

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 REPLY TO ANADARKO PETROLEUM CORPORATION'S
MEMORANDUM ON SUMMARY JUDGMENT**

TIMOTHY C. FOX
Attorney General of Montana

CORY J. SWANSON
Deputy Attorney General
JEREMIAH D. WEINER
Assistant Attorney General
ANNE YATES
BRIAN BRAMBLETT
KEVIN PETERSON
Special Assistant Attorneys General
215 North Sanders
Helena, Montana 59620-1401

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General

DAKOTAH G. BENJAMIN
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
**Counsel of Record*

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Pursuant to Case Management Plan No. 1, Section IX(B) (Dec. 20, 2011), the State of Montana hereby responds in opposition to the Memorandum of *Amicus Curiae* Anadarko Petroleum Corporation in Support of Wyoming's Motion for Summary Judgment ("Anadarko Memo.") (Filed Aug. 2, 2013).

INTRODUCTION

In essence, Anadarko Petroleum Corporation ("Anadarko"), like Wyoming, argues that post-1950 coalbed methane ("CBM") producers in Wyoming may accomplish through groundwater pumping what they could not accomplish through surface water diversions. Under this logic, post-1950 CBM producers in Wyoming could dry up the flows going into Montana through groundwater pumping and Montana would have no remedy under the Yellowstone River Compact ("Compact"). The Special Master has previously rejected this argument, and many of Anadarko's other arguments regarding whether the Compact covers groundwater. Additionally, Anadarko's characterization of the extent and timing of streamflow depletions caused by CBM groundwater production as *de minimis*, is disputed by both Montana's and Wyoming's expert witnesses, precluding summary judgment on this issue.

Anadarko argues that CBM pumping should be excluded as a matter of law under the Compact for the reason that neither State regulates such pumping under the doctrine of prior appropriation. However, the Court's precedents concerning compacts governing interstate surface waters uniformly hold that depletion of the compacted surface waters by groundwater pumping must be accounted for under the Compact. This is true even in cases where the Court was presented with arguments that neither of the compacting states regulated groundwater pumping at the time of the compact. Anadarko's arguments should be rejected, and Wyoming's Motion on Montana's groundwater claims should be denied.

STATEMENT OF MATERIAL FACTS

I. FACTUAL CORRECTIONS

1. As an initial matter, Anadarko's reliance on the Special Master's June 2, 2009 Memorandum Opinion is misplaced. That opinion was subject to additional briefing and was superseded by the Special Master's First Interim Report. Thus, to the extent that the June 2, 2009 Memorandum Opinion is inconsistent with the Special Master's First Interim Report, the First Interim Report is controlling, and Anadarko's arguments based on inconsistent language in the June 2, 2009 opinion should be rejected.

2. Additionally, contrary to Anadarko's mischaracterization, Article IX, Section 3 of the 1972 Montana Constitution subjects all surface, underground, flood and atmospheric waters within the boundaries of the state to appropriation for beneficial use. As such, virtually all sources of water fall within the parameters of the Montana Water Use Act ("Use Act"). In fulfillment of its duties related to water resource management and permitting under the Use Act, the Montana Department of Natural Resources and Conservation, Water Resources Division ("DNRC"), has accepted the principle that, absent proof otherwise, all groundwater is ultimately connected to surface water and subject to surface water priorities. Declaration of Tim Davis, ¶ 4 (Aug. 2, 2013) ("Davis Declaration"), attached to Montana's Brief in Opposition to Wyoming's Motion for Summary Judgment as Exhibit O (Aug. 2, 2013).

