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 OF THE SPECIAL MASTER ON WYOMING'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGEMENT (NOTICE REQUIREMENT FOR DAMAGES)

BARTON H. THOMPSON, JR.
Special Master
Jerry Yang & Akiko Yamazaki Environment & Energy Building
473 Via Ortega
MC: 4205
Stanford, California 94305

September 28, 2012

MEMORANDUM OPINION OF THE SPECIAL MASTER ON WYOMING'S MOTION FOR PARTIAL SUMMARY JUDGEMENT (NOTICE REQUIREMENT FOR DAMAGES)

On September 12, 2001, Wyoming filed a motion for partial summary judgment seeking to bar Wyoming from claiming damages for years in which it did not notify Wyoming that insufficient water was reaching Montana to meet its pre-1950 Montana appropriations. July 29, 2011 Hearing Transcript, p. 45, line 21 to p. 47, line 15. Wyoming's motion specifically sought to:

> preclude the State of Montana from claiming damages or other relief based on Section V(A) of the Yellowstone River Compact for the years 1952-2003, and 2005, which were years in which Montana did not notify Wyoming that Montana's pre-1950 appropriators were not receiving adequate water from the Tongue and Powder Rivers. Wyoming also seeks 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.

Wyoming's Motion for Partial Summary Judgment, Sept. 12, 2011, p. 1.

Subsequent to a hearing on the motion, I issued a memorandum opinion concluding that, pursuant to the provisions of the Yellowstone River Compact, "for periods when data was not available to Wyoming regarding the extent of Montana's pre-1950 appropriations, Montana generally should not be entitled to damages for a violation of Article V(A) if it did not provide notice to Wyoming that insufficient water was reaching Montana to satisfy those pre-1950 appropriations." Memorandum Opinion of the Special Master on Wyoming's Motion for Partial Summary Judgment (Notice Requirements for Damages, Dec. 20, 2011, pp. 3-4 (hereinafter "2011 Memorandum Opinion").[1] I also concluded that "Montana's notice to Wyoming did not have to take any particular shape or form" nor come from any particular Montana official. Id., p.

[1] For ease of reference, I have incorporated some portions of my prior memorandum opinion into this opinion. Where there is any inconsistency between this and the prior memorandum opinion, this opinion replaces the earlier opinion.

7. "The key requirement is simply that Montana have placed Wyoming on adequate notice that Montana was not receiving sufficient water to meet the requirements of Article V(A) of the Compact." Id. I also concluded that there were several potential exceptions to the general notice rule that could exclude Montana from providing notice in years in which (1) it would be futile to provide notice because Wyoming had made it clear that it would not alter its water use, (2) Wyoming had other sufficient reason to believe or know that Montana was receiving insufficient water to satisfy its pre-1950 appropriative rights, or potentially (3) Wyoming prevented the adoption of a rule or process for enforcing Montana's rights under Article V(A) without the need for a call or notice. Id. at 8-9 & n.10.

In addressing Wyoming's argument that Montana should not recover damages for any those days in a water year prior to receiving notice, I also concluded that Montana's notice did not need to be instantaneous. Id. at 8. "So long as Montana acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies, the notice typically should permit Montana to seek damages for the entire year." Id.

Because discovery had not yet begun, I decided that it was premature to rule on Wyoming's motion. Instead, I gave Wyoming permission to file a renewed motion for partial summary judgment on or before June 15, 2012. Wyoming filed its renewed motion on June 15. The motion has been fully briefed, and a hearing was held in Denver, Colorado, on July 27, 2012.

I. THE SUMMARY JUDGMENT STANDARD

The general standards in a summary judgment motion are frequently recited and well established. While not binding, the Federal Rules of Civil Procedure "serve as useful guides" in original actions. Nebraska v. Wyoming, 507 U.S. 584, 590 (1993). Under Rule 56, summary

judgment is appropriate only "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. The moving party has the initial burden to show that there is an "absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has made that case, "the burden then shifts to the nonmoving party, who must offer evidence of specific facts that is sufficient to raise a 'genuine issue of material fact.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

In deciding whether the moving party is entitled to summary judgment, the record "must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); see also Bancoklahoma Mortgage Corp. v. Capital Title Co., 194 F.3d 1089, 1098 (1999). Where the evidence requires inferences to be drawn, all such inferences "must be made in favor of the non-movant." Davis v. City of Chicago, 841 F.2d 186, 189 (7th Cir. 1988). "Summary judgment … is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." Hunt v. Cromartie, 526 U.S. 541, 553 (1999). "If reasonable minds could differ as to the import of the evidence, summary judgment should not be granted." Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 250 (1986).

The obligation of the non-moving party to establish a genuine issue of material fact, however, is not trivial. As discussed later, a central question in this case is the required specificity of the evidence that Montana must show to defeat Wyoming's motion for partial summary judgment. Much of Montana's evidence regarding what, if any, notice it provided Wyoming in any given year suffers from an unfortunate lack of specificity. Rule 56(e) provides that an adverse party's response to a motion for summary judgment, by affidavit or other permissible evidence, "must set forth *specific facts* showing that there is a genuine issue for

trial." Fed. R. Civ. P. 56(e) (emphasis added). Any affidavits or other evidence, moreover, must be based on the personal knowledge of the affiant. Id.

