

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

MONTANA'S EXPEDITED MOTION FOR PROTECTIVE ORDER

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January 12, 2013

MONTANA'S EXPEDITED MOTION FOR A PROTECTIVE ORDER

COMES NOW, the State of Montana, pursuant to Section VIII.G.3 of Case Management Plan No. 1 ("CMP No. 1"), and moves for a protective order directing Wyoming to comply with the requirements of CMP No. 1 with regard to the subpoenas that it has issued.

INTRODUCTION

Beginning on December 26, 2012 and continuing through January 11, 2013, the State of Wyoming has issued 75 subpoenas for the production of documents to various persons and entities in Montana and other states. The subpoenas indicate that compliance can be made by mailing the documents to the Wyoming Attorney General's office by a certain date, but the dates specified in the subpoenas do not comport with the deadlines set forth in CMP No. 1. Compounding this problem, Wyoming failed to include a copy of CMP No. 1 with the subpoenas as required, so the subpoena recipients are unable to determine their rights and obligations. Time is of the essence on this issue because many of these subpoenas have already been served, and recipients do not currently have accurate information about compliance. As described in more detail below, Montana therefore moves for an expedited Order requiring Wyoming to serve amended subpoenas on all recipients that comply with CMP No. 1.¹

BACKGROUND

On December 26, 2012, the State of Wyoming submitted a Notice of Production and Issuance of Subpoenas for the production of documents in care of the law firm of Montgomery & Andrews.² The subpoenas are directed to eight different persons or entities, and require those persons or entities to produce and permit inspection and copying of certain documents. The required documents are designated in an attached Exhibit "A." Also attached to the subpoenas is

¹ Montana does not concede the relevancy of the documents Wyoming has subpoenaed.

² Montana is not attaching a copy of the subpoenas because, contrary to the CMP, *see* CMP No. 1 § VI, Wyoming filed all of the subpoenas with the Special Master.

a copy of the Statement Required by Fed. R. Civ. P. 45(A)(1)(a)(iv). The subpoenas state as follows:

You are hereby commanded to produce and permit inspection and copying of the following documents or objects at the place, date and time specified below:

Full, complete and legible or audible copies of the documents or objects listed in Exhibit "A," which is attached hereto.

Compliance with this subpoena can be made by mailing copies of the requested documents to Wyoming Attorney General's office, Water and Natural Resources Division, Attn: James Kaste, 123 State Capitol, Cheyenne, WY 92002, for receipt on or before January 21, 2013.

On December 31, 2012, Wyoming submitted a second Notice of Production and Issuance of Subpoenas for the production of documents. These subpoenas were issued to 32 separate individuals or entities, and require them to produce and permit inspection and copying of documents as specified in an attached Exhibit A. Similar to the first batch of subpoenas, the individuals and entities are instructed that compliance can be made by mailing copies of the requested documents to the Wyoming Attorney General's office for receipt on or before January 21, 2013. These 32 subpoenas were presumably served directly upon the individuals and entities named, since Wyoming refused Montana's invitation to serve them through Montana counsel.

On January 2, 2013, Wyoming submitted a third Notice of Production and Issuance of Subpoenas for the production of documents. These subpoenas were issued to 9 separate individuals or entities, and are similar to the first and second batch of subpoenas in their attachments and instructions for compliance. These individuals and entities are provided with a date of January 25, 2013, to mail copies of the requested documents to the Wyoming Attorney General's office.

On January 4, 2013, Wyoming submitted a fourth Notice of Production and Issuance of Subpoenas for the production of documents. These subpoenas were issued to 13 separate

individuals or entities, and are similar to the previous subpoenas in their attachments and instructions for compliance. These individuals and entities are provided with a date of January 28, 2013, to mail copies of the requested document to the Wyoming Attorney General's office.

On January 9, 2013, Wyoming submitted a fifth Notice of Production and Issuance of Subpoenas for the production of documents. These subpoenas were issued to 7 separate individuals or entities, and are similar to the previous subpoenas in their attachments and instructions for compliance. These individuals and entities are provided with a date of February 1, 2013, to mail copies of the requested documents to the Wyoming Attorney General's office.

On January 11, 2013, Wyoming submitted a sixth Notice of Production and Issuance of Subpoenas for the production of documents. These subpoenas were issued to 6 separate individuals or entities, and are similar to the previous subpoenas in their attachments and instructions for compliance. These individuals and entities are provided with a date of February 4, 2013, to mail copies of the requested documents to the Wyoming Attorney General's office.

Montana has reviewed the subpoenas that were issued and determined that they do not comply with the requirements of CMP No. 1, for the reasons set forth below.

