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

MEMORANDUM OPINION REGARDING

WYOMING'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(MONTANA'S SUPPLEMENTAL EVIDENCE)

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December 22, 2012

MEMORANDUM OPINION REGARDING

WYOMING'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(MONTANA'S SUPPLEMENTAL EVIDENCE)

This opinion is the second stage in an examination of whether the periods of time for which Montana can seek damages or other relief in this case can be narrowed, through partial summary judgment, based on when Montana provided appropriate notices to Wyoming. In the first stage, I concluded that Wyoming is entitled to partial summary judgment precluding Montana from claiming damages or other relief for the years 1952-1986, 1990-1999, and 2005 because there is no genuine dispute that Montana did not provide necessary notice to Wyoming in those years. Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgment, Sept. 28, 2012 (hereinafter "Memorandum Opinion"), p. 43. I now conclude that there is no genuine dispute that Montana did not provide appropriate notice to Wyoming (1) prior to May 1 in the years 1987-1989 and 2001-2003, and (2) on any date prior to the end of the irrigation season in 2000. At trial, Montana will be allowed to claim damages or other relief in these years for periods prior to these dates only if and to the extent that Montana can prove that it acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies. See id., pp. 34-35.

I. Procedural History

Wyoming initiated the current process when it filed a renewed motion for partial summary judgment on June 15, 2012. Wyoming's motion sought to preclude Montana from claiming any damages or other relief for the years 1952-2003 and 2005 on the ground that those "were years in which Montana did not notify Wyoming that Montana's pre-1950 appropriators

were not receiving adequate water from the Tongue and Power Rivers." Wyoming's Motion for Partial Summary Judgment, Sept. 12, 2011, p. 1. Montana also sought "partial summary judgment precluding Montana from claiming damages or other relief for those days in the years 2004 and 2006 that preceded Montana's notifications in those years." Id.

In my Memorandum Opinion of September 28, 2012, I concluded that Wyoming's motion for partial summary judgment, seeking to bar Montana from seeking damages or other relief for lack of any notice, should be denied for the years 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006. Memorandum Opinion, pp. 20-33. For all other years, I concluded that Wyoming is entitled to partial summary judgment precluding Montana from claiming damages or other relief for violations of Article V(A). Id., p. 43.

While I concluded that partial summary judgment was not appropriate for the years 1987-1989, 2000-2003, 2004, and 2006, I also found that the testimony of Montana officials was often vague or non-existent regarding the dates of notices that Montana claimed it provided to Wyoming in the years 1987-1989 and 2000-2003. Id., p. 33. To ensure that Wyoming was "not required to defend against damages for periods in which it did not receive adequate notice and to guarantee an orderly trial," I therefore ordered Montana to provide by affidavit or declaration of competent witnesses additional information regarding notices provided to Wyoming during these years. Id. This information included the dates of the notices, "as specifically as the witness can recall." Id. While I originally ordered that the information be provided on or before December 1, 2012, I later extended the filing date until December 7, 2012.

Montana submitted its supplemental evidence in response to my order on December 7. The supplemental evidence included the Second Declaration of Richard M. Moy, dated December 7, 2012, and supporting exhibits ("Second Moy Declaration"); the Declaration of Jack

Stults, dated December 7, 2012, and supporting exhibits ("Stults Declaration"); and excerpts of the depositions of Gordon W. "Jeff" Fassett, Sue Lowry, and Keith Kerbel. I subsequently allowed Montana to clarify the Second Moy Declaration, and in response, Montana submitted the Third Declaration of Richard M. Moy, dated December 19, 2012 ("Third Moy Declaration").

II. Montana's Supplemental Evidence

Richard Moy and Jack Stults, in their declarations submitted as part of Montana's supplemental evidence, state that they or other Montana officials provided the following notices to Wyoming during the years 1987-1989 and 2000-2003.

1987-1989

1. According to Mr. Moy, he had communications with various Wyoming water officials (George Christopulos, Jeff Fassett, Lou Allen, John Shields, Mike Whitaker, and Sue Lowry) in the years 1987-1989 in which he placed them "on notice that Montana was not receiving adequate water under the Compact to satisfy Montana's Article V(A) rights, and that Wyoming was therefore required to reduce its diversions, storage, and water use to allow additional water to flow downstream for Montana." See Second Moy Declaration, ¶¶ 24, 27; Third Moy Declaration, ¶¶ 11-12. Mr. Moy also states that he informed Wyoming officials that "Montana was not receiving sufficient water to satisfy Montana's pre-1950 water rights on the Tongue River, including direct flow rights and the Tongue River Reservoir," and that he "requested Wyoming to reduce its post-1950 uses of water in these years in order to allow more water to flow into Montana." See Second Moy Declaration, ¶ 35; Third Moy Declaration, ¶¶ 17, 22. According to Mr. Moy, these various communications occurred during the irrigation season, specifically in "May or June." Third Moy Declaration, ¶¶ 15, 22.

