15, 2017 |

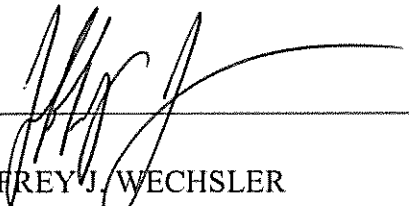
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|----------------------------|-------------------|
| Discovery cutoff | February 28, 2017 |
| Summary Judgment Motions | March 31, 2017 |
| Summary Judgment Responses | May 1, 2017 |
| Summary Judgment Replies | May 17, 2015 |
| Summary Judgment Hearing | June 1, 2017 |
| Final Pretrial Conference | August 4, 2017 |
| Trial – Billings Montana | August 7, 2017 |

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Joint Memorandum Regarding Issues, Procedure, and Proposed Schedule for Remedies Phase was served electronically, and by U.S. Mail as indicated below on April 25, 2016, to the following:

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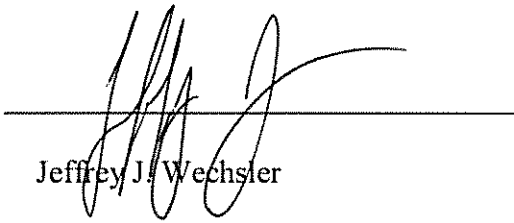
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I further certify that all parties required to be served have been served.



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