

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

**MEMORANDUM OPINION REGARDING
MONTANA'S EXPEDITION MOTION FOR PROTECTIVE ORDER**

BARTON H. THOMPSON, JR.
Special Master
Jerry Yang & Akiko Yamazaki Environment &
Energy Building
473 Via Ortega
MC: 4205
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January 14, 2013

Montana moves for a protective order directing Wyoming to comply with the requirements of Case Management Plan No. 1 (the “CMP”) with regard to the 75 subpoenas that Wyoming has issued between December 26, 2012 and January 11, 2013 for the production of documents by various non-states. Montana objects in particular that the subpoenas (1) provide for less than 30 days to complete full production, (2) do not inform subpoenaed parties that they can comply by making documents available for inspection or copying, and (3) do not include a copy of the CMP (which includes the procedure for objections to a subpoena before the Special Master). Montana requests that I order Wyoming either to serve amended subpoenas that comply with the CMP or mail to each subpoena recipient an amended subpoena and explanatory cover letter.

Montana is correct that the subpoena is in violation of the CMP. The CMP provides for 60 days to complete full production. CMP ¶ VIII(C)(1)(e)(ii). Yet the subpoenas set dates for the completion of production that range from 21 to 26 days from the date of the subpoena. The CMP also provides that a copy of the CMP should accompany all subpoenas (in part to ensure that non-parties know how they can object to the subpoena). *Id.* ¶ VIII(G)(3)(b). Yet the subpoenas include only the statement required of Rule 45. Counsel for Wyoming not only were aware of the provisions of the CMP, but they negotiated them with counsel for Montana and submitted them for my approval. There is no excuse for Wyoming’s failure to comply with these provisions, rather than seeking either an agreement with Montana or my permission to modify them. In the future, I expect counsel for Wyoming to follow the procedures of the CMP absent an explicit agreement or order to the contrary.

Despite Wyoming’s clear violation of the CMP, I conclude that no supplemental information currently needs to be sent to the recipients of the subpoenas. The burden is on the moving party to show the need for a protective order. *Fonville v. District of Columbia*, 230 F.R.D. 38 (D.D.C. 2005). As part of its burden, the movant must demonstrate “specific evidence of the harm that would result” if the protective order is not granted. *Jennings v. Family Management*, 201 F.R.D. 272, 275 (D.D.C. 2001). In the normal situation, recipients should seek the protective order, since that is the best indication of the potential need for protection. *Washington v. Thurgood Marshall Academy*, 230 F.R.D. 18, 21 (D.D.C. 2005), citing 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459 (2d ed. 1995). In this instance, no recipient apparently has yet raised a concern regarding the terms of the subpoena.

The time periods that Wyoming has given recipients to respond, while much shorter than provided in the CMP, are not unreasonable on their face under the federal Rules of Civil Procedure. See *Washington v. Thurgood Marshall Academy*, *supra*, 230 F.R.D. at 25 (approving a 29-day period, as “easily enough time to comply,” particularly given that the recipient could simply mail the requested documents to counsel). Given the stage of this litigation, I would have looked favorably on any motion that Wyoming had brought prior to issuing the subpoenas to reduce the time for completion of production from the 60 days provided in the CMP. There is no reason at the moment to believe that the times provided by Wyoming’s subpoenas will not be sufficient for the recipients to comply. Turning to Montana’s other concerns, mailing the requested documents will often be the simplest method by which a recipient can respond. Concerns about the failure to include a copy of the CMP are largely alleviated by (1) the

inclusion of the statement required of Rule 45, and (2) the cover letter from counsel for Wyoming noting that if a recipient has “any questions or concerns” about complying with the subpoena, the recipient can call counsel for Wyoming or the recipient’s own attorney. If evaluated under rule 45 rather than the CMP, in short, the subpoenas would appear to be facially acceptable.

It is critical, however, that no recipient *in fact* be harmed or put to an inordinate burden by the subpoenas, particularly since the recipients are private individuals. Therefore, if any recipient contacts Wyoming with any questions or concerns regarding the time permitted for production, other terms of the production, or the subpoena in general, Wyoming must

1. Provide any recipient who requests additional time a reasonable amount of additional time to comply with Wyoming’s subpoena. At a minimum, Wyoming must allow at least 35 days in total from the date of the service of the subpoena.
2. Inform any party who objects to mailing the documents that they can instead produce the documents for inspection or copying (or follow whatever other procedure is agreed to between recipient and Wyoming or provided by a subsequent order of the Special Master).
3. Inform the recipient that, if he or she objects to the timing, procedure, or substance of the subpoena, he or she can seek relief from the Special Master by following the procedure set out in paragraph VIII(G)(1)(b)(i) of the CMP.

The current situation is not ideal. Counsel for Wyoming should have followed the CMP or sought approval to vary from it. Under the circumstances, however, I conclude that the procedure that I have set out above will provide adequate protection to the recipients of the subpoenas and that no additional steps currently need to be taken. Montana, of course, is free to renew its motion if facts come to its attention showing that its citizens are being prejudiced or harmed by Wyoming’s subpoenas despite the procedure set out above.

Date: January 14, 2013



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