3. As explained in the Davis Declaration, the Montana Water Use Act only requires a new water use permit for an "appropriation," which means "to divert, impound, or withdraw . . . a quantity of water for a beneficial use" § 85-2-102, MCA. The DNRC determined that while CBM production results in the withdrawal of groundwater, unless the CBM producer intends to put the groundwater to a beneficial use, the withdrawal is not subject to the permitting

requirements of the Use Act. *Id.*, ¶ 5. If a CBM producer intends to put groundwater to beneficial use, the groundwater use is subject to the requisite proof, including analysis of the hydrological connection between the source groundwater aquifer and surface water. *Ibid.* However, if the CBM producer does not intend to put the ground water to beneficial use, it is not subject to the permit criteria under the Use Act, and analysis of the hydrological connection between the source groundwater aquifer and surface water is not conducted. *Ibid.*

4. The withdrawal of groundwater incidental to CMB production is not typically regulated by the Montana DNRC because the withdrawal is not considered a beneficial use in and of itself. This does not mean that groundwater withdrawn during CBM production is not connected to surface water or cannot adversely affect surface water users. *Id.*, ¶ 6. As explained *infra*, Montana has provided evidence that CBM groundwater production in Wyoming depletes surface flows that would otherwise be available for use by Montana's pre-1950 appropriators.

5. CBM development has resulted in a large amount of pumping in the basin. Mr. Larson concluded that the CBM pumping is hydrologically connected to the surface water. He evaluated the impacts of the CBM pumping on the Tongue River in Montana. See generally Expert Report of Steve Larson (Jan. 4, 2013) ("Larson Report"), and Expert Rebuttal Report of Steven Larson (June 4, 2013) ("Larson Rebuttal Report"), attached to Montana's Brief in Opposition to Wyoming's Motion for Summary Judgment as Exhibits W and X.

6. Mr. Larson concluded that "water production associated with CBM development has reduced and will continue to reduce groundwater levels and thus deplete groundwater storage." He further concluded that "the depletive effects of stream flow of water production associated with CBM development will continue for many decades after CBM water production has ceased." Larson Report at 4.

7. Mr. Larson utilized a groundwater model developed by the United States Bureau of Land Management which implicitly determined the degree of interconnection of surface water and ground water, and explicitly estimated the depletive effects of CBM water production on the Tongue River. *Ibid.*

8. Wyoming does not contest that this pumping has some effect on the streamflow of the Tongue River in Montana. See Wyoming's Motion for Summary Judgment at 36 (Filed July 3, 2013) ("Wyo. Mot.") ("Both states recognize that this groundwater is connected to the surface to some degree").

9. The Wyoming office of the State Engineer has received a number of complaints alleging interference with water rights in the Tongue or Powder basins. See Deposition Transcript of Lisa Lindemann at 62-68 (Nov. 26, 2012), attached to Montana's Brief in Opposition to Wyoming's Motion for Summary Judgment as Exhibit Y.

10. After making appropriate adjustments based on the analysis of the Wyoming experts, Mr. Book calculated the impacts to Montana from post-1950 CBM groundwater pumping in Wyoming in 2001, 2002, 2004 and 2006. In those four years, Mr. Book calculated that Wyoming's impacts were a total of 1,022 acre feet during the years that a net depletion occurred. Expert Rebuttal Report of Dale E. Book, P.E. at 27, Table 3 (June 4, 2013) ("Book Rebuttal Report"), attached as Exhibit L to Montana's Brief in Opposition in Opposition to Wyoming's Motion for Summary Judgment.

ARGUMENT

THE COMPACT COVERS ALL GROUNDWATER PUMPING THAT AFFECTS SURFACE FLOWS

A. The Compact Protects Pre-1950 Rights in Montana from Post-1950 Groundwater Pumping in Wyoming

The Special Master has already held that “[t]he language of the Compact in this case is sufficiently broad and inclusive to encompass at least some forms of groundwater that are hydrologically connected to the surface waters of the Powder and Tongue Rivers.” See First Interim Report of the Special Master at 44 (Feb. 10, 2010) (“FIR”). Furthermore, the Special Master concluded that the Compact protects pre-1950 appropriators in Montana “against *all* interference by new users, whether by surface or groundwater diversion.” *Id.*, at 53 (emphasis added); see also Brief for the United States as Amicus Curiae in Opposition to the Motion to Dismiss at 23 (filed May 2008) (“U.S. Br. in Opp.”) (“Montana is correct that if pumping groundwater removes surface water from the Yellowstone River’s covered tributaries, then the pumping is a diversion regulated by the Compact.”). Thus, Anadarko’s arguments regarding whether the language of the Compact covers groundwater pumping have already been rejected by the Special Master and should not be reconsidered now.