As already noted, where affidavits or other evidence requires inferences to be drawn, all such inferences "must be made in favor of the non-movant." Davis v. City of Chicago, 841 F.2d 186, 189 (7th Cir. 1988). "Inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts, and from underlying facts on which there is conflicting direct evidence but which the judge must assume may be resolved at trial in favor of the non-moving party." T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987), citing First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 285-86 (1968).. That said, inferences must be "reasonable." *Davis*, supra, at 189; *T.W. Electrical Serv.*, supra, at 631. "Clearly, there must be some limit on the extent of the inferences that may be drawn in the nonmoving party's favor from whatever 'specific facts' it sets forth; if not, Rule 56(e)'s requirement of 'specific facts' would be entirely gutted*" T.W. Electrical Serv.,* supra, at 631. Furthermore, the "mere possibility that a factual dispute may exist, without more, is an insufficient basis upon which to justify denial of a motion for summary judgment." Id.

Several decisions help shed light on the application of these standards and emphasize that the non-moving party cannot rely merely on vague, conclusory statements. Particularly informative is the United States Supreme Court's decision in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). A principal issue in *Lujan* was the plaintiff's standing to challenge reclassification of 4500 acres of public lands in Wyoming. The affidavit of one of the plaintiff's members, Peterson, claimed that she used lands "in the vicinity." Id. at 846. The Court of Appeals held that this was sufficient to withstand summary judgment. Noting that the affidavit was at a minimum ambiguous regarding the specific lands she used, the Court of

Appeals concluded that the ambiguity "means that the District Court was obliged to resolve any factual ambiguity in favor of [plaintiff], and would have had to assume, for the purposes of summary judgment, that Peterson used the 4500 affected acres." Id. at 889, quoting 878 F.2d at 431. A majority of the Supreme Court disagreed, emphasizing the importance of specificity and not simply assuming critical facts:

> That is not the law. In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth specific facts showing that there is a genuine issue for trial." The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. ….
>
> At the margins there is some room for debate as to how "specific" must be the "specific acts" that Rule 56(e) requires in a particular case. But … Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory ….

Id. at 888-889.

Two summary-judgment cases from the Seventh Circuit Court of Appeals also furnish useful light on the obligation of the non-moving party. Both dealt with claimed property rights in employment. In Hadley v. County of Du Page, 715 F.2d 1238 (7th Cir. 1983), the plaintiff argued that he had "de facto" tenure in his Du Page County job because, according to his complaint, the county had a policy of not firing employees absent a hearing. In response to the county's summary judgment motion, the plaintiff submitted his own affidavit asserting that the county had an unwritten but existing policy." Id. at 1243. The Seventh Circuit found the assertion insufficient to defeat summary judgment. First, the affidavit failed to "substantiate" the assertion "in any way." Id. Second, the affidavit failed to provide the type of "specific facts" demanded by Rule 56(e); according to the Court of Appeals, the plaintiff's affidavit was

> nothing more than a mere allegation that these policies existed at the time of his termination. It appears to this court that Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.

Id.

In *Davis v. City of Chicago*, supra, the question on summary judgment was similarly whether the plaintiff had a legitimate property claim in his position as a rodent-control foreman with the City of Chicago. Plaintiff based his claimed property right on an "alleged long-standing custom and policy that probationary foremen would not be fired except for cause that arose during the term of their probation." 841 F.2d at 188. In an effort to defeat summary judgment on this issue, the plaintiff submitted his own affidavit, in which he stated, "It is a longstanding custom and policy of the City of Chicago's Department of Streets and Sanitation that a foreman on probationary status will be fired only for cause arising during the probationary period itself." Id. at 189. The Court of Appeals again found this one statement insufficient to defeat summary judgment:

> This one-sentence statement fails to give the source or derivation of this alleged custom, any indication of when it came into being or how long it existed, any proof that other probationary employees were aware of it or had relied on it, any explanation for why such a long-standing custom would not have been alluded to explicitly in the 1984 statute, or examples of any other situation where it had been utilized. In short, while Davis need not allege any particular one of these facts, he does have the burden of establishing *some* fact in his affidavit which would create a genuine issue as to the existence of a property interest. As this Court has stated previously, 'Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted."

Id., citing *Hadley v. County of Du Page*, supra, at 1243.

II. THE NOTICE REQUIREMENT

As several special masters have noted, "there is a 'special drama' when one state sues another invoking the original jurisdiction of the Supreme Court." Kansas v. Colorado, Third Report of the Special Master, Aug. 2000, at 10, quoting retired Chief Justice Vincent McCusick. That "drama is surely heightened" when money damages are claimed. Id. Nonetheless, the Supreme Court has held that monetary or in-kind damages can be appropriate where a state violates its obligation to supply water to another state under an interstate compact. Kansas v. Colorado, 533 U.S. 1, 7 (2001); Texas v. New Mexico, 482 U.S. 124, 128 (1987). Such damages do not run afoul of the Eleventh Amendment. *Kansas v. Colorado*, 533 U.S. at 7. If damages could not be awarded, there would be no remedy for a state's prior defaults under a compact. *Texas v. New Mexico*, supra, at 128. Downstream states like Montana would be at the total mercy of upstream states like Wyoming.

It does not matter, moreover, that the upstream state was not aware of its obligations or even disagreed that it had an obligation. In *Texas v. New Mexico*, the Special Master found that the upstream state, New Mexico, had acted in good faith and could not have even determined its exact obligation until late in its original action before the Supreme Court. According to the Court, however,

> Good-faith differences about the scope of contractual undertakings do not relieve either party from performance. A court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for. There is often a retroactive impact when courts resolve disputes about the scope of a promisor's undertaking; parties must perform today or pay damages for what a court decides they promised to do yesterday and did not. In our view, New Mexico cannot escape liability for what has been adjudicated to be past failures to perform its duties under the Compact.

