November 11, 2011

Dear Special Master Thompson:


Montana disagrees with certain aspects of the Draft Memorandum Opinions, but, in accordance with CMO No. 9, will limit its comments to clarifications and corrections. Montana has no comments on the Draft Article V(B) Opinion. Montana submits the following two comments on the Draft Summary Judgment Opinion.

First, the use of the word “Liability” in the title parenthetical of the Draft Summary Judgment Opinion may lead to unnecessary confusion. The subject of the Opinion is the notice
required for damages. Liability is separate from damages. “Liability” refers to violation of the Compact and the amount of the violation, not damages or other remedies. See Special Master’s Draft Case Management Plan No. 1, ¶ II (Sept. 28, 2011). This confusion could be avoided by changing the parenthetical to “Notice Requirements for Damages.”

Second, pages 4 and 5 of the Draft Summary Judgment Opinion contain a discussion of the issue of mitigation. Montana would like to clarify that the States did not discuss mitigation in their briefs. Accordingly, it would be appropriate to delete the discussion of mitigation, at least until the States have had an opportunity to address the issue as part of the further briefing that the Draft Summary Judgment Opinion contemplates. See p. 12 of the Opinion; see also State of Wyoming’s Letter Brief Commenting on Special Master’s Memorandum Opinion on Wyoming’s Motion to Dismiss Bill of Complaint 4-5 (July 17, 2009).

Montana reserves the right to file exceptions with respect to the Draft Memorandum Opinions when they are finalized. Montana also reserves the right, and requests the opportunity, to respond to other comments at the telephonic status conference scheduled for November 28, or otherwise, as the Special Master may direct.

Sincerely yours,

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