2000

2. According to Mr. Stults, Montana frequently received complaints or input from Montana irrigators in the year 2000. Declaration of Jack Stults, ¶ 17. Whenever he received these complaints, he "would raise the issue of water shortage in Montana with Wyoming water officials, including Pat Tyrell and Sue Lowry." Id. "Without intending to trigger any legal action or litigation," he "made it clear to Wyoming officials, including Pat Tyrrell and Sue Lowry that Wyoming needed to regulate their water uses to ensure that more water would cross the state line into Montana." Id., ¶ 18. According to Mr. Stults, these communications were "during the irrigation season, when it was apparent that Wyoming was using water and Montana irrigators were suffering." Id.

3. According to Mr. Stults, Keith Kerbel, under Mr. Stults' supervision, also "had similar discussions with Mike Whitaker, the Wyoming Division II Supervisor" in "the spring and summer" of 2000. Id., ¶ 21.

4. According to Mr. Stults, Mr. Moy also had discussions with Wyoming officials in 2000 "regarding water shortages in Montana and the need for action by Wyoming." Id., ¶ 22.

2001

5. According to Mr. Stults, Montana again received complaints or input from Montana irrigators in the year 2001. Declaration of Jack Stults, ¶ 17. Whenever he received these complaints, he "would raise the issue of water shortage in Montana with Wyoming water officials, including Pat Tyrell and Sue Lowry." Id. "Without intending to trigger any legal action or litigation," he "made it clear to Wyoming officials, including Pat Tyrrell and Sue Lowry that Wyoming needed to regulate their water uses to ensure that more water would cross the state line into Montana." Id., ¶ 18. According to Mr. Stults, these communications were

"during the irrigation season, when it was apparent that Wyoming was using water and Montana irrigators were suffering." Id.

6. According to Mr. Stults, Keith Kerbel, under Mr. Stults' supervision, also "had similar discussions with Mike Whitaker, the Wyoming Division II Supervisor" in "the spring and summer" of 2001. Id., ¶ 21.

7. Mr. Stults also states that he "personally observed Mr. Kerbel request action from Wyoming officials to get water to Montana on more than one occasion." Id. ¶ 21. Mr. Kerbel "believe[s] these occurred during the irrigation season" of 2001. Id.

8. According to Mr. Stults, Mr. Moy also had discussions with Wyoming officials in 2001 "regarding water shortages in Montana and the need for action by Wyoming." Id., ¶ 22.

9. Mr. Moy states that he believes he complained to Wyoming in 2001, when Montana was unable to fill the Tongue River Reservoir, that Wyoming was not receiving sufficient water to satisfy its pre-1950 water rights as a result, in Montana's view, of Wyoming's overuse under the Compact. Second Moy Declaration, ¶ 35. Although Mr. Moy's most recent declaration only explicitly addresses the years 1987-1989 (since these were the years about which I had expressed concern), the declaration clarifies that his complaints included requests that Wyoming reduce its post-1950 uses to allow more water to flow into Montana. Third Moy Declaration, ¶ 22. According to Mr. Moy, his complaint or complaints in 2001 were made "most likely in May or June." Second Moy Declaration, ¶ 36; see also Third Moy Declaration, ¶ 22.

2002

10. According to Mr. Stults, Montana again received complaints or input from Montana irrigators in the year 2002. Declaration of Jack Stults, ¶ 17. Whenever he received these complaints, he "would raise the issue of water shortage in Montana with Wyoming water

officials, including Pat Tyrell and Sue Lowry." Id. "Without intending to trigger any legal action or litigation," he "made it clear to Wyoming officials, including Pat Tyrrell and Sue Lowry that Wyoming needed to regulate their water uses to ensure that more water would cross the state line into Montana." Id., ¶ 18. According to Mr. Stults, these communications were "during the irrigation season, when it was apparent that Wyoming was using water and Montana irrigators were suffering." Id.

