

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 RESPONSE TO MOTION TO IMPOSE TIME LIMITS
ON THE PRESENTATION OF EVIDENCE AT TRIAL**

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October 10, 2013

The State of Wyoming seeks to limit presentation of relevant evidence at trial through a prejudicial last-minute motion to impose a fifty-four hour time limit on each side. The motion should be denied.

Wyoming's motion is predicated on Montana's list of likely, but still tentative, witnesses that Montana gave to Wyoming. As a courtesy, Montana provided Wyoming a tentative witness order and estimation of time in order to assist Wyoming's trial planning. Montana was not required to provide such a list. Wyoming then took the list, revised the amount of time estimated by Montana, added its own witnesses, and attached the list to its Motion to the Special Master, without the consent of Montana. This is a much different use of the list than Montana was given to believe would be made. Attached is Montana's original list which shows the range of times that Montana currently estimates for each witness and the range of dates in which the witness might testify.

Montana disagrees with Wyoming's characterization of the case and its issues. This is a case in the original jurisdiction of the United States Supreme Court, a controversy "between sovereigns which involve[s] issues of high public importance." *United States v. State of Texas*, 339 U.S. 707, 715 (1950). This is not simply a breach of contract case; it involves an interpretation and construction of federal law. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) ("congressional consent transforms an interstate compact within this Clause into a law of the United States" (internal citations omitted)). It is a complicated dispute between two sovereigns that has been brewing for decades. Wyoming has resisted Montana's efforts to obtain the water to which it is entitled for over thirty years; trial proceedings to resolve the dispute should not be arbitrarily limited to a certain number of hours at the request of one party. The issues to be

resolved have been set forth in Montana's Pretrial Memorandum and need not be repeated here. Wyoming's characterization is not correct and should not be used in resolution of this motion.

Wyoming's motion appears to be part of its strategy, along with its seven motions in limine, to limit the record and control and restrict the presentation of evidence. It is simply improper. First, in original jurisdiction cases, the Court "has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. at 715; *Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (Court will not proceed until all the facts are before it). Fifty-four hours total, including cross-examination and redirect, will not result in full development of the facts. Montana's current list of witnesses includes thirty-five witnesses. There are over one thousand exhibits, including 427 listed by Wyoming and 71 joint exhibits. Wyoming's estimates are incredibly unrealistic; it has listed, for instance, about a dozen witnesses as taking less than one hour.

Wyoming's argument that time limits are routine is not supported by the rule or cases cited to the Special Master. First, as noted above, this is not a federal district court case, and therefore, Fed. R. Civ. P. 16 is only a guide in this proceeding. Sup. Ct. R. 17(2). Second, the cases cited do not support a routine imposition of time limits similar to the one proposed by Wyoming. For example, in *Evans v. Port Authority of New York and New Jersey*, 246 F.Supp. 2d 343 (S.D.N.Y. 2003), the time limits were imposed when the trial court was faced with a plaintiff's counsel who had previously failed to comply with discovery and had disregarded the rules, and the absence of a joint pretrial order. Furthermore, the court stated that the time limitation was flexible and the court would consider application to expand the time allowed. The Seventh Circuit has stated:

[W]e disapprove of the practice of placing rigid hour limits on a trial. The effect is to engender an unhealthy preoccupation with the clock, evidenced in this case by

the extended discussion between counsel and the district judge at the outset of the trial over the precise method of time-keeping – a method that made the computation of time almost as complicated as in a professional football game.

Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 473 (7th Cir. 1984).

As previously set forth in Montana's objection to Wyoming's informal request for time limits, there are additional reasons why the motion should be denied. Montana's estimate for its case-in-chief is seven to ten days for the presentation of direct testimony (excluding cross-examination and re-direct) as set forth in its Final Pre-Trial Memorandum, at 4, filed on September 23, 2013. Seven to ten days with six hours of testimony each day is forty-two to sixty hours for the presentation of direct testimony in the case-in-chief. Fifty-four hours, including cross-examination, redirect examination and rebuttal, is not sufficient.

Wyoming has previously rejected other suggestions that would have streamlined the proceedings, including the use of pre-filed testimony and resolving objections to exhibits prior to trial. Wyoming also objected to early submission of exhibits to the Special Master that would have sped up the proceedings.

Moreover, if Wyoming were going to demand a limit on time for testimony it should have done so last June when the States submitted their stipulated form of Case Management Order No. 11. The fifty-four hour suggestion, made little more than one week before trial, is too late. It would be unfair to Montana to impose such a stringent limitation at this point in the final preparation for trial.

Limitations on presentation of evidence at trial of this nature and in this circumstance would be extraordinary. The demands of the federal district court dockets that might justify "establishing a reasonable limit on the time allowed to present evidence" (Fed. R. Civ. P.