482 U.S. at 129 (citations omitted).

Despite the award of damages in *Kansas v. Colorado* and *Texas v. New Mexico*, however, judgments "requiring the payment of money between states are rare, and historically have involved only liquidated amounts." Kansas v. Colorado, Third Report of the Special Master, Aug. 2000, at 10. The policies underlying the Eleventh Amendment, although not directly applicable in original jurisdiction cases such as this one, also counsel for care in determining whether a state is obligated to pay damages to another state for violation of an interstate water compact. The instant motion therefore requires a careful balance between ensuring that Montana receives an appropriate remedy for any years in which it did not receive sufficient water for pre-1950 appropriations in violation of Article V(A)'s requirements and that Wyoming is not forced to pay damages in years in which it did not receive adequate notice.

A. What Notice, If Any, Was Montana Required to Provide?

My earlier 2011 Memorandum Opinion addressed the question of what, if any, notice Montana was required to provide Wyoming in order to maintain a later action for damages under Article V for failing to curtail pre-January 1, 1950 water uses in Wyoming that prevented adequate water reaching Montana to satisfy its pre-1950 appropriations. As I explained in that opinion, the Compact does not explicitly spell out a procedure for enforcing the requirements of Article V(A). Montana and Wyoming, moreover, have argued for years not only over the substantive requirements of the Compact but also regarding the appropriate means of implementing and enforcing its provisions.

The overall structure of the Compact would suggest that the various water entitlements of Article V might be enforceable without the need for any type of notice or "call" from Montana when it is receiving inadequate water. As discussed in previous rulings, Article V(A) is merely the first level in a three-level hierarchy of water rights. See First Interim Report of the Special

Master, Feb. 10, 2010, pp. 18-19. The highest priority under the Compact goes to pre-1950 appropriative rights. Compact, Art. V(A). Once these rights are satisfied, water goes next to "provide supplemental water supplies" for pre-1950 right holders. Id., art. V(B), 1st clause. Finally, the "remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes" according to percentages set out for each tributary. Id., art. V(B), 3rd clause. This structure could be read to anticipate a mechanism in which the respective state's water rights are determined based purely on existing flows and implemented without the need for notifications or calls.

It is unnecessary, however, to decide at this time whether the Compact would permit either the Compact Commission or the Supreme Court to order such a procedure moving forward or whether the parties could agree to such a procedure voluntarily without amending the Compact. No such procedure is currently in place. While the parties at times have discussed the value of developing data and an administrative structure to better administer the Compact (see, e.g., Yellowstone River Compact Comm'n, Forty-First Annual Report vi-vii (1982)), they have yet to do so. Indeed, as described later, pre-1950 water rights in Montana on rivers at issue I this case stood unquantified for much of the Compact's life. Moreover, the parties understood that this would be the case the early years of the Compact. See Montana's Brief in Opposition to Wyoming's Motion for Partial Summary Judgment, Sept. 23, 2011, p. 19 & n.3.

The question therefore becomes whether the Compact requires Montana to provide notice in years when a comprehensive system for implementing and enforcing Article V of the Compact does not exist. As noted in my earlier opinion, I conclude that it does. The key section is again Article V(A), which provides that pre-1950 appropriative rights in Montana "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water *under the*

doctrine of appropriation" (emphasis added). See Montana v. Wyoming, 131 S. Ct. 1765, 1771 (2011) (looking to the law of prior appropriation to determine Montana's and Wyoming's rights under Article V(A)). As Wyoming notes, prior appropriation states have historically depended on notifications or "calls" to enforce senior water rights, although the nature of calls varies among states . Given changing flows, upstream junior appropriators do not always know if they need to reduce diversions to protect the rights of downstream seniors. Where seniors are not receiving sufficient water, most states therefore require them to give notice of that fact – or, to use the technical term, "call the river." Once the river is called, juniors have to reduce their diversions. See generally, George Vranesh, Vranesh's Colorado Water law 27 (James W. Corbridge & N. Teresa Rice eds. 1999); Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, Legal Control of Water Resources 1081 (4th ed. 2006); David H. Getches, Water Law 111 (4th ed. 2009). In cases where a river is administered by a water master or other official with day-to-day oversight, calls may not be needed or required; instead, the water master or other official may sometimes directly manage or enforce priorities. Except in such settings, however, the call requirement is intrinsic to the prior appropriation system.

Although the question does not appear to have been litigated often, at least one court has also held that an upstream junior cannot be held liable for a downstream senior's "shortage of water unless [the senior] demanded that water, to the extent of his needs and within his senior appropriation, be allowed to reach his diversion point. The absence of such a demand [is] decisive." Worley v. United States Borax & Chemical Corp., 428 P.2d 651, 654-55 (1967). Such a call requirement is consistent with the central role that notifications or calls play in prior-appropriation systems. The call requirement is not merely an idol mandate, but serves the important function of avoiding the possibility that water will be wasted. Id. at 654 (requiring an

upstream junior to furnish water without a call "opens up the possibility of wasting water"). In this case, a call requirement ensures that Wyoming does not have to reduce its uses unless the water is required to meet the obligations of Article V(A). Absent a call or a more comprehensive system for administering the Compact, Wyoming would have to guess as to when pre-1950 uses in Montana need more water pursuant to Article V(A), risking substantial and unneeded waste..

The call requirement also helps mitigate any injury that is occurring to a senior appropriator.[2] In most but not all years, Montana was in the best position to determine and know whether its pre-1950 uses were not being met. If Montana knew that it was not receiving adequate water, notifying Wyoming would have given Wyoming the opportunity to curtail post-January 1, 1950 uses and thus reduce any damages. Absent some form of notice, Wyoming may have had little reason to suspect that it was violating Article V of the Compact by failing to curtail post-January 1, 1950 uses.