11. Mr. Stults also states that he "personally notified Wyoming officials including Pat Tyrrell and Sue Lowry of water shortages in the Tongue and Powder River basins in Montana in May and June of 2002 ." Id. ¶ 20. His "intent was to make a verbal request for water under the Compact," and he believes that he communicated that intent. Id. According to Mr. Stults, this notification took place "in May and June." Id.

12. According to Mr. Stults, Keith Kerbel, under Mr. Stults' supervision, also "had similar discussions with Mike Whitaker, the Wyoming Division II Supervisor" in "the spring and summer" of 2002. Id., ¶ 21.

13. Mr. Stults also states that he "personally observed Mr. Kerbel request action from Wyoming officials to get water to Montana on more than one occasion." Id. Mr. Kerbel "believe[s] these occurred during the irrigation season" in 2002. Id.

14. According to Mr. Stults, Mr. Moy also had discussions with Wyoming officials in 2002 "regarding water shortages in Montana and the need for action by Wyoming." Id., ¶ 22.

15. Mr. Moy states that he believes he complained to Wyoming in 2002, when Montana was unable to fill the Tongue River Reservoir, that Wyoming was not receiving sufficient water to satisfy its pre-1950 water rights as a result, in Montana's view, of Wyoming's overuse under the Compact. Second Moy Declaration, ¶ 35. Although Mr. Moy's most recent declaration only

explicitly addresses the years 1987-1989 (since these were the years about which I had expressed concern), the declaration clarifies that his complaints included requests that Wyoming reduce its post-1950 uses to allow more water to flow into Montana. Third Moy Declaration, ¶ 22. According to Mr. Moy, his complaint or complaints in 2002 were made "most likely in May or June." Second Moy Declaration, ¶ 36; see also Third Moy Declaration, ¶ 22.

2003

16. According to Mr. Stults, Montana once again received complaints or input from Montana irrigators in the year 2003. Declaration of Jack Stults, ¶ 17. Whenever he received these complaints, he "would raise the issue of water shortage in Montana with Wyoming water officials, including Pat Tyrell and Sue Lowry." Id. "Without intending to trigger any legal action or litigation," he "made it clear to Wyoming officials, including Pat Tyrrell and Sue Lowry that Wyoming needed to regulate their water uses to ensure that more water would cross the state line into Montana." Id., ¶ 18. According to Mr. Stults, these communications were "during the irrigation season, when it was apparent that Wyoming was using water and Montana irrigators were suffering." Id.

17. Mr. Stults also states that he "personally notified Wyoming officials including Pat Tyrrell and Sue Lowry of water shortages in the Tongue and Powder River basins in Montana in May and June of … 2003." Id. ¶ 20. His "intent was to make a verbal request for water under the Compact," and he believes that he communicated that intent. Id. According to Mr. Stults, this notification took place "in May and June." Id.

18. According to Mr. Stults, Keith Kerbel, under Mr. Stults' supervision, also "had similar discussions with Mike Whitaker, the Wyoming Division II Supervisor" in "the spring and summer" of 2003. Id., ¶ 21.

19. According to Mr. Stults, Mr. Moy also had discussions with Wyoming officials in 2003 "regarding water shortages in Montana and the need for action by Wyoming." Id., ¶ 22.

III. Wyoming's Notice of Objection

As a preliminary matter, Wyoming objects to my decision to permit Montana to clarify the Second Moy Declaration, calling it "unprecedented" and "tantamount to a third bite at the apple." Notice of Objection and Request for Clarification, December 17, 2012, p. 2. There was no third bite at the apple. Montana's original motion sought to preclude Montana from seeking any damages or other relief for the years 1952-2003 and 2005 on the ground that Montana provided no notice to Wyoming in those years. Wyoming's Motion for Partial Summary Judgment, Sept. 12, 2011, p. 1. In my original Memorandum Opinion, I concluded that, although some evidence was vague or ambiguous, Montana's initial submission demonstrated a genuine issue of material fact as to whether it provided notice in the years 1987-1989 and 2000-2003, and I therefore denied Wyoming's motion to preclude Montana from claiming any damages or other relief in those years. Memorandum Opinion, pp. 24, 27-29, 31-32. My conclusions were based on the evidence that Montana submitted in its July opposition to Wyoming's motion.[1]

The purpose of my order for additional information was to further pin down the dates and other details of the notices that Montana claimed to provide. This was intended to assist all parties in their preparation for trial and, ideally, to reduce the periods at issue in each year. Recognizing that a fuller record might show that no genuine issue of material fact actually existed for a given year, I also reserved the right to change my original ruling and grant partial summary judgment in favor of Wyoming after seeing the new submission. Id., pp. 34, 44.