16(c)(2)(O)) at a pretrial conference in certain cases are not evident here. Wyoming has provided no reason for the Special Master to take this extraordinary action.

In any event, Montana will proceed prudently and expeditiously and has no intention of prolonging the proceeding unnecessarily.

For the foregoing reasons, Wyoming's motion to impose time limits should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Montana's Response to Motion to Impose Time Limits on the Presentation of Evidence at Trial was served electronically, and by U.S. Mail on October 10, 2013, to the following:

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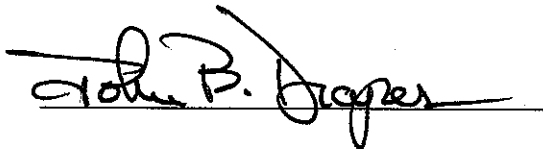
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I further certify that all parties required to be served have been served.



John B. Draper

STATE OF MONTANA
DRAFT WITNESS ORDER
(Draft – October 8, 2013)
(Tentative – Subject to change)

	Witness	Estimated Time for Testimony¹	Total Hours (cumulative)	Estimated Range of Possible Dates for Testimony²
1.	John Tubbs	1 hour	1	Oct. 16
2.	Dale Book	12 – 14 hours	13 – 15	Oct. 16-21
3.	Chuck Dalby	1 – 2 hours	14 – 17	Oct. 21
4.	Tim Davis	3 – 4 hours	17 – 21	Oct. 21 – 22
5.	Millie Heffner	1 – 2 hours	18 – 23	Oct. 22
6.	Mike Roberts	1 – 2 hours	19 – 25	Oct. 22 – 23
7.	Jack Stults	3 – 4 hours	22 – 29	Oct. 22 – 23
8.	Keith Kerbel	2 – 3 hours	24 – 32	Oct. 23 – 24
9.	Gary Fritz	1 – 2 hours	25 – 34	Oct. 23 – 24
10.	Kevin Smith	5 – 7 hours	30 – 41	Oct. 23 – 25
11.	Art Hayes	5 – 7 hours	35 – 48	Oct. 24 – 28
12.	Gordon Aycock	4 – 5 hours	39 – 53	Oct. 25 – 29
13.	Chris Tweeten	1 – 2 hours	40 – 55	Oct. 25 – 30
14.	Jason Whiteman	1 – 2 hours	41 – 57	Oct. 25 – 30
15.	Doug Littlefield	2 – 3 hours	43 – 60	Oct. 28 – 31
16.	Rich Moy	3 – 4 hours	46 – 64	Oct. 28 – 31
17.	Mike Whitaker ³	3 – 4 hours	49 – 68	Oct. 29 – Nov. 1
18.	Carmine LoGuidice	3 – 4 hours	52 – 72	Oct. 29 – Nov. 12
19.	Bill Knapp	3 – 4 hours	55 – 76	Oct. 30 – Nov. 12
20.	Dave Schroeder	3 – 4 hours	58 – 80	Oct. 30 – Nov. 13
21.	Pat Boyd	3 – 4 hours	61 – 84	Oct. 31 – Nov. 14
22.	John Engels	1 – 2 hours	62 – 86	Oct. 31 – Nov. 14
23.	Tana Ankney	1 – 2 hours	63 – 88	Oct. 31 – Nov. 14
24.	Greg Benzel	1 – 2 hours	64 – 90	Oct. 31 – Nov. 15
25.	Tom Koltiska	1 – 2 hours	65 – 92	Oct. 31 – Nov. 15
26.	Rick Allen	3 – 4 hours	68 – 96	Nov. 1 – 18
27.	Alan Fjell	1 – 2 hours	69 – 98	Nov. 1 – 18
28.	Charles Gephart	2 – 3 hours	71 – 101	Nov. 13 – 18
29.	Jay Nance	1 – 2 hours	72 – 103	Nov. 12 – 19

¹ Includes estimates for cross and re-direct. Cross was estimated to be approximately the same amount of time as direct.

² Assumes approximately 6 hours of testimony per day.

³ Assumes that Wyoming will cover all testimony for Whitaker, LoGuidice, Knapp, Schroeder, Boyd, Engels, Ankney, Benzel, and Koltiska during Montana's case-in-chief, and will not re-call these witnesses.

30.	Roger Muggli	3 - 4 hours	75 - 107	Nov. 12 - 19
31.	Charles Kepper	1 - 2 hours	76 - 109	Nov. 12 - 20
32.	Les Hirsch	1 - 2 hours	77 - 111	Nov. 12 - 20
33.	John Hamilton	1 - 2 hours	78 - 113	Nov. 13 - 20
34.	Art Compton	1 - 2 hours	79 - 115	Nov. 13 - 21
35.	Steve Larson	3 - 4 hours	82 - 119	Nov. 13 - 21