Not surprisingly, the parties to the Compact previously have recognized the importance of a call in protecting pre-1950 rights. The 1982 annual report of the Compact Commission noted that Montana had "voiced its concern that during low-flow years Wyoming needs to regulate its post-1950 water rights more carefully so that Montana can use its pre-1950 water." The report goes on to note that "Montana, in turn, *must* notify Wyoming when it is not able to obtain its pre-1950 water." Yellowstone River Compact Commission, Thirty-First Annual Report, p. iv (1982) (emphasis added). The 1983 report similar reports Montana's concerns regarding its pre-1950 water rights and once again notes that Montana "must notify Wyoming

[2] Because Wyoming's motion did not directly raise questions of mitigation and the parties did not brief what, if any, role mitigation plays where damages are being south for violations of an interstate water compact, I do not decide whether notice was required under the doctrine of mitigation. As the text notes, however, the policy that animates the requirement of mitigation also animates the call requirement.

when it is not able to obtain its pre-1950 water." Yellowstone River Compact Commission, Thirty-Second Annual Report, p. iv (1983).[3]

When Montana believed that it had received insufficient water to satisfy its "developed and protected pre-1950 appropriative rights" in 2004, it furnished Wyoming with written notice. Letter from Jack Stults to Patrick T. Tyrrell, May 18, 2004, Exhibit A to the Declaration of Richard M. Moy, Sept. 22, 2011. The notice specifically referred to the notice as a "call, under the terms of the compact":

> As Compact Commissioner for Montana, and as directed by Governor Martz, I am notifying you that *this letter constitutes Montana's call, under the terms of the compact*, for our valid and protected pre-1950 water rights on the Tongue River and Powder Rivers. We are calling for all pre-1950 junior water in Wyoming to satisfy our senior pre-1950 [sic] water on the Tongue and Powder Rivers.

Id., p. 2 (emphasis added). When Montana became concerned again about stateline deliveries in 2006, it again notified Wyoming in writing. Letter from Jack Stults to Patrick T. Tyrrell, July 28, 2006, Exhibit B to the Declaration of Richard M. Moy, Sept. 22, 2011. Unlike the 2004 letter, however, the 2006 letter – perhaps anticipating possible litigation – denied that any notification was needed:

> Although this letter is not required by the Compact, as Compact Commissioner for Montana, and as directed by Governor Schweitzer, this letter constitutes Montana's call and demand, under the terms of the Compact, for water to satisfy our valid and protected pre-1950 water rights on the Tongue and Powder Rivers.

Id., p. 2.

For all of these reasons, I reaffirm my earlier conclusion that, during the years at issue in this case, Montana was under an obligation to notify Wyoming in those years in which it

[3] As Wyoming notes, it would seem particularly unfair for Montana to agree in the early 1980s that it would provide notice to Wyoming if it was receiving inadequate water to meet its pre-1950 water uses and then to argue that such notice was unnecessary in order to pursue damages or other relief. Wyoming's Reply Brief in Support of its Motion for Partial Summary Judgment, p. 9. Because I conclude that the Compact generally requires such notice, I do not reach the question of whether Montana is estopped from arguing that no notice is required.

believed that it was not receiving adequate water to meet its pre-1950 uses. However, as discussed in my earlier opinion, that notice did not have to take any particular shape or form. Although all prior-appropriation states employ a call requirement, the nature of the required notice varies from state to state. For example, in Wyoming, calls for regulation of water rights must be in writing and must use either the state form or a letter containing "essentially the same information." Wyo. State Bd. of Control Regulations & Instructions, ch. I, § 24. By contrast, calls in Montana do not need to be in writing or meet any particular formal specifications. Montana "encourage[s] that it be person to person initially." Deposition of Jack Stults, April 25, 2012, p. 229, lines 11-12. See also Tucker v. Missoula Light & Water Co., 250 P. 11, 13 (Mont. 1926) (indicating that oral calls are acceptable). Montana also does not require that any particular person deliver the call. A "ranch manager could go to another ranch manager and say, 'we got the senior right; you got the junior right. We're not getting all of our water. We think you should shut down to the extent that we need – until we get what we need.'" Stults Deposition, supra, p. 229, lines 21-25.[4]

Because calls vary from state to state (as Montana's and Wyoming's procedures illustrate) and the Compact does not specify any particular form of call, there is no basis for imposing the specific requirements of any particular state on a notice in this case. Instead, the focus should be on whether the notice serves the core function of a call – *placing an 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.* Oral notification can serve this

[4] According to the Montana State Attorney General, "Montana does not generate or provide any 'forms' for use by senior water users when making a call for water against a junior appropriator. Nor is there a specific statute detailing how a call between private water users is to be made." Letter of Jennifer Anders to the Special Master of Aug. 13, 2012, p. 1.

function as well as a written call (although, as this case illustrates, oral notice can pose a greater proof problem than a written call). And there is no need for the notice to contain any specific information beyond that needed to meet this core function. In this case, such information 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.

Nor must any particular Montana official have provided the notice, although the notice must have been provided by an official acting within his authority. In its original papers, Wyoming suggested that any notice or call must come "from one voice – the voice of Montana's compact commissioner." Wyoming's Brief in Support of its Motion for Partial Summary Judgment, Sept. 12, 2011, p. 22. In its current papers, Wyoming argues that only Montana's compact commissioner could make a call for regulation through the Yellowstone River Compact Commission, and that only the Governor of Montana could make a call directly to the State of Wyoming. Wyoming's Brief in Support of its Renewed Motion for Partial Summary Judgment, June 15, 2012, pp. 21-30 (hereinafter "Wyoming 2012 Brief").