[1] Even if I had concluded that Montana had not adequately supported its alleged notices for the years in issue, Federal Rule of Civil Procedure 56(e)(1) provides that courts may give a party who has not provided proper support the opportunity to do so.

Montana's supplemental evidence for the years 1987-1989 initially raised exactly such doubts, but because Montana offered to clarify the relevant declaration, I granted Montana the opportunity to do so. As I noted in my Supplemental Memorandum Opinion, I did not wish to preclude Montana from pursuing damages or other relief for the years 1987-1989 if there were, as I originally concluded, a genuine issue of material fact for those years.

IV. Earlier Holding Confirmed

Having reviewed the Second Moy Declaration, the Third Moy Declaration, and the Stults Declaration, I conclude that these declarations support my earlier holding that Wyoming's motion for partial summary judgment, seeking to preclude Montana from claiming any damages or other relief, should be denied for the years 1987-1989 and 2000-2003. In each of these years, there is a genuine issue of material fact as to whether Montana provided appropriate notice to Wyoming.

V. Dates at Issue in 1987-1989 and 2000-2003

Wyoming requests that, in each of the years for which I have denied partial summary judgment for Wyoming, I specify the dates that are in issue based on the evidence as to when Montana officials say that they provided notices. Notice of Objection and Request for Clarification, December 17, 2012, p. 2. As noted earlier, an important goal in ordering Montana to provide additional information was to try to narrow the dates at issue in these years – by determining periods during which there is no genuine dispute that Montana had not provided notice to Wyoming. Anticipating that witnesses might not always be able to provide specific dates for notices that took place a decade or more ago, I also suggested an approach for resolving any uncertainty:

> If an official cannot recall when he provided notice in a given year, the assumption will be that the notice was given at the end of the year, effectively precluding Montana from

> seeking damages for that year. If an official recalls only that the notice was provided at some point during a broad period (e.g., during a two-month stretch of time), the assumption will be that the notice was given at the end of that period.

Memorandum Opinion, p. 34.

Montana, however, objects that the use of such an assumption in a summary judgment proceeding is inappropriate. Montana's Response to Wyoming's Request for Clarification, Dec. 19, 2012, pp. 2-3. According to Montana, such an assumption "requires an inference that an act occurred at the end of a period instead of the beginning," in "direct contradiction to the basic standard set by Rule 56, which requires all inferences to be resolved in favor of the non-movant on summary judgment." Id., p. 2.

A. The Appropriate Summary Judgment Standard

Montana is correct that "on a motion for summary judgment all reasonable inferences must be drawn in favor of the non-moving party, *regardless of who bears the ultimate burden of proof*." Douglas v. York County, 360 F.3d 286, 290 (1st Cir. 2004) (emphasis added). But the Supreme Court also has emphasized that the non-moving party must "designate specific facts showing there is a genuine issue for trial." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). As a result, the rule that inferences must be drawn in favor of the non-moving party does not mean that a court must assume that "general averments embrace the 'specific facts'" needed to avoid summary judgment. Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990). Overly general or conclusory allegations in an affidavit or declaration may not be sufficient to show a genuine issue of material fact, even if they could be read to incorporate the specific facts needed to make such a showing. Id. at 888-889.

The question of when notices may have been provided in this case shows the logic of this rule. Taken to the extreme, Montana's position would favor highly conclusory averments over

more specific averments. If a declarant stated that Montana officials provided notice to Wyoming "during the last fifty years," making all inferences in favor of the moving party would require the Court to find that there was a genuine issue of material fact as to whether Montana provided notice to Wyoming throughout the entire 50-year period. As *Lujan* emphasizes, there is a limit to how far inferences in favor of the non-moving party can be stretched. Thus in *Lujan*, the court did not have to assume, for purposes of summary judgment, that the declarant used "unspecified portions of an immense tract of territory." Id. at 889.

