

**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**

---

**NOTICE OF PRODUCTION AND ISSUANCE OF SUBPOENAS**

GREGORY A. PHILLIPS  
Attorney General of Wyoming

PETER K. MICHAEL\*  
Chief Deputy Attorney General

JAY JERDE  
Deputy Attorney General  
JAMES KASTE  
Senior Assistant Attorney General  
CHRISTOPHER BROWN  
Senior Assistant Attorney General  
DAVID J. WILLMS  
Senior Assistant Attorney General  
123 State Capitol  
Cheyenne, WY 82002  
(307) 777-6196  
*\*Counsel of Record*

Notice is hereby given that the undersigned has issued Subpoenas for the production of documents to:

Ron & Kathy Hirst  
13 Springdale Ln  
Forsyth, MT 59327-9490

Edward & Mattie Keim  
1550 Tongue River Rd.  
Forsyth, MT 59327

Robert Keim  
1450 Tongue River Rd  
Forsyth, MT 59327

Jonas & Mary Borntrager  
36 Wagon Trail Ln  
Forsyth, MT 59327

Barbara Borntrager/Moses  
36 Wagon Trail Ln  
Forsyth, MT 59327

David Borntrager/Joe  
215 Amish Ln  
Forsyth, MT 59327

Cara Jorgensen  
7 Rose Ln  
Forsyth, MT 59327

Gerald & Laurie Foerderer  
1410 Tongue River Rd  
Forsyth, MT 59327

Mary Keim  
99 Amish Lane  
Forsyth, MT 59327

The time and place for the production are set forth in the Subpoenas, a true copy of which is attached hereto.

This Notice is given pursuant to the provisions of Rules 34(c) and 45(b)(1), Federal Rules of Civil Procedure.

Dated this 2nd day of January, 2013.

THE STATE OF WYOMING



---

James C. Kaste  
Senior Assistant Attorney General  
123 State Capitol  
Cheyenne, WY 82002  
307-777-6946  
james.kaste@wyo.gov

## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the *Notice of Production and Issuance of Subpoenas* was served by electronic mail and by placing the same in the United States mail, postage paid, this 2nd day of January, 2013.

Jeanne S. Whiteing  
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Helena, MT 59620-1401  
[janders@mt.gov](mailto:janders@mt.gov)

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Jeffrey Wechsler  
Montgomery & Andrews  
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[jwechsler@montand.com](mailto:jwechsler@montand.com)

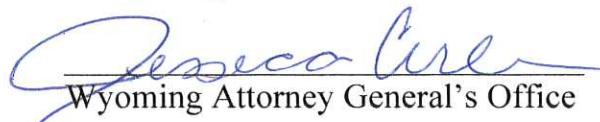
Jennifer Verleger  
North Dakota Attorney General's Office  
500 North Ninth Street  
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[jverleger@nd.gov](mailto:jverleger@nd.gov)

James J. Dubois  
United States Department of Justice  
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Division of Natural Resources Section  
999 18th St. #370 South Terrace  
Denver, CO 80202  
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Solicitor General of the United States  
US Department of Justice  
950 Pennsylvania Avenue, Room 5614  
Washington, DC 20530-0001  
[SupremeCtBriefs@usdoj.gov](mailto:SupremeCtBriefs@usdoj.gov)

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Washington, DC 20006-1806  
[Michael.wigmore@bingham.com](mailto:Michael.wigmore@bingham.com)

Barton H. Thompson Jr.  
Susan Carter, Assistant  
Jerry yang and Akiko Yamazaki  
Environment & Energy Building, MC-4205  
473 via Ortega  
Stanford, CA 94305-4205  
[Susan.carter@stanford.edu](mailto:Susan.carter@stanford.edu)

  
Wyoming Attorney General's Office

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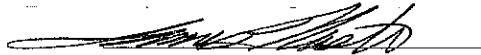
You are hereby commanded to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below:

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 Resource Division Attn: James Kaste, 123 State Capitol, Cheyenne, WY 82002, for receipt on or before January 25, 2013.

DATED this 2nd day of January, 2013

Issuing Officer's Signature

A handwritten signature in black ink, appearing to read "James C. Kaste", written over a horizontal line.

James C. Kaste

An attorney, as officer of the Court, may issue and sign a Subpoena on behalf of a Court in which the attorney is authorized to practice (Rule 45, Federal Rules of Civil Procedure)

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PROOF OF SERVICE

---

Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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DECLARATION OF SERVER

---

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
Address of Server

## STATEMENT REQUIRED BY FED. R. CIV. P. 45(a)(1)(A)(iv)

### (c) PROTECTING A PERSON SUBJECT TO A SUBPOENA.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

### (d) DUTIES IN RESPONDING TO A SUBPOENA.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *CONTEMPT.* The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

## **EXHIBIT "A"**

1. All documents in your possession, custody, or control which reflect your water rights, including rights to surface water, groundwater, or stored water.