Montana's argument that only Montana's compact commissioner could provide notice to Wyoming stems from the language of Article III(A) that the Compact

> *shall be administered by* a commission composed of one (1) representative of the state of Wyoming and one (1) representative from the State of Montana, to be selected by the governors of said states as such sates may choose, and one (1) representative selected by the director of the United States geological survey ….

Yellowstone River Compact, art. III(A) (emphasis added). Wyoming, however, misperceives the function of a notice or call under Article V(A) of the Compact. Wyoming has an obligation under Article V(A) of the Compact to reduce any post-1950 uses when necessary to meet the needs of pre-1950 appropriations in Montana. No administration by the Compact Commission is

needed to effectuate Article V(A), although the Commission might have the authority to develop an independent system for implementing the Compact if it wishes (as discussed earlier). A call, in turn, is not seeking administration of the Compact by the Commission but simply providing Wyoming with notice that it has to reduce post-1950 water uses to the degree required by Article V(A).

If administration by the Commission is not needed, Wyoming argues that only the governor can provide notice to Wyoming. Wyoming's argument here appears to be two-part. First, Wyoming argues that no Montana statute gives anyone other than the Governor the express authority to "make demands on another sovereign state." Wyoming 2012 Brief, p. 26. Second, Wyoming notes that section 2-15-201 of the Montana Code provides that the governor "*is the sole official organ of communication* between the government of this state and the government of any other state or of the United States" (emphasis added).

As just explained, the purpose of a call is notification. Wyoming's obligation to reduce post-1950 water uses when needed to satisfy pre-1950 appropriations in Montana under Article V(A) stems from the Compact, not the call. The call ensures that Wyoming knows when it may need to reduce any post-1950 water uses and thus avoids the potential for waste. The notice or call requirement, in short, is procedural, not substantive. Given the role of the notice or call, the DNRC would appear to have adequate authority to provide the notice. See, e.g., Mont. Code Ann. § 85-1-101; 85-1-204. This does not mean that all employees of the DNRC have the authority to issue a notice or call for purposes of Article V(A) of the Compact. The issuance of a notice must be within the clear authority of the official, so that Wyoming can appropriately rely on the notice when made.

Finally, the notice or call does not need to be instantaneous in order to provide Montana with the right to pursue damages for any violation by Wyoming of Article V(A). As noted earlier, Wyoming's motion for partial summary judgment seeks to preclude Montana "from claiming damages or other relief for those days [in any year in which notice was provided] that preceded Montana's notification." Wyoming's Motion for Partial Summary Judgment, Sept. 12, 2011, p. 1. However, in many cases, pre-1950 users in Montana may not have immediately realized that they were not receiving adequate water because of Wyoming's failure to comply with Article V(A) of the Compact, and information cannot be expected to have travelled instantaneously from water users to Montana officials to Wyoming. So long as Montana acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies, the notice should typically permit Montana to seek damages for the entire year. Although this places Wyoming at risk of paying damages for periods in which it was not on notice of Montana's deficiency, neither party is knowingly at fault in this situation. Given that Wyoming enjoyed the use of the excess water during these periods, it is appropriate that Wyoming should compensate Montana for the loss of such water when notice was diligently provided.

B. The Evidence Presented by the Parties

Wyoming has met its initial burden of presenting affidavits that, absent contradicting declarations or testimony from Montana showing a genuine issue of material fact, establish that Wyoming did not receive notice from Wyoming in any years other than 2004 and 2006. See, e.g., Affidavit of Gordon W. Fassett, Sept. 9, 2011 (from March 16, 1987 to June 15, 2000, no "call, claim, demand, or other contemporaneous notification, either orally or in writing, from a Montana commissioner, or anyone acting under his authority"); Affidavit of Richard G. Stockdale, Sept. 6, 2011 (same from June 15, 2000 to January 16, 2001); Affidavit of Patrick T.

Tyrell, Sept. 12, 2011 (same since February 12, 2001, except for the 2004 and 2006 written notices).

The question thus becomes whether Montana has provided evidence showing a genuine issue of material fact for any years other than 2004 and 2006. Montana contends that it provided an adequate notification or call in 15 years: 1981, 1982, 1985, 1987, 1988, 1989, 1992, 1994, 1998, 2000, 2001, 2002, 2003, 2004, and 2006. In determining whether Montana provided adequate notice in these years, I have looked to see whether Montana has presented credible and admissible evidence that, in the year at issue, (1) an official with appropriate authority in the DNRC, (2) notified Wyoming that (3) pre-1950 appropriations in Montana were short of water, and (4) requested Wyoming to take action to provide more water to Montana in compliance with its obligations under the Compact. As discussed below, I have concluded that Montana has met its burden, although just barely for some years, of showing a genuine issue of material fact in 1985, 1987, 1989, 2000, 2001, 2002, 2003, 2004, and 2006. Wyoming is entitled to summary judgment for all other years. As discussed in the next section, however, Montana will need to provide additional information regarding its notices in 1985, 1987, 1989, 2000, 2001, 2002, and 2003, including more specific information regarding the dates of those notices, in order to seek damages for those years at trial.

1981, 1982, and 1985

There is no deposition testimony directly establishing that Montana provided any form of notice or request to Wyoming in 1981 or 1982. In his declaration, Richard Moy, who was the Montana DNRC Water Management Bureau Chief from 1981 to 2008, stated:

> During the period 1981-2008, pre-1950 water rights in Montana experienced shortages, not only in 2004 and 2006 but also in other years, that Montana believed were caused by Wyoming's overuse under the Compact. Montana's representatives complained to the Wyoming representatives about this, not only in

> 2004 and 2006 but also *in other years*, but Wyoming refused to admit that Wyoming had any obligation under the Compact to protect Montana's pre-1950 uses.