Of course, "there is some room for debate as to how 'specific'" a declaration must be. Id. at 889. The question in this case is how specific the date ranges in Montana's declarations must be in order to permit the conclusion that the range embraces all dates within that range. A statement that notice was given during the "irrigation season" would appear to be too broad and unspecific to justify concluding that there is a genuine issue of material fact that notice was provided at some point prior to the end of the irrigation season. Such a declaration is similar in many respects to the averments involved in *Lujan*. While the averments in *Lujan* were geographically over-broad, an averment that notice was given during the "irrigation season" would seem temporally over-broad. This would seem particularly true where an averment is lacking details more generally and where there is little or no other evidence to support the averment. See *Lujan*, 497 U.S. at 889 (emphasizing that the summary-judgment standard is "assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory").

Whether an averment is sufficiently specific depends on context. Where the issue is whether Montana gave Wyoming notice in a particular year and therefore can claim damages or other relief for that year, an averment that notice was given during the irrigation season of the

year is sufficiently specific. But where the issue is when notice was given during a particular year, thus determining the period for which Montana can claim damages, an averment that notice was given at some point during the year or even during the "irrigation season" would seem too general and broad to justify drawing an inference that notice was provided at the beginning of the irrigation season – or at any specific point during the irrigation season other than the end.

On the other hand, where an averment regarding a notice or other critical event is limited to a relatively small window of time, the averment would seem specific enough to justify drawing reasonable inferences in favor of the non-moving party. Cf. Calkins v. Palmer, 785 P.2d 183 (Kan. App. 1989) (where plaintiff was uncertain whether her fall occurred on February 11 or 12, 1986, and her lawsuit was filed on February 12, 1988, the trial court was correct in denying summary judgment under a two-year statute of limitations). Although it would be nice if witnesses could always remember specific dates, averments involving a relatively limited period of time would seem sufficient to meet the Rule 56 standard; unfortunately, memories often dim over time.

Many of the averments in this case fall in the middle – e.g., that notice was provided in "May or June." Although an argument could be made that even this range is overly broad, I have concluded that on balance such averments are sufficiently specific in this case to justify drawing inferences in favor of Montana, the non-moving party. Thus, contrary to my suggestion in the earlier Memorandum Opinion, I am now convinced that averments involving date ranges of one or two months should be read for purposes of partial summary judgment as encompassing all dates within them for purposes of summary judgment.

Asking whether Montana has shown that there is a genuine dispute that it provided adequate notice by a specific date is helpful in showing the differences in the various averments.

For example, if the question is posed as to whether Montana has shown that there is a genuine dispute whether it provided notice by June 30 in a given year, a general averment that it provided notice at some point in the "irrigation season" would seem insufficiently specific. On the other hand, given the inferences that are normally made in favor of the non-moving party, an averment that notice was provided in "June and July" or even "June or July" arguably demonstrates a genuine dispute on the issue.

B. Factual Conclusions

1. 1987-1989 & 2001-2003

Montana has provided declarations involving sufficiently specific date ranges in 1987, 1988, 1989, 2001, 2002, and 2003 to justify drawing inferences in favor of Montana as the non-moving party:

- In 1987, 1988, and 1989, Mr. Moy states that he provided notice during "May or June." See ¶ 1 above in section II of this opinion.
- In 2001, Mr. Moy states that he provided notice during "May or June." See ¶ 9 above.
- In 2002, Mr. Moy states that he provided notice during "May or June," and Mr. Stults states that he provided notice during "May and June." See ¶¶ 11 & 15 above.
- In 2003, Mr. Stults states that he provided notice during "May and June." See ¶ 17 above.

The only question for these years is whether there is any other averments that would justify assuming an earlier notice. Montana points to Mr. Stult's declaration that Keith Kerbel, under Mr. Stults' supervision, had "similar discussions with Mike Whitaker, the Wyoming Division II Supervisor" in the "spring and summer" of 2000 and 2001. Stults Declaration ¶ 21; see Montana's Response to Wyoming's Request for Clarification, supra, p. 4. However, the

reference to "similar discussions" is vague and not sufficient to establish adequate notice to Wyoming. Mr. Stult's declaration also would appear to be hearsay as to the provision of notice by Mr. Kerbel to Wyoming. Finally, like an averment that a conversation took place during the "irrigation season," an averment that discussions took place in the "spring and summer" is too general and broad to justify drawing inferences as to specific dates in favor of Montana.[2]

For 1987, 1988, 1989, 2001, 2002, and 2003, drawing all reasonable inferences in favor of Montana calls for concluding that there is no genuine dispute that Montana did not provide Wyoming with appropriate notice prior to May in each year. At trial, Montana will be entitled to present evidence that it provided adequate notice to Wyoming beginning in May. As discussed in prior opinions, Montana can seek damages for earlier periods "only if and to the extent that Montana acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies." Memorandum Opinion, pp. 34-35. Montana bears the burden of proof at trial of proving that it provided adequate notice, the timing of that notice, and if relevant, that it acted with due diligence in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies. The purpose of this ruling is simply to narrow the periods in each year for which Montana can claim at trial that it provided adequate notice.