2. All documents in your possession, custody, or control which reflect the acres you had under irrigation, the means of diversion to those acres, and the diversions of water you made to those acres during the years 1987-1989, 2000-2004 and 2006, including the dates when those diversions occurred, how much water was diverted, and the source of supply for those diversions whether they were from surface water, groundwater, or storage.

3. All documents in your possession, custody, or control reflecting communications with anyone from the Montana Department of Natural Resources and Conservation, with anyone from the Montana Attorney General's Office, with any other attorney or employee of the State of Montana or its agencies, with any other water user or irrigator, with any water commissioner, or with any other person regarding your actual water use and/or right to use water during the years 1987-1989, 2000-2004 and 2006, including communications that related to the use of water by neighboring irrigators in either the State of Montana or the State of Wyoming or communications related to this lawsuit.

4. All documents in your possession, custody, or control reflecting any calls or requests for regulation that may have been made by you or any other water user during the years 1987-1989, 2000-2004 and 2006 on any source of supply in which you have a water right.

5. All documents in your possession, custody, or control reflecting any action or agreement by or between yourself and any other water user(s) to share a shortage of water with or without regard to priority during the years 1987-1989, 2000-2004 and 2006.



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Senior Assistant Attorney General

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(307) 777-6196

*\*Counsel of Record*

To: Edward & Mattie Keim  
1550 Tongue River Rd.  
Forsyth, MT 59327

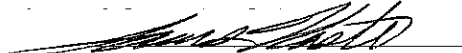
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PROOF OF SERVICE

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Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
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Signature of Server

\_\_\_\_\_  
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PROOF OF SERVICE

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Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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DECLARATION OF SERVER

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I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
Address of Server



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(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *CONTEMPT.* The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

## **EXHIBIT "A"**

1. All documents in your possession, custody, or control which reflect your water rights, including rights to surface water, groundwater, or stored water.

2. All documents in your possession, custody, or control which reflect the acres you had under irrigation, the means of diversion to those acres, and the diversions of water you made to those acres during the years 1987-1989, 2000-2004 and 2006, including the dates when those diversions occurred, how much water was diverted, and the source of supply for those diversions whether they were from surface water, groundwater, or storage.

3. All documents in your possession, custody, or control reflecting communications with anyone from the Montana Department of Natural Resources and Conservation, with anyone from the Montana Attorney General's Office, with any other attorney or employee of the State of Montana or its agencies, with any other water user or irrigator, with any water commissioner, or with any other person regarding your actual water use and/or right to use water during the years 1987-1989, 2000-2004 and 2006, including communications that related to the use of water by neighboring irrigators in either the State of Montana or the State of Wyoming or communications related to this lawsuit.

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No. 137, ORIGINAL

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IN THE  
SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, Defendants

---

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

---

**SUBPOENA**

GREGORY A. PHILLIPS  
Attorney General of Wyoming

PETER K. MICHAEL\*  
Chief Deputy Attorney General

JAY JERDE  
Deputy Attorney General  
JAMES KASTE  
Senior Assistant Attorney General  
CHRISTOPHER BROWN  
Senior Assistant Attorney General  
DAVID J. WILLMS  
Senior Assistant Attorney General  
123 State Capitol  
Cheyenne, WY 82002  
(307) 777-6196

\**Counsel of Record*

To: Jonas & Mary Borntrager  
36 Wagon Trail Ln  
Forsyth, MT 59327

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DATED this 2nd day of January, 2013

Issuing Officer's Signature

A handwritten signature in black ink, appearing to read "James C. Kaste", written over a horizontal line.

James C. Kaste

An attorney, as officer of the Court, may issue and sign a Subpoena on behalf of a Court in which the attorney is authorized to practice (Rule 45, Federal Rules of Civil Procedure)

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PROOF OF SERVICE

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Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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DECLARATION OF SERVER

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I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
Address of Server

## STATEMENT REQUIRED BY FED. R. CIV. P. 45(a)(1)(A)(iv)

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#### (2) *Command to Produce Materials or Permit Inspection.*

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(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

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(i) disclosing a trade secret or other confidential research, development, or commercial information;

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(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

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Attorney General of Wyoming

PETER K. MICHAEL\*  
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JAY JERDE  
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Senior Assistant Attorney General  
CHRISTOPHER BROWN  
Senior Assistant Attorney General  
DAVID J. WILLMS  
Senior Assistant Attorney General  
123 State Capitol  
Cheyenne, WY 82002  
(307) 777-6196  
*\*Counsel of Record*



To: Barbara Borntrager/Moses  
36 Wagon Trail Ln  
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DATED this 2nd day of January, 2013

Issuing Officer's Signature



James C. Kaste

An attorney, as officer of the Court, may issue and sign a Subpoena on behalf of a Court in which the attorney is authorized to practice (Rule 45, Federal Rules of Civil Procedure)

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PROOF OF SERVICE

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Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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DECLARATION OF SERVER