REQUIREMENTS OF CASE MANAGEMENT PLAN NO. 1

CMP No. 1 requires a State to provide a copy of the Case Management Plan when it issues a subpoena to a person or entity who is not a State. CMP § VIII.G.3(b). This requirement provides notice to the person or entity of his or her rights and obligations under CMP No. 1. Wyoming did not include a copy of CMP No. 1 with any of the 75 subpoenas it has issued. Those persons and entities thus have no way of knowing that they have the right to seek relief under the CMP pursuant to Section VIII.G.3(b) by asking the Special Master to quash or issue a protective order.

Wyoming's failure to include CMP No. 1 with the subpoenas also means the recipients have no way of knowing their obligations under CMP No. 1. For example, Section VIII.C.1(e)(ii) of CMP No. 1 imposes the following deadlines on any non-State for production of documents:

Any non-State upon which a request for production of documents/request for inspection is served shall have 30 days within which to make objections and 60 days from the date of service within which to complete full production subject to unresolved objections, unless otherwise agreed by the propounder and respondent.

Wyoming's subpoenas do not comport with these deadlines. The subpoenas instruct that compliance can be made by mailing copies of the requested documents to the Wyoming Attorney General's office by a date certain. In all instances, the date certain is less than 30 days prior to the date of the subpoena, let alone the date of service. In this respect, Wyoming has misrepresented the requirements imposed by the Special Master, and has denied the recipient of the subpoena the opportunity to

Given Wyoming's failure to include CMP No. 1 with the subpoenas, it is appropriate for the State of Montana, under its *parens patriae* authority, to seek relief under Section VIII.G.3(b) by filing this Motion for Protective Order.

ARGUMENT

All told, Wyoming has issued 75 subpoenas for the production of documents, none of which comply with CMP No. 1. In each of these subpoenas, Wyoming misrepresents the date by which compliance must be made. Whereas the CMP allows 30 days within which to make objections and 60 days from the date of service within which to complete full production, Wyoming's subpoenas specify a date that falls significantly short of those deadlines. Additionally, nowhere in the Notice or the subpoena is the recipient given any information about their right to contest the subpoena before the Special Master.

Compounding this problem, Wyoming does not attach a copy of the CMP that governs this case, thus depriving the recipient of the sole means by which they could discern the applicable deadlines for themselves, or their ability to seek relief before the Special Master. Since Wyoming denied Montana's invitation to serve all of these subpoenas, and the subpoenas have presumably already been served, the recipients do not currently have accurate information about their rights and obligations under CMP No. 1. The State of Montana should not be burdened with the task of providing this information to its citizens. The CMP obligates Wyoming to assume this responsibility, and it has failed in that regard.

The only information provided with the subpoenas is the statement required by Rule 45. But this statement is not a substitute for CMP No. 1. The Rule 45 statement does not set forth the deadlines that are specific to the CMP, and does not instruct that the person or entity subpoenaed has the right to seek relief before the Special Master. Even if the person or entity were represented by counsel, the attorney would be uninformed about the particular provisions of CMP No. 1 relative to written discovery.

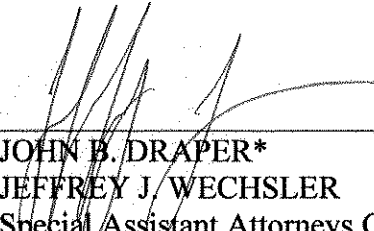
Additionally, the subpoenas instruct that compliance can be made by mailing copies of the requested documents to the Wyoming Attorney General's office by a date certain. This is deficient in that the subpoenas do not inform the subpoenaed party that compliance can be made by making the documents available for inspection or copying. The last thing the recipient is told is that failure to obey the subpoena may constitute contempt of court. With no proper instruction on what is required by CMP No 1, the recipients are left in the dark about their rights.

CONCLUSION

For the reasons set forth above, Montana requests that the Special Master promptly issue a protective order requiring Wyoming to personally serve amended subpoenas that comply with the CMP. In the alternative, Wyoming should be required to mail to each subpoena recipient an amended subpoena that includes a copy of CMP No. 1, and that is accompanied by a cover letter explaining that (1) the CMP should have been included with the subpoena; (2) the CMP sets forth the relevant deadlines for compliance with the subpoena; (3) the recipient has 30 days from the date of service of the subpoena to object; (4) the recipient has 60 days from the date of service of the subpoena to complete full production of documents; and (5) the subpoenaed party may comply with the subpoena by making the requested documents available for inspection or copying, and is not required to mail a copy to the Wyoming Attorney General's office.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Montana's Expedited Motion for Protective Order was served electronically on January 12, 2013, and by placing the same in the U.S. mail on January 14, 2013, to the following:

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



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