2. 2000

The only explicit references in Montana's supplemental declarations to discussions in 2000 between Montana and Wyoming officials are in the Stults Declaration. According to Mr. Stults:

[2] Montana also calls for considering the deposition testimony of Mr. Kerbel. Montana's Response to Wyoming's Request for Clarification, supra, p. 4 n.2. Because of uncertainties in some of the depositions, I had ordered that Montana provide its supplemental information by affidavit or declaration of competent witnesses. Memorandum Opinion, p. 33. Interestingly, Montana did not provide a declaration for Mr. Kerbel. In any case, Mr. Kerbel's testimony did not specify when any relevant notice that he may have provided in these years actually occurred.

- The technical committee of the Compact Commission met in 2000. Stults Declaration, ¶ 10. However, Mr. Stults does not state that there was any call or notice during these discussions.
- In 2000, Mr. Stults had discussions with Wyoming about "irrigated acreage, water rights, and water uses." Id., ¶ 11. However, Mr. Stults again does not state that such discussions involved any call or notice or, if they did, when they occurred.
- Beginning in 1998 or 1998, the "Wyoming State Engineer Jeff Fassett initiated regular field trips to promote mutual communication between the States" (generally in June) at which there were discussions of "water availability, water management, and water uses," as well as "water management, water availability, and shortages, reservoir operations, Wyoming regulation of water rights, and other pertinent matters." Id., ¶ 13. However, Mr. Stults does not state whether and when such a field trip occurred in 2000. Even assuming that a field trip occurred in 2000, Mr. Stults also does not state that he made a call or notice during any such field trip.
- In 2000, Mr. Moy and his staff expressed concerns about changes in irrigation methods and other unspecified issues at the annual Commission meeting and "throughout the irrigation season." Id., ¶ 15. However, Mr. Stults again does not state that there was any call or notice during these discussions
- In 2000, Mr. Stults and his staff monitored water availability in Montana, and they "frequently received complaints or input from irrigators." When he received letters and complaints, he would "raise the issue of water shortage in Montana with Wyoming water officials." Id., ¶ 17. He also made it clear that Wyoming needed to regulate its water use, and these communications "occurred during the irrigation season, when it was

apparent that Wyoming was using water and Montana irrigators were suffering." Id., ¶ 18. While Mr. Stults gives an example of complaint letters in 2002 (id., ¶ 17), he does not provide a specific date in 2000 when he raised the issue of water shortages or made it clear to Wyoming that it needed to regulate its water use.

- Mr. Stults states that Mr. Kerbel had "similar discussions" with Mike Whitaker, the Wyoming Division II Supervisor, in the spring and summer of 2000. Id., ¶ 21. As noted earlier, the reference to "similar discussions" is vague and not sufficient to establish adequate notice to Wyoming. Mr. Stult's declaration would appear to be hearsay as to the provision of notice by Mr. Kerbel to Wyoming. Finally, as discussed above, the reference to "spring and summer" is similar in breadth to "irrigation season."
- Finally, Mr. Stults states that Mr. Moy had discussions "during the period of 2000, 2001, 2002, and 2003 with Wyoming officials regarding water shortages in Montana and the need for action by Wyoming." Id., ¶ 22. Mr. Stults provides no details regarding the date and timing of Mr. Moy's conversations.

Read in the light most favorable to Wyoming, Mr. Stults' declaration states that he provided notice to Wyoming during the irrigation season of 2000. As explained earlier, such a broad averment does not justify assuming that Montana provided notice prior to the end of the irrigation season. Such an assumption would "presume" a fact that is not present in Mr. Stults' declaration. *Lujan*, 497 U.S. at 889. It is worth emphasizing that (1) Montana has had more than sufficient time to determine more specifically when any notices were provided in 2000, and (2) my Memorandum Opinion specifically advised that the declarations on the timing of the notices should be "as specific as possible" (Memorandum Opinion, p. 34).