Declaration of Richard M. Moy, Sept. 22, 2011, ¶ 4 (emphasis added). However, Mr. Moy did not state in which year Montana's representatives complained to Wyoming representatives.

In his subsequent deposition, Mr. Moy stated that, in drafting this deposition, he "thought" that 1981, 1982, and 1985 were "drought years" in which "Montana pre-'50 experience[d] shortages." Deposition of Richard Moy, April 18, 2012, p. 50, lines 1-13. Mr. Moy also stated that 1985 was a "good example" of a year in which he believes "Wyoming's overuse caused Montana to experience shortages." Id., p. 59, lines 5-19. Nowhere in his deposition testimony or declaration, however, did Mr. Moy state that Montana complained to Wyoming in 1981, 1982, or 1985 – or indeed in any specific year other than 2004 and 2006.

In his deposition, Mr. Moy stated that Montana complained "every time there was a drought year or the flows were very low on the Tongue and the Powder Rivers." Moy Deposition, supra, p. 92, lines 13-15. Montana suggests that this statement, combined with evidence that 1981, 1982, and 1985 were dry years, is sufficient to avoid summary judgment for those years. By itself, however, such a broad conclusory statement does not constitute the type of specific facts required to avoid summary judgment. As the Supreme Court made clear in, I cannot simply assume that "general averments" such as the deposition testimony of Mr. Moy "embrace the 'specific facts' needed to sustain the complaint." *Lujan v. National Wildlife Federation*, supra, at 888. Moreover, Mr. Moy's deposition makes clear that his complaints generally took place at the meetings of the Compact Commission after the irrigation season was complete. According to Mr. Moy, none of the complaints were made "at a time when, if [Wyoming] had complied with it, it was the irrigation season … and water would now come"

(because most Commission meetings "were not tied to the irrigation season"). Id., p. 106, lines 7-20. Later in his deposition, Mr. Moy stated that "I *think* there were verbal calls made during the irrigation season," but he did not identify any particular year in which such calls were made. Id., p. 226, lines 5-6.

The annual reports of the Compact Commission would appear to confirm that Montana did not request that Wyoming cutback its use in these years because of perceived deficiencies in the water available to pre-1950 Montana users. For example, the 1981 annual report of the Compact Commission notes that "No incidents during the year required administration of the water in accordance with the provisions of the Compact. At the present level of water-resources development, the Commission believes that a program of intensive water-use regulations is not necessary." Yellowstone River Compact Comm'n, Thirtieth Annual Report iii (1981) (hereinafter "1981 Comm'n Report"). Furthermore, the annual report suggests that division of Yellowstone River waters under Article V would probably be necessary "at some yet undetermined time," indicating that the states did not believe it was necessary then. Id.

The 1982 annual report suggests that Montana was becoming concerned about pre-1950 water, but had not yet reached the stage where it had asked Wyoming to cut back on its post-1950 water use:

> Montana voiced its concern that during low-flow years Wyoming needs to regulate its post-1950 water rights more carefully so that Montana can use its pre-1950 water. Montana, in turn must notify Wyoming when it is not able to obtain its pre-1950 water. A situation developed during the spring of 1981 in which Montana was *almost* unable to fill the Tongue River Reservoir even though it has a pre-1950 water right.
>
> Flows on the tributaries of the Yellowstone River *were generally high enough so as not to require administration* by the Commission in accordance with the provisions of the Compact. However, the Commission feels that an administrative process must developed *in the very near future* because of the many competing demands for Yellowstone River water. ….

Yellowstone River Compact Comm'n, Thirty-First Annual Report iv (1982) (emphasis added) (hereinafter "1982 Comm'n Report").

The 1985 annual report again suggests, although more obliquely, that no problems had been raised regarding pre-1950 water uses in Montana, in part because new water uses had not yet developed to a stage where water shortages were resulting. Thus, the annual report notes that the "attention of the Commission is continuing to focus on the need to define the procedures for implementing Compact provisions *for the time when development of water within the Yellowstone River basin requires that these provisions be administered*." Yellowstone River Compact Comm'n, Thirty-Fourth Annual Report iii (1985) (hereinafter "1985 Comm'n Report"). Mr. Moy attended all of three of these meetings and presumably would have said something if he indeed had voiced express concerns to Wyoming prior to the meeting about Wyoming's post-1950 water uses. See 1981 Comm'n Report, supra, at ii; 1982 Comm'n Report, at ii; 1985 Comm'n Report, at ii.

In summary, Montana has failed to provide specific facts establishing that there is a genuine issue of fact as to whether Montana provided adequate notice to Wyoming for the years 1981, 1982, or 1985. Instead, all of the evidence submitted in connection with this motion strongly suggests that Montana provided no notice to Wyoming in these years.