1. The Special Master has already held that “springs” and “swamps” include groundwater

Anadarko argues that the Compact’s use of “springs” and “swamps” cannot cover water produced through CBM production. See Anadarko Memo., at 8. Anadarko previously presented this argument. See Amicus Brief In Support of Respondent State of Wyoming at 6, 14 (Apr. 25, 2008). After considering the plain language, the Special Master held that these terms are broad enough to include groundwater. See FIR at 45-46 (internal citations omitted) (emphasis in original) (“A ‘spring’ moreover, is a location where *groundwater naturally emerges from the*

Earth's subsurface in a defined flow and in an amount large enough to form a pool or stream-like flow. . . . A 'swamp,' in turn, is an older name for a 'wetland,' which is merely 'an area that is periodically or permanently saturated or covered by surface water or *groundwater*.'"'). Thus, Anadarko's argument that the language of the Compact does not cover groundwater has already been addressed and rejected by the Special Master.

2. The Compact protects pre-1950 appropriators in Montana from *all* interference by new users

The Special Master has also rejected Anadarko's suggestion that the Compact only protects pre-1950 appropriators in Montana from surface water "diversions." As explained by the Solicitor General, "[a] compact need not include any special recitation in order to prevent a groundwater loophole; a plainly applicable apportionment of substantive rights is enough. Here, the Compact's protection of Montana's first-tier rights against second- and third-tier diversions by Wyoming extends to all such diversions, including diversions accomplished by groundwater pumping." U.S. Br. in Opp. at 28. Additionally, as noted above, the Special Master has held that "[t]he overall language of the Compact . . . reveals a clear intent to protect pre-1950 appropriations from all forms of interference by subsequent water users, including the withdrawal of at least some forms of hydrologically connected groundwater." FIR at 51. Thus, whether CBM groundwater pumping is classified as a surface water "diversion" or a groundwater "withdrawal" is irrelevant given that Montana's pre-1950 rights are protected from "*all* interference by new users." *Id.*, at 53 (emphasis added).

B. CBM Groundwater Production in Wyoming Depletes Surface Flows Needed to Satisfy Pre-1950 Rights in Montana

1. The extent to which CBM groundwater production impacts surface flows is a disputed material fact

The Compact does not use the term “material” or “materially,” and Anadarko’s attempt to add language to the Compact should be rejected. See generally, *Alabama v. North Carolina*, 560 U.S. 330, 130 S. Ct. 2295, 2312-13 (2010). In fact, at least one other contemporaneously ratified compact governing interstate surface waters uses the term “materially.” See Arkansas River Compact Art. IV(D) (1949) (“[T]he waters of the Arkansas river, as defined in Article III, shall not be materially depleted”). Had the drafters of the Compact, or the state and federal legislators that ratified the Compact, intended to include the term “material” or “materially” in the Compact, they easily could have. But they did not, and the Special Master has not read any materiality requirement into the Compact, and should reject Anadarko’s request to do so at this juncture.

Anadarko’s claim that the Compact drafters did not intend the Compact to cover “de minimis or speculative impacts or surface streams,” Anadarko Memo at 11, is demonstrably false. The 1951 Senate Report on the Compact states that “a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, *nor would such a demand have legal standing.*” Sen. Rep. No. 883, 82d Cong., 1st Sess. (1951), at 2 (emphasis added). Thus, the States and Federal Government were clear that the Compact would not allow one State to cause another State to receive a different supply of water.

Additionally, as Anadarko acknowledges, the extent and timing of streamflow depletions caused by CBM groundwater production is disputed by Montana’s and Wyoming’s experts. See Anadarko Memo. at 12 (“Given these numerous factors, there is sure to be significant disputes

and uncertainty as to the timing and appropriate point of diversion from which to determine if any depletion or accretion has occurred.”). Because Mr. Larson and Dr. Schreüder disagree over the amount and timing of surface flow depletions caused by CBM groundwater production, this issue is inappropriate for resolution on a motion for summary judgment.

