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**U.S. MAIL AND EMAIL**

August 26, 2011

Barton H. Thompson, Jr., Special Master  
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473 Via Ortega  
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[susan.carter@stanford.edu](mailto:susan.carter@stanford.edu)

**Re: *Montana v. Wyoming & North Dakota,*  
No. 137, Orig., U.S. Supreme Court  
Request for Modification of Case Management Order No. 8**

Dear Special Master Thompson:

You issued Case Management Order No. 8 on August 19, 2011 ("CMO No. 8"). Paragraph 9 of CMO No. 8 requires that any request for modification or supplementation of the Order be submitted on or before Friday, August 26, 2011. In accordance with Paragraph No. 9, the State of Montana submits this request for modification of Paragraph 2 of CMO No. 8.

Paragraph 2 of CMO No. 8 requires Wyoming to file a Motion for Partial Summary Judgment, with accompanying affidavits, on the issue whether the Yellowstone River Compact ("Compact") "preclude[s] the State of Montana from claiming damages or other relief in any years in which Montana did not notify the State of Wyoming that its pre-1950 appropriators were not receiving adequate water." CMO No. 8 at ¶ 2. Montana agrees that resolution of the legal issue is appropriate at this time, as it will help determine the scope of discovery, but disagrees that it should be framed as a Motion for Partial Summary Judgment with supporting affidavits.

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By requiring the legal issue be framed as a Motion for Partial Summary Judgment, Paragraph 2 of CMO No. 8 contemplates the potential resolution of factual issues prior to discovery. Specifically, it requires the States to submit evidence in the form of affidavits regarding the communications that occurred between the States since 1950. Montana believes that it is premature to require the States to submit evidence at this time. Rather, Montana requires discovery to more fully evaluate the communications, both written and verbal, that occurred between the States and employees of both States. It is only after discovery that Montana will be in a position to respond to Wyoming's factual assertions. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that summary judgment should be entered "after adequate time for discovery," and explaining that Federal Rule of Civil Procedure 56(d)<sup>1</sup> "allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (stating that "the plaintiff must present affirmative evidence to defeat a properly supported motion for summary judgment . . . . even where the evidence is likely to be within the possession of the defendant, *as long as the plaintiff has had a full opportunity to conduct discovery*" (emphasis added)); *CenTra, Inc. v. Estrin*, 538 F.3d 401, 420 (6th Cir. 2008) ("Typically, when the parties have no opportunity for discovery, denying the Rule 56[(d)] motion and ruling on a summary judgment motion is likely to be an abuse of discretion"); *Ball v. Union Carbide Corp.*, 385F.3d 713, 719 (6th Cir. 2004) ("It is well-established that the plaintiff must receive 'a full opportunity to conduct discovery' to be able to successfully defeat a motion for summary judgment").

Further, determination of the specified factual issues may not be necessary, depending on the Special Master's resolution of the legal issue. The States should not be required to expend the resources necessary to determine facts that may not be relevant.

Therefore, Montana requests that the Special Master limit the briefing under Paragraph 2 of CMO No. 8 to the purely legal issue of whether the Compact requires notification. Accordingly, Montana requests that Paragraph 2 on the first full page be modified as follows (proposed additions shown in italics, proposed deletions shown in ~~strikeout~~):

On or before Monday, September 12, 2011, the State of Wyoming shall file a ~~Motion for Partial Summary Judgment to brief~~ *addressing the issue of whether the Compact precludes the State of Montana from claiming damages or other relief in any years in which Montana did not notify the State of Wyoming that its pre-1950*

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<sup>1</sup> Formerly Fed. R. Civ. P. 56(f).

~~appropriators were not receiving adequate water. Notwithstanding the statement of the issue in Paragraph 2(A) of this Order, the State of Wyoming shall be free to frame the issue as it deems appropriate. In its motion, Wyoming shall identify those years in which it contends Montana cannot claim damages or other relief for failure to notify Wyoming of inadequate water. Along with its motion, the State of Wyoming shall file supporting factual affidavits and a brief in support of its motion. The affidavits should set out the nature of any notice(s) that Wyoming received from Montana regarding the adequacy of water crossing the border between Wyoming and Montana, or Montana's ability to meet the needs of its pre-1950 appropriators, and the years in which Wyoming received such notice(s).~~

~~The State of Montana shall file its opposition brief, along with any supporting affidavits, on or before Friday September 23, 2011. If Montana disagrees with Wyoming regarding which years Montana provided notice(s) to Wyoming regarding the adequacy of water flowing across the border or the ability to meet the needs of pre-1950 appropriators, Montana's affidavits should set out the nature of the notice(s) that it provided Wyoming and the years in which it provided the notice(s). The State of North Dakota, if it wishes to file a brief in support of or opposition to Wyoming's motion *position*, along with any amicus that wishes to file a brief in support of or opposition to the motion *Wyoming's position*, shall also file its brief on or before September 23, 2011.~~

~~The State of Wyoming may file a reply brief on or before Wednesday, September 28, 2011.~~

In any event, Montana reserves the right to respond to the summary judgment motion filed pursuant to CMO No. 8 by invoking the provisions of Federal Rule of Civil Procedure 56(d).

Barton H. Thompson, Jr.  
August 26, 2011  
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Thank you very much for your consideration.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John B. Draper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John B. Draper  
Counsel of Record  
State of Montana

cc: (Email)  
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