1987, 1988, and 1989

The only deposition testimony that addresses the years 1987, 1988, and 1989 is that of Keith Kerbel. During these years, Mr. Kerbel was field manager for the Billings office of the Montana DNRC, which handled the "Upper Yellowstone and basically Pryor Creek and the big one." Deposition of Keith Kerbel, April 23, 2012, p. 18, lines 3-5 & p. 21, lines 11-13. In these years, the Tongue, Powder, and Little Powder rivers were under the purview of the Miles City

field office. Id., p. 21, lines 6-11. Mr. Kerbel, moreover, testified that he "wasn't an active participant back then" in meetings of the Yellowstone River Compact Commission. Id., p. 109, lines 19-20. According to the minutes of the Compact Commission meetings in 1987, 1988, and 1989, Mr. Kerbel did not attend the meetings. See Yellowstone River Compact Comm'n, Thirty-Sixth Annual Report ii-iii (1987) (hereinafter "1987 Comm'n Report"); Yellowstone River Compact Comm'n, Thirty-Seventh Annual Report ii (1988) (hereinafter "1988 Comm'n Report"); Yellowstone River Compact Comm'n, Thirty-Eighty Annual Report ii (1989) (hereinafter "1989 Comm'n Report").

Although Mr. Kerbel testified in his deposition that Montana officials complained in some years to Wyoming officials that insufficient water was crossing the border to ensure water for pre-1950 Montana users, he initially seemed uncertain of the specific years, although he seemed more certain about 1988 than either 1987 or 1989. In answer to the question whether Montana ever told Wyoming that it wanted Wyoming to curtail its water use "so more water flows down the Tongue, Powder, or Little Powder Rivers, he testified that he did not recall "it ever been said, but I know it was inferred." Id., p. 107, lines 7-13. Asked which years, Mr. Kerbel initially responded that he did not recall. Id., p. 107, lines 16-17. Pushed for specifics, Mr. Kerbel then stated:

> I know they inferred – I know in '88 we had a hell of a time. In '87, '88, and '9, I know we were short on both sides of the border. I know it was a frustrating summer.
>
> Talking to the Wyoming folks and Montana folks, when I talked to those guys, they kept saying well, it's the same thing down here. There's no water to give to you. *I know we talked about trying to get water in '88 down to Montana.* And I was told that basically it was used up. I mean, Wyoming used it all.

Id., p. 107, line 7 to p. 108, line 4 (emphasis added). Asked once again about when conversations took place, Mr. Kerbel responded:

> I know – I'm sure we did in '88. I can't say for a fact, but I know we did in '88. I shouldn't say I know, but I would guess if it happened at any time before 2000, it would have happened in '87, '88, or '89. But I'd have to defer to the minutes.

Id., p. 109, lines 5-10. As noted earlier, Mr. Kerbel was not at the Compact Commission meetings for any of the years from 1987 to 1989, and he testified that he could not say if Montana complained to Wyoming in any meeting that he did not attend. Id., p. 110, lines 3-6.

Later in his deposition, Mr. Kerbel again stated that Montana officials had complained to Wyoming officials that there was insufficient water to meet the needs of pre-1950 users in Montana, but he was even less specific about years:

> A. Well, I know we've had historical conversations from the Wyoming office from our office talking about water shortages in different specific years.
>
> *And the late '80s was one specific instance, an example, where we talked about water shortage situations on both sides of – both sides of the line.* And we basically viewed this. And we're short on water on our side. And I talked to those guys on their side, and they're telling me the same story. They don't have water to give. They says everything over here is – we're shutting off water to 1890s and before on Tongue River and Goose Creek and whatever.
>
> Come to find out, they've never shut off water on the Tongue River main stem. I found that out later. ….
>
> So the bottom line is, is that, yes, we've had conversation historically about shortages that occurred *in the late '80s* and the early 2000s. ….

Id., p. 141, line 13 to p. p. 142, line 13 (emphasis added).

However, Mr. Kerbel became more specific in response to questions from Mr. Wechsler, who represented Montana at the deposition:

> A. …. The fall of '87, things really went downhill from then on. And then kind of climbed back out in the early '90s, 1990s. '89 was a better year, but '88 was the worst year.
>
> *I know I talked to the Sheridan boys, the Wyoming constituency, my counterparts in Wyoming about what we could do together to work out a scenario where we could get more water across the state line.* And if they were using water – if there was any wasting of water, different scenarios we discussing showing our frustration. And they, basically, came back and they had the same frustration I did too.
>
> So I knew for a fact where we were talking about trying to get water and making call and all this stuff, per se, it was going to be a frustrating discussion

because we were all in the same boat. But, yeah, it was a water-short year. *And we talked back and forth quite a bit those summers.*

….

Q. During those – did you communicate to those Wyoming individuals[5] that Montana was needing water during those water-short years?

A. Of course.

Q. And those are those same water-short years that we talked about earlier?

A. Yes.

Q. And were those communications, say, separate from the annual commission meetings?

A. Yeah. They were mostly phone calls. And they occurred in, probably, August when we were all frustrated as hell.

Q. Some of those occurred during the irrigation season?

A. Oh, of course, they did.

Q. And by making those communications to the State of Wyoming, was it your intent to get Wyoming to do something to get water to Montana?

A. Well, I probably knew the answer before I called, but at least it was worth a try.

Q. Was that your intent?

A. Yes.

Id., p. 272, line 15 to p. 274, line 15 (emphasis added).

Finally, under further questioning from counsel for Wyoming, Mr. Kerbel testified that he talked with Mike Whitaker in Wyoming "in '87, '88, and '89." Id., p. 279, lines 11-12. Once again, Mr. Kerbel indicated that such conversations were during the summer of those years. Id., p. 279, lines 1-3. His "recollection" was that, in 1988, the conversations probably took place in July or August. Id., p. 286, lines 24-25.