2. Wyoming has a continuing obligation to ensure that Montana’s pre-1950 rights are fulfilled

Anadarko’s claim that the Compact “resets on an annual year basis” confuses Article V(A) with Article V(B) of the Compact. See Anadarko Memo. at 14. Anadarko quotes Article V(C) for the proposition that “[t]he quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3 and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year.” Montana’s claims, however, do not rest on any alleged violation of Article V(B). Rather, as explained in Montana’s Brief in Opposition to Wyoming’s Motion for Summary Judgment, Montana’s is seeking retrospective and prospective relief for Wyoming’s repeated violation of Article V(A).

Furthermore, the Special Master has already held that “[p]rotection of pre-1950 appropriations under Article V(A) . . . requires Wyoming to ensure on a *constant* basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana.” See FIR at 29 (emphasis added). Through the expert reports of Steve Larson, Montana has provided evidence that post-1950 CBM groundwater production in Wyoming has long-term depletive effects on the stream flows needed to satisfy pre-1950 appropriators in Montana. Thus, even if the Special Master were to find that the Compact contains an implicit “materiality” requirement, Montana has provided evidence that CBM groundwater production in Wyoming depletes surface

water needed to satisfy pre-1950 rights in Montana, and the issue therefore cannot be decided on summary judgment.

C. Whether and How the Signatory States Regulate CBM Groundwater Production is Irrelevant

Anadarko erroneously claims that Wyoming's and Montana's internal regulation of groundwater should impact the interpretation of the Compact, a federal law. Montana responded to this argument in its Brief in Opposition to Wyoming's Motion for Summary Judgment, and incorporates that response by reference here. However, Anadarko's mischaracterization of Montana's treatment of interconnected groundwater requires additional correction.

Anadarko quotes *Ryan v. Quinlan*, 124 P. 512, 516 (1912) for the proposition that "there is no presumption that any subsurface water, in whatever form it may be found, is tributary to any stream." Anadarko Memo. at 8. However, *Ryan v. Quinlan* was later significantly limited by the Montana Supreme Court. In *Perkins v. Kramer*, 423 P.2d 587, 591 (Mont. 1966), a case relating to appropriation of percolating waters, the Court cited *Ryan v. Quinlan* as follows:

"The fact that groundwater is not easily traced in its movement is the reason why this court has said: 'The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams.'

* * *

Modern hydrological innovations have permitted more accurate tracing of groundwater movement. For this reason, we feel that traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists. The use of chemical dyes, chloride solutions, and radioisotopes to trace groundwater migration is well-established. More recent techniques include the use of electric analogs and computer analysis. These tracing methods require the drilling of test wells as well as geological analysis of the water-bearing structure." *Ibid.*

Additionally, the Montana DNRC has “accepted the principle that, absent proof otherwise, all groundwater is ultimately connected to surface water and subject to surface water priorities.” Davis Declaration, ¶ 4.

As explained in the Davis Declaration, CBM groundwater pumping generally is not subject to a permitting requirement in Montana for the reason that it is generally not put to beneficial use, not because it is from deep wells. *Id.*, ¶ 5. Montana’s treatment of CBM produced groundwater is similar to how it would treat a landowner wanting to dewater a mine. Montana does not require a permit to remove water from a mine because in removing the water the landowner would not be putting it to a beneficial use. However, if a CBM producer were to put CBM produced groundwater to beneficial use, then Montana would require that the producer obtain a permit. See Davis Declaration, ¶ 5; c.f. N.M. Stat. Ann. § 72-12A-5 (“Mine dewatering is neither an appropriation of water nor waste, but is governed by the provisions of the Mine Dewatering Act. No water rights may be established solely by mine dewatering.”). Furthermore, where a party seeks a permit to appropriate groundwater for a beneficial use, due to the potential depletion of surface waters, Montana requires proof of legal availability of surface water even where the proposed wells are over 1,000 feet deep. See Preliminary Determination to Grant Permit, *Application for Beneficial Water Use Permit No. 41K 30063379 by Hillcrest Colony*, attached hereto as Exhibit 1; Preliminary Determination to Grant Permit, *Application for Beneficial Water Use Permit No. 40A 30049157*, attached hereto as Exhibit 2.