Wyoming suggests that I should set the date on which Montana will be presumed to have provided notice as "September 30, 2000, or the end of the irrigation season that year, whichever is later." Notice of Objection and Request for Clarification, supra, p. 2. However, as Montana points out, there is nothing in the record that would justify me using September 30, 2000 as a cutoff date for purposes of partial summary judgment. See Montana's Response to Wyoming's Request for Clarification, supra, pp. 2-3.

In its response to Wyoming's Request for Clarification, Montana claims that "Mr. Moy stated that during the irrigation season in May or June of 2000, 2001, 2002, and 2003 he informed Wyoming that Montana was water short and that the two States 'needed to administer the Compact.'" Montana's Response to Wyoming's Request for Clarification, supra, p. 4. Neither the Second Moy Declaration nor the Third Moy Declaration, however, refer explicitly to the year 2000. Montana cites to paragraphs 27-30 and 36 of the Second Moy Declaration and paragraph 22 of the Third Moy Declaration. However, these paragraphs, alone or in combination, do not establish that Mr. Moy provided adequate notice to Wyoming at any point in 2000.

- In paragraph 27 of his second declaration, Mr. Moy states that he and his staff had "discussions with Wyoming about the fact that Montana was water short and that we needed to administer the Compact to remedy that problem," but he also states that he does "not recall exact dates or times."
- In paragraph 28, he states that USGS records reflect that 2000 was a "particularly dry year."
- Paragraph 29 references no dates.

- In paragraph 30, Mr. Moy states that, "When the opportunity arose, I communicated my concerns to Wyoming in water short years," but he does not say whether any such opportunity arose in 2000 (or, if so, when any communication occurred).
- Finally, in paragraph 36, Mr. Moy states that his "communications to Wyoming were during spring meetings, the irrigation season, or other times when it was apparent that the Reservoir was having trouble filling, most likely in May or June," but as noted, there is no statement elsewhere in the declaration that there was any communication in 2000.
- In paragraph 22 of his third declaration, Mr. Moy states that (1) paragraph 36 of his second declaration refers to communications referenced in paragraphs 24 and 35 and (2) he provided Wyoming officials with notice in May or June of 1987, 1988, and 1989. There is no reference to 2000 or to paragraphs 27-30 of the second declaration.

A complete review of Montana's supplemental evidence thus shows that, for purposes of partial summary judgment and under the analysis described earlier, Montana should be presumed to have provided notice to Wyoming in the year 2000 no earlier than the end of the irrigation season.

V. Summary of Rulings on Partial Summary Judgment

To summarize my conclusions in this opinion and in my prior Memorandum Opinion:

1. Wyoming is entitled to partial summary judgment precluding Montana from claiming damages or other relief for the violation of Article V(A) in the years 1952-1986, 1990-1999, and 2005.
2. There is no genuine dispute that Montana did not provide appropriate notice to Wyoming prior to May 1 in the years 1987-1989 and 2001-2003. At trial, Montana will be allowed to claim damages or other relief in these years for periods prior to these dates only if and

to the extent that Montana can prove that it acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies.

3. There is no genuine dispute that Montana did not provide appropriate notice to Wyoming on any date prior to the end of the irrigation season in 2000. At trial, Montana will be allowed to claim damages or other relief in 2000 for periods prior to the end of the irrigation season only if and to the extent that Montana can prove that it acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies.
4. There is no genuine dispute that Montana provided appropriate notice to Wyoming of pre-1950 deficiencies on May 18, 2004 and July 28, 2006.

In reaching these conclusions, I have carefully considered the arguments of both sides and reviewed in detail the materials submitted in response both to the original motion and my order for supplemental evidence. However, if either Montana or Wyoming believes that I have either missed or misconstrued any relevant precedent or evidence, it may provide me with that information in a letter brief on or before Monday, December 31, 2012.

Finally, although Wyoming originally sought "partial summary judgment precluding Montana from claiming damages or other relief for those days in the years 2004 and 2006 that preceded Montana's notifications in those years," none of the briefs on Wyoming's renewed motion for partial summary judgment has addressed the question of whether Montana provided oral notice to Wyoming in those years prior to their letter notices. At our next status conference, which is currently scheduled for Monday, January 14, 2013, I would like to discuss whether any additional action is needed to reach a final determination of that portion of Wyoming's motion and, if so, the procedure to be followed.