

**U.S. Mail and Email**

November 22, 2014

Barton H. Thompson, Jr., Special Master  
Woods Institute  
Jerry Yang and Akiko Yamazaki Environment  
& Energy Building - MC 4205  
473 Via Ortega  
Stanford, CA 94305  
susan.carter@stanford.edu

**Re: *Montana v. Wyoming & North Dakota,*  
No. 137, Orig., U.S. Supreme Court  
Admitted Exhibits; Final Quantifications**

Dear Special Master Thompson:

**ADMITTED EXHIBITS**

You requested that Montana and Wyoming confer and put together a consolidated exhibit list and thumb drive of all admitted exhibits. The States did confer, and, for the most part, agreed on the exhibit list and exhibits to be included on the thumb drive. However, Wyoming sent you their version without mentioning that it did not have the complete concurrence of Montana. Montana is therefore providing with the hard copy of this letter a thumb drive that includes a more complete version of the admitted exhibits than the thumb drive provided by Wyoming. The enclosed thumb drive includes all the exhibits that Wyoming provided on its thumb drive, but it also includes versions of three exhibits that show which portions of each were ultimately admitted and which portions were withdrawn or excluded, as described below. An admitted exhibit list is also provided on the thumb drive. It is the same list as Wyoming's except that it includes additional explanatory remarks on Exhibit W3 as explained below:

Exhibit M12 (Rebuttal Report of Douglas R. Littlefield, Ph.D.): Portions of Dr. Littlefield's report were excluded or modified during trial. *See* Tr. 2375:22 – 2388:12. Accordingly, Montana has proposed that Exhibit M12 be highlighted to indicate the

portions of Dr. Littlefield's report that were excluded or modified, and notes added indicating the modifications that were made.

Exhibit W3 (Expert Report of Bern Hinckley): At trial, Mr. Hinckley withdrew or modified certain text and tables in his report, including his ultimate table. Accordingly, Montana has provided a copy of the exhibit highlighting the portions that were withdrawn or modified, with notes indicating the specific changes that were made to numbers and text. Montana has also included a note on the exhibit list for W3 indicating that certain text and tables within the exhibit were modified at trial.

Exhibit W40 (Bill Knapp Letter re: Storage Regulation 2004 Water Year): During trial, Montana objected to Exhibit W40 on the basis that it constituted a late expert report. *See* Tr. 2112:22 – 2117:16. The admission of that exhibit was therefore limited to only the attachments and the list of the attachments on page 1. *See* Tr. 2136:9 – 2137:3. Accordingly, Montana has proposed that Exhibit W40 be highlighted to indicate the portion that was excluded at trial.

The reason for Montana's proposal is that indicating on the exhibits themselves which portions were excluded, withdrawn, or otherwise changed during trial, and noting such matters on the Exhibit List, will be of substantial assistance to the Court, and will help ensure that the Court does not mistakenly rely on material that was not admitted, or that was changed or withdrawn by the Special Master or the parties. Montana's proposed alterations to the exhibits do not change the substance of the exhibits or remove material that was present in the originals; rather, the alterations consist of highlighting and marginal notes to alert the Court to the fact that certain material was stricken, withdrawn, or otherwise changed during trial.

Wyoming objected to including Montana's changes for the reasons stated in the email from James Kaste to John Draper of October 6, 2014, attached hereto. Montana does not agree with Wyoming's objections. Indeed, Wyoming's refusal to include the Montana changes will make it more difficult for the Court to review the record. Therefore, the more complete versions proposed by Montana, included on the thumb drive provided with this letter, should be used.

### **FINAL QUANTIFICATIONS**

Regarding any quantifications that may be necessary in light of your final rulings, Montana has offered to confer with Wyoming and recommend jointly any such final numbers. Montana continues to stand ready to confirm or finalize, jointly with Wyoming, any such quantifications.

Barton H. Thompson, Jr.  
November 22, 2014  
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Respectfully submitted,

Sincerely yours,

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

John B. Draper  
Counsel of Record  
State of Montana

cc: (Email)  
James Kaste, Esq. (also hard copy with thumb drive)  
Peter K. Michael, Esq.  
Jennifer L. Verleger, Esq. (also hard copy with thumb drive)  
James J. DuBois, Esq.  
Jeanne S. Whiteing, Esq.  
Michael Wigmore, Esq.  
Chris Brown, Esq.  
Cory Swanson, Esq.  
Alan Joscelyn, Esq.  
Anne Yates, Esq.



## Donna Ormerod

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**From:** james kaste  
**Sent:** Monday, October 06, 2014 4:36 PM  
**To:** John Draper  
**Cc:** andrew kuhlmann; chris brown; Swanson, Cory; Yates, Anne; Jeffrey Wechsler; Donna Ormerod  
**Subject:** Re: Admitted Exhibits

John,

I don't have any problem with the changes to the wording on the exhibit, except with regard to Ex. W3. On page 5656, the exhibit was admitted in its original state, and the Court will have to read the transcript to identify the changes Mr. Hinckley testified to on the stand. Similarly, we cannot include the exhibits attached to your e-mail and placed in the dropbox because they are different from the exhibits admitted at trial. While I understand the desire to assist the court by altering the documents to conform to the testimony or ruling, I do not think it is proper to do so where the document was admitted in its original form. Accordingly, we will make all but the one change to Ex. W3 on the exhibit list and we will send the exhibits as received by the Special Master at trial to him on the thumb drives tomorrow morning. I suspect at this point, if Montana disagrees with this course of action, that the most efficient process would be for Montana to submit these documents independently with an explanation of its rationale for substituting them for the originals.

Thank you for taking the time to look this over one more time. Please let me know if you have any questions or concerns.

James.

James C. Kaste  
Deputy Attorney General  
Water & Natural Resources Division  
123 State Capitol  
Cheyenne, WY 82002  
(307) 777-6946 phone  
(307) 777-3542 fax  
[james.kaste@wyo.gov](mailto:james.kaste@wyo.gov)

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On Mon, Oct 6, 2014 at 2:28 PM, John Draper <[john.draper@draperllc.com](mailto:john.draper@draperllc.com)> wrote:

Andrew, James and Chris-

Attached here and/or in our drop box (<https://www.dropbox.com/sh/9e3026rjyx0440n/AACps-JNqI35VVFmQjXVIGVya>)

are the Exhibit List and Exhibits M12, W-3 and W-40. The Exhibit List has been modified to more accurately reflect the status of some of the exhibits. The individual exhibits have been highlighted to show excluded, withdrawn or changed portions.

If you agree with our changes, please enter the current date on the front of the Exhibit List and submit the Exhibit List and thumb drive with our modifications, sending us the list and thumb drive simultaneously.

Best regards-

John

John B. Draper

**Draper & Draper LLC**

**325 Paseo de Peralta**

**Santa Fe, NM 87501**

**505-570-4591 DIRECT**

**505-570-4590 OFFICE + FAX**  
**john.draper@draperllc.com**

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