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I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
Address of Server

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**SUBPOENA**

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*\*Counsel of Record*

To: David Borntrager/Joe  
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PROOF OF SERVICE

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Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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DECLARATION OF SERVER

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I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
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STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, Defendants

---

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

---

**SUBPOENA**

GREGORY A. PHILLIPS  
Attorney General of Wyoming

PETER K. MICHAEL\*  
Chief Deputy Attorney General

JAY JERDE  
Deputy Attorney General  
JAMES KASTE  
Senior Assistant Attorney General  
CHRISTOPHER BROWN  
Senior Assistant Attorney General  
DAVID J. WILLMS  
Senior Assistant Attorney General  
123 State Capitol  
Cheyenne, WY 82002  
(307) 777-6196  
*\*Counsel of Record*

To: Cara Jorgensen  
7 Rose Ln  
Forsyth, MT 59327

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 Resource Division Attn: James Kaste, 123 State Capitol, Cheyenne, WY 82002, for receipt on or before January 25, 2013.

DATED this 2nd day of January, 2013

Issuing Officer's Signature

A handwritten signature in black ink, appearing to read "James C. Kaste", written over a horizontal line.

James C. Kaste

An attorney, as officer of the Court, may issue and sign a Subpoena on behalf of a Court in which the attorney is authorized to practice (Rule 45, Federal Rules of Civil Procedure)

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PROOF OF SERVICE

---

Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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DECLARATION OF SERVER

---

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
Address of Server

## STATEMENT REQUIRED BY FED. R. CIV. P. 45(a)(1)(A)(iv)

### (c) PROTECTING A PERSON SUBJECT TO A SUBPOENA.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

### (d) DUTIES IN RESPONDING TO A SUBPOENA.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *CONTEMPT.* The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

## **EXHIBIT "A"**

1. All documents in your possession, custody, or control which reflect your water rights, including rights to surface water, groundwater, or stored water.

2. All documents in your possession, custody, or control which reflect the acres you had under irrigation, the means of diversion to those acres, and the diversions of water you made to those acres during the years 1987-1989, 2000-2004 and 2006, including the dates when those diversions occurred, how much water was diverted, and the source of supply for those diversions whether they were from surface water, groundwater, or storage.

3. All documents in your possession, custody, or control reflecting communications with anyone from the Montana Department of Natural Resources and Conservation, with anyone from the Montana Attorney General's Office, with any other attorney or employee of the State of Montana or its agencies, with any other water user or irrigator, with any water commissioner, or with any other person regarding your actual water use and/or right to use water during the years 1987-1989, 2000-2004 and 2006, including communications that related to the use of water by neighboring irrigators in either the State of Montana or the State of Wyoming or communications related to this lawsuit.

4. All documents in your possession, custody, or control reflecting any calls or requests for regulation that may have been made by you or any other water user during the years 1987-1989, 2000-2004 and 2006 on any source of supply in which you have a water right.

5. All documents in your possession, custody, or control reflecting any action or agreement by or between yourself and any other water user(s) to share a shortage of water with or without regard to priority during the years 1987-1989, 2000-2004 and 2006.

No. 137, ORIGINAL

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IN THE  
SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA, Plaintiff

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Attorney General of Wyoming

PETER K. MICHAEL\*  
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JAMES KASTE  
Senior Assistant Attorney General  
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Senior Assistant Attorney General  
DAVID J. WILLMS  
Senior Assistant Attorney General  
123 State Capitol  
Cheyenne, WY 82002  
(307) 777-6196  
*\*Counsel of Record*

To: Gerald & Laurie Foerderer  
1410 Tongue River Rd  
Forsyth, MT 59327

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 Resource Division Attn: James Kaste, 123 State Capitol, Cheyenne, WY 82002, for receipt on or before January 25, 2013.

DATED this 2nd day of January, 2013

Issuing Officer's Signature



James C. Kaste

An attorney, as officer of the Court, may issue and sign a Subpoena on behalf of a Court in which the attorney is authorized to practice (Rule 45, Federal Rules of Civil Procedure)



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PROOF OF SERVICE

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Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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DECLARATION OF SERVER

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I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
Address of Server

## STATEMENT REQUIRED BY FED. R. CIV. P. 45(a)(1)(A)(iv)

### (c) PROTECTING A PERSON SUBJECT TO A SUBPOENA.

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(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

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(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

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**SUBPOENA**

GREGORY A. PHILLIPS  
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123 State Capitol  
Cheyenne, WY 82002  
(307) 777-6196  
*\*Counsel of Record*

To: Mary Keim  
99 Amish Lane  
Forsyth, MT 59327


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James C. Kaste

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PROOF OF SERVICE

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Served Date: \_\_\_\_\_ Place: \_\_\_\_\_

Served on (Print Name) \_\_\_\_\_ Manner of Service: \_\_\_\_\_

Served by (Print Name) \_\_\_\_\_ Title: \_\_\_\_\_

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Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
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