Moreover, as Anadarko acknowledges, Montana protects senior surface water users in Montana from CBM production impacts by requiring CBM producers to enter into mitigation agreements with the owners of impacted surface and groundwater rights. Anadarko Memo. at 18; Mont. Code. Ann. § 82-11-175. Section 82-11-175 provides:

“(2) Ground water produced in association with a coal bed methane well must be managed in any of the following ways:

- (a) used as irrigation or stock water or for other beneficial uses in compliance with Title 85, chapter 2, part 3;
- (b) reinjected to an acceptable subsurface strata or aquifer pursuant to applicable law;
- (c) discharged to the surface or surface waters subject to the permit requirements of Title 75, chapter 5; or
- (d) managed through other methods allowed by law.

(3)(a) Prior to the development of a coal bed methane well that involves the production of ground water from an aquifer that is a source of supply for appropriation rights or permits to appropriate under Title 85, chapter 2, the developer of the coal bed methane well shall notify and offer a reasonable mitigation agreement to each appropriator of water who holds an appropriation right or a permit to appropriate under Title 85, chapter 2, that is for ground water and for which the point of diversion is within:

- (i) 1 mile of the coal bed methane well; or
- (ii) one-half mile of a well that is adversely affected by the coal bed methane well.

(b) The mitigation agreement must address the reduction or loss of water resources and must provide for prompt supplementation or replacement of water from any natural spring or water well adversely affected by the coal bed methane well. The mitigation agreement is not required to address a loss of water well productivity that does not result from a reduction in the amount of available water because of production of ground water from the coal bed methane well.” Mont. Code Ann. § 82-11-175.

Thus, Montana does regulate the impact of CBM groundwater production.

As explained in Montana’s Brief in Opposition to Wyoming’s Motion for Summary Judgment, the Supreme Court in *Kansas v. Nebraska and Colorado*, No. 126 Orig. rejected the very argument Anadarko and Wyoming advance here regarding the impact of a signatory state’s internal regulation of groundwater on compact interpretation. Neither Anadarko nor Wyoming has presented any reason why the Special Master should not similarly reject this argument here.

D. The Futile Call Doctrine Does not Apply to Current Depletions of a Live Stream

Anadarko argues that curtailing CBM production in Wyoming would provide no benefit to pre-1950 appropriators in Montana. See Anadarko Memo at 22-26. However, whether, in dry water years, the curtailment of post-1950 CBM groundwater production in Wyoming will provide benefits to pre-1950 appropriators in Montana is a disputed material fact inappropriate for resolution on summary judgment. As explained *supra*, Montana and Wyoming's experts disagree on the timing and extent surface flow depletions caused by CBM groundwater production.

Additionally, as long as curtailing CBM production would provide some additional water at the state line, then Montana's call would not be futile. Montana has provided evidence that CBM groundwater production in Wyoming resulted in a net loss of 1,022 acre-feet at the state line over the course of 2001, 2002, 2004, and 2006. See Book Rebuttal Report at 27, Table 3. Thus, Montana has provided evidence that curtailing post-1950 CBM production in Wyoming would provide additional streamflow at the state line, which would benefit pre-1950 appropriators in Montana.

Wyoming is obligated to account for these groundwater depletions in the years in which the depletions impact streamflows in Montana. Wyoming may do this through any manner it chooses, including augmentation, purchasing additional rights, or not irrigating acreage in Wyoming. Whatever method Wyoming chooses, Wyoming has an obligation under the Compact to ensure that the depletive effects caused by CBM groundwater production do not detrimentally impact pre-1950 users in Montana.

E. The Court's Interpretation of the Republican River Compact and the Arkansas River Compact Supports Montana's Position

The Court's precedents concerning compacts governing interstate surface waters uniformly hold that depletion of the compacted surface waters by groundwater pumping must be accounted for under the compact. This is true even where it has been argued that neither of the compacting states regulated groundwater pumping at the time of the compact. As explained by the Solicitor General, while the Republican River Compact and Arkansas River Compact "differ textually and structurally from the Yellowstone River Compact and from one another, they demonstrate that interstate compacts can sensibly be read to encompass groundwater pumping that circumvents the compacts' allocation of surface water." U.S. Br. in Opp., at 28.

