

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 ISSUANCE OF SUBPOENA DUCES TECUM TO TESTIFY AT A
DEPOSITION IN A CIVIL ACTION**

Notice is hereby given that the undersigned has issued a Subpoena for the
deposition and production of documents to:

Keith Kerbel
Bureau of Reclamation
2900 4th Avenue
North Billings, MT 59107

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

Dated this 9 day of April, 2012.

THE STATE OF WYOMING



Peter K. Michael
Counsel of Record
Chief Deputy Attorney General
123 Capitol Building
Cheyenne, WY 82002
307-777-6946
peter.michael@wyo.gov

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Notice of Issuance of Subpoena Duces Tecum to Testify at a Deposition in a Civil Action was served by electronic mail and by placing the same in the United States mail, postage paid, this 9th day of April, 2012.

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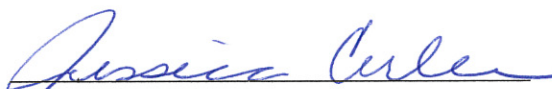
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Wyoming Attorney General's Office

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SPECIAL MASTER

SUBPOENA DUCES TECUM TO TESTIFY AT A DEPOSITION
IN A CIVIL ACTION

To: Keith Kerbel
Bureau of Reclamation
2900 4th Avenue
North Billings MT 59107

COMES NOW the Defendant, State of Wyoming, and pursuant to Rule 45, Federal Rules of Civil Procedure, herewith commands you to appear for a deposition to be taken at **9:00 am on April 23, 2012**, at the DNRC Regional Office, 1371 Rimtop Drive, Billings, MT 59105-1978.

Mr. Kerbel is instructed to bring with him to the deposition and make available for inspection and/or copying, any and all documents, files or notes in his **private** possession

or control relating to the administration of water rights on the Tongue, Powder and Little Powder Rivers and their tributaries, or relating to the Yellowstone River Compact, but only if they arise out of his former employment by the State of Montana. Mr. Kerbel is **not** required to bring any documents relating to the administration of water rights on the Tongue, Powder and Little Powder Rivers and their tributaries, or relating to the Yellowstone River Compact, which documents arise out of his employment by the United States of America or any other employment other than his employment by the State of Montana. Mr. Kerbel is further instructed to bring any materials he has reviewed in preparation for his deposition.

The deposition will be taken before a court reporter authorized to administer oaths and will be used for all purposes permitted under the Federal Rules of Civil Procedure and Case Management Plan No. 1. (See attached Deposition Notice)

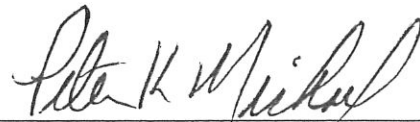
The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 4/9/12

CLERK OF COURT

Signature of Clerk or Deputy Clerk

OR



Attorney's Signature

The name, address, e-mail and telephone number of the attorney representing The State of Wyoming, who issues or requests this subpoena, are:

Peter K. Michael, Chief Deputy Attorney General, 123 Capitol Building, Cheyenne, WY 82002, (307) 777-6946, peter.michael@wyo.gov

Proof of Service

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for Kieth Kerbel was received by me on _____.

I served the subpoena by delivering a copy to the named individual as follows:

_____ on (date) _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of \$50.

I declare under penalty of perjury that this information is true.

Date: _____

Server's Signature

Printed name and title

Server's Address

FEDERAL RULE OF CIVIL PROCEDURE 45 (C), (D), AND (E) (EFFECTIVE 12/1/07)

(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;

(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

(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.

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).

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BEFORE THE HONORABLE BARTON H. THOMPSON, JR.
SPECIAL MASTER

NOTICE OF DEPOSITION DUCES TECUM OF KEITH KERBEL

Please take notice that the Defendant State of Wyoming will take the following deposition in this case:

On April 23, 2012, beginning at 9:00 a.m., counsel for Defendants will take the deposition of Keith Kerbel at DNRC Regional Office, 1371 Rintop Drive, Billings, MT 59105-1978.

Mr. Kerbel is instructed to bring with him to the deposition and make available for inspection and/or copying, any and all documents, files or notes in his **private** possession

or control relating to the administration of water rights on the Tongue, Powder and Little Powder Rivers and their tributaries, or relating to the Yellowstone River Compact, but only if they arise out of his former employment by the State of Montana. Mr. Kerbel is **not** required to bring any documents relating to the administration of water rights on the Tongue, Powder and Little Powder Rivers and their tributaries, or relating to the Yellowstone River Compact, which documents arise out of his employment by the United States of America or any other employment other than his employment by the State of Montana. Mr. Kerbel is further instructed to bring any materials he has reviewed in preparation for his deposition.

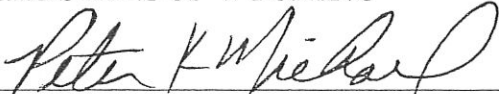
The deposition will be taken before a court reporter authorized to administer oaths and will be used for all purposes permitted under the Federal Rules of Civil Procedure and Case Management Plan No. 1.

You are invited to attend and cross-examine. Arrangements are being made to have the deposition available by telephone for those who prefer to attend via telephone.

The deposition shall continue from hour to hour and day to day until complete, subject to the restrictions set forth in Case Management Plan No. 1. Defendant currently estimates that the deposition should last about eight hours.

Dated this 9th day of April, 2012.

THE STATE OF WYOMING



Peter K. Michael
Counsel of Record
Chief Deputy Attorney General
123 Capitol Building
Cheyenne, WY 82002
307-777-6946

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Notice of Deposition Duces Tecum of Keith Kerbel was served by electronic mail and by placing the same in the United States mail, postage paid, this 9th day of April, 2012.

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