

In the
Supreme Court of the United States

STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants

OFFICE OF THE SPECIAL MASTER

**SUPPLEMENTAL MEMORANDUM OPINION OF THE SPECIAL MASTER ON
WYOMING'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT
(NOTICE REQUIREMENT FOR DAMAGES)**

Having reviewed Montana's Supplemental Evidence, dated December 7, 2012, I conclude, consistent with my Memorandum Opinion of September 28, 2012, that Wyoming's motion for partial summary judgment should be denied for the years 2000, 2001, 2002, 2003, 2004, and 2006.

Based on a review of the Supplemental Evidence, however, I conclude that Montana has not currently demonstrated that there is a genuine issue of material fact regarding the years 1988, 1989, 1990. There are two reasons for this conclusion.

First, my ruling in my earlier Memorandum Opinion for the years 1988, 1989, and 1990 relied on the deposition testimony of Keith Kerbel. As I noted in my Memorandum Opinion, Mr. Kerbel's testimony was often vague and unclear regarding relevant communications in these years. I therefore denied Wyoming's motion for partial summary judgment for these years "subject to Montana providing more specific information regarding Mr. Kerbel's communications with Wyoming in those years." Memorandum Opinion, p. 24. Although my Memorandum Opinion called for the more specific information "supported by affidavit or declaration of competent witnesses," Montana has not provided any affidavit or declaration of Mr. Kerbel clarifying or supplementing his deposition testimony. I therefore must assume that Mr. Kerbel

cannot clarify or expand on his prior testimony. Instead, Montana's supplemental evidence for these years consists entirely of the December 7, 2012 Declaration of Richard Moy.

Second, the Declaration of Mr. Moy does not provide specific facts showing that Montana provided Wyoming with adequate notice in any of the years 1988, 1989, or 1990. As Montana has noted, I have stated that the notice does not need to take any particular form, but there are minimum standards. As I stated in my Memorandum Opinion, the "focus should be on whether the notice serves the core function of a call – *placing the upstream holder of water rights on notice that a downstream senior is not receiving adequate water under its right and that the upstream user must therefore reduce its diversions in order to allow additional water to flow downstream for the senior's use.*" Memorandum Opinion, p. 13. The information in such a notice "would include notification that Montana is not getting sufficient water to meet its pre-1950 appropriative rights and a request that Wyoming reduce its post-1950 uses of water in order to allow more water to flow to Montana." *Id.*, p. 14. Mr. Moy's Declaration states in relatively broad, non-specific terms that, during the years in question, he "personally informed Wyoming water officials that Montana was not receiving sufficient water to satisfy its pre-1950 water rights." Moy Declaration ¶ 24; see also *id.* ¶ 35. However, he does not also state anywhere in his declaration that he requested Wyoming to reduce its post-1950 uses of water in these years in order to allow more water to flow to Montana.

It is worth distinguishing two types of situations. In the first situation, a Montana official is working with Wyoming to try to develop a long-term methodology for implementing the Compact and, as part of this process, emphasizes that developing a methodology is important because Montana has not always received sufficient water to satisfy its pre-1950 water rights. In the second situation, a Montana official tells a Wyoming official that Montana is currently not receiving sufficient water to satisfy its pre-1950 water rights, and with the intent to get water flowing now to its users, asks Wyoming what it can do to deliver additional water pursuant to the Contract. The first situation would not constitute sufficient notice. The second might, depending on the particular facts. As noted, Mr. Moy's testimony does not state that he asked Wyoming to deliver additional water pursuant to the Compact in 1988, 1989, or 1990 or even to inquire of Wyoming whether it was using water in those years that it should instead have delivered to Montana under the Compact.

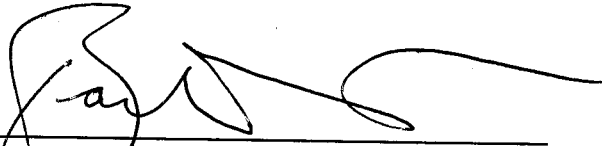
While Wyoming would be entitled to partial summary judgment for 1988, 1989, and 1990 based on the current record, Montana in a letter delivered to me subsequent to yesterday's conference call has offered to clarify Mr. Moy's testimony specifically on the question of whether his communications with Wyoming officials in these years constituted adequate calls or requests for water. Montana's letter is unclear as to whether Mr. Moy, in such a clarification, would state that he "considered his communications to be a verbal call or demand to curtail water use in Wyoming" (as the letter states) or whether he would provide more detail regarding the content of the communications that would show that the communications actually met the notice criteria that I set out in my

earlier Memorandum Opinion. The question is what Mr. Moy said, not what he "considered his communications to be."

There is a limit to how many times I will permit Montana to supplement its evidence on Wyoming's motion. That said, I do not want to preclude Montana from pursuing damages or other relief for 1988, 1989, or 1990 if there is indeed a genuine issue of material fact as to whether its officials provided adequate notice to Wyoming in those years. I therefore will provide Montana, if it wishes, until Wednesday, December 19, 2012, to supplement the current declaration of Richard Moy.

To avoid any misunderstanding, any supplementation must address the deficiencies noted above. It also should (1) clarify the differences, if any, between the communications referred to in paragraphs 24 and 35, (2) clarify whether the information in paragraph 36 refers only to the communications in paragraphs 35 or also to those in paragraph 24, and (3) provide any additional specifics that Mr. Moy can provide as to which Wyoming officials were involved in the communications referenced in paragraphs 24 and 35. To the degree that Mr. Moy does not remember specifically the Wyoming officials who were involved in his communications, he should state the limit of his knowledge and provide as much information as possible regarding the positions of the officials involved.

Date: December 14, 2012



Barton H. Thompson, Jr.
Special Master

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