Contrary to Anadarko's argument, the Court's interpretation of the Republican River Compact and the Arkansas River Compact fully support Montana's position here. As with the Yellowstone River Compact, the Republican River Compact made no mention of groundwater or wells. The groundwater question was referred to Special Master Vincent L. McKusick, who concluded:

The Compact fully allocates the entire natural stream flow of the Basin undepleted by the activities of man. . . . To *whatever extent* groundwater pumping depletes the stream flow in the Basin, such depletion constitutes consumption of a part of the virgin water supply and must be accounted against the allocated share of the pumping State. The use of a State's allocation through groundwater pumping is permissible, but such pumping is subject to the restrictions imposed by the Compact allocations. In sum, I conclude that *the Compact restricts groundwater consumption to whatever extent it depletes stream flow* in the Republican River Basin. I therefore recommend that Nebraska's Motion to Dismiss be denied. First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) at 1-3 (footnote omitted), *Kansas v. Nebraska*, No. 126, Orig. (2000) (emphasis added).

The Supreme Court denied Nebraska's Motion to Dismiss, thereby rejecting the upstream States' arguments. See *Kansas v. Nebraska and Colorado*, 530 U.S. 1272 (2002); see also *Kansas v.*

Colorado, 543 U.S. 86, 91 (2004) (groundwater pumping held to violate Arkansas River Compact).

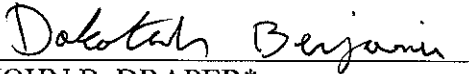
Accordingly, Wyoming's and Anadarko's argument that Compact contains a groundwater loophole that permits post-1950 CBM producers in Wyoming to deplete stream flows needed to satisfy pre-1950 rights in Montana is inconsistent with the purpose of the Yellowstone River Compact and the Court's interpretation of the Republican River Compact and Arkansas River Compact.

CONCLUSION

For the foregoing reasons, Wyoming's Motion for Summary Judgment should be denied.

Respectfully submitted,

TIMOTHY C. FOX
Attorney General of Montana
CORY J. SWANSON
Deputy Attorney General
JEREMIAH D. WEINER
Assistant Attorney General
ANNE YATES
Special Assistant Attorney General
Helena, Montana 59620-1401


JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
DAKOTAH G. BENJAMIN
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
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CERTIFICATE OF SERVICE

I certify as Counsel of Record for the State of Montana that a copy of Montana's Reply to Anadarko Petroleum Corporation's Memorandum on Summary Judgment is being served electronically and by placing the same in the U.S. mail on August 19, 2013, to the following:

Peter K. Michael
Interim Attorney General
Jay Jerde
Christopher M. Brown
Matthias Sayer
Andrew Kuhlmann
James C. Kaste
The State of Wyoming
123 Capitol Building
Cheyenne, WY 82002

James Joseph Dragna
Bingham, McCutchen LLP
355 South Grand Avenue Suite 4400
Los Angeles, CA 90071
jim.dragna@bingham.com

Michael Wigmore
Bingham McCutchen LLP
2020 K Street NW
Washington, DC 20006-1806
michael.wigmore@bingham.com

peter.michael@wyo.gov
jjerde@wyo.gov
chris.brown@wyo.gov
matthias.sayer.wyo.gov
andrew.kuhlmann@wyo.gov
james.kaste@wyo.gov

Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteinglaw.com

Jennifer L. Verleger
Assistant Attorney General
North Dakota Attorney General's
Office
500 North 9th Street
Bismarck, ND 58501-4509
jverleger@nd.gov

Solicitor General of the United States
U. S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5614
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov

James DuBois
United States Department of Justice
Environmental and Natural Resources
Division of Natural Resources Section
999 18th St. #370 South Terrace
Denver, CO 80202
james.dubois@usdoj.gov

Barton H. Thompson, Jr., Special Master
Susan Carter, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 Via Ortega
Stanford, CA 94305-4205
(Original and Three Copies)
susan.carter@stanford.edu

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

Dolton Benjamin for

John B. Draper