The annual reports of the Yellowstone River Compact Commission reveal that water was extremely short in all three years. The 1987 annual report notes that "the streamflow at the four Compact gaging stations – the Clarks Fork Yellowstone River, the Bighorn, the Tongue River, and the Power River – was significantly below normal." 1987 Comm'n Report, supra, at v. In 1988, flows were even lower, with the Bighorn's flow being just 66% of the mean annual flow,

[5] Mr. Kerbel testified that "historically" he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp. Kerbel Declaration, supra, p. 273, lines 15-18.

the Tongue reported at 55%, and the Powder measured as only 40%. 1988 Comm'n Report, supra, at iii. And drought conditions continued for the Bighorn, Tongue, and Powder Rivers in 1989, with streamflow in the Powder the "second lowest of record." 1989 Comm'n Report, supra, at iii. The 1987 report also implicitly suggests that discussions between Montana and Wyoming had occurred regarding water supplies in the two states, since Gary Fritz (the Montana representative) "remarked that when Montana experiences water-supply problems, Wyoming has already began [sic] restricting water use to pre-1950 rights." 1987 Comm'n Report, supra, at iv.

Based on the testimony of Mr. Kerbel, Wyoming's motion for partial summary judgment is denied for the years 1987, 1988, and 1989 (subject to Montana providing more specific information regarding Mr. Kerbel's communications with Wyoming in those years, as discussed below) Read in the light most favorable to Montana, Mr. Kerbel's testimony provides that he informed Wyoming officials during the summer of all three years that Montana was facing water shortages and asked whether more water could be provided to Montana. For 1988, Mr. Kerbel further testified that the conversations with Wyoming officials occurred in July or August.

It is worth emphasizing that denial of Wyoming's motion for partial summary judgment does not mean that I or the Court ultimately will conclude that Montana is entitled to damages in these years even if Montana was denied water to which it was entitled under Article V(A). As noted, Mr. Kerbel's deposition testimony was often vague, and he initially seemed unsure of the years in which he discussed shortages with Wyoming. At trial, moreover, Wyoming may decide to challenge Mr. Kerbel's authority to issue any notices for these years. Although the deposition testimony presented by Montana is sufficient to establish Mr. Kerbel's authority for purposes of summary judgment, Mr. Kerbel did not head the office responsible for the Tongue, Powder, and

Little Powder rivers in the years in question and therefore may not have had the authority to provide appropriate notice under the Compact for pre-1950 appropriations on these rivers.

1992, 1994, and 1998

The only deposition testimony to address the 1990's is again that of Mr. Kerbel. In the early 1990s, Mr. Kerbel took over the Miles City field office and thus assumed added responsibility for the Tongue, Powder, and Little Powder rivers. Kerbel Declaration, supra, p. 22, lines 1-15.

In his deposition, Mr. Kerbel never stated that he notified Wyoming of shortages in Montana in any particular year in the 1990s. Instead, his testimony referred only generically to unspecified years in the 1990s. Thus, Mr. Kerbel testified that he "had conversation historically about shortages that occurred in the late '80s and the early 2000s. And there was a couple years in 1990s, but I don't remember the years." Id., p. 142, lines 11-15. Most of his testimony about the 1990s dealt with the contrast to the 1980s and 2000s. For example, Mr. Kerbel testified that he and Mike Whitaker "had conversations in the '80s. We had less in the '90s because we had better water years in the '90s. And then we had several discussions in the drought years of the 2000s." Id., p. 278, lines 22-25. According to Mr. Kerbel, he and Mike Whitaker's conversations were "Mostly '80s and 2000s." Id., p. 279, line 4.

The 1992 Annual Report of the Yellowstone River Compact Commission implicitly suggests that Montana had become concerned with the potential impact of post-1950 Wyoming water uses on pre-1950 Montana uses but had not brought its concerns, at least formally, to Wyoming. Gary Fritz (the Montana representative) reported at the annual meeting of the Commission in 1992 that "post-1950 use … affects Montana's utilization of water in the basin," but he also "noted that the impacts do not occur every year." Yellowstone River Compact

Comm'n, Forty-First Annual Report vi (1992). Tellingly, Gordon Fassett (the Wyoming representative) responded:

> that he was not aware that the topic would be on the agenda of the meeting and, consequently, was not prepared to discuss it. He stated that he was worried about the issues that Montana raised. He asked if Montana could cite specific examples of injury. He stated that he saw little benefit from resolving issues in the abstract but agreed that real issues should be addressed."

Id. Mr. Fassett, in short, did not appear to be aware of any specific complaints by Montana and seemed willing to address "real issues" if they arose. Id.

There is nothing in the 1994 or 1998 annual reports to suggest that Montana notified Wyoming of problems with pre-1950 water uses in these years either, although both years appeared to have slightly low water flows in at least some of the relevant rivers. In 1994, water flows in the Bighorn, Tongue, and Power rivers was 73 percent, 85%, and 99% of average, respectively. Yellowstone River Compact Comm'n, Forty-Third Annual Report ii (1994). In 1998, flows in the Bighorn and Powder were actually above average, although the flow in the Tongue was only 70 percent of average. Yellowstone River Compact Comm'n, Forty-Seventh Annual Report ii (1998).

Wyoming is again entitled to partial summary judgment for 1992, 1994, and 1998. Montana has failed to provide any specific facts that would show that Montana put Wyoming on sufficient notice of shortages for those years. As before, Mr. Kerbel's broad, conclusory statements are not the sort of specific facts that are needed to establish a genuine issue of material fact for these years. See *Lujan v. National Wildlife Federation*, supra, 497 U.S. at 888-89; *Hadly v. County of Du Page*, supra, 715 F.2d at 1243; *Davis v. City of Chicago*, 841 F.2d at 188-89.

2000

2000 was again a very low-flow year, with flows in the Bighorn, Tongue, and Powder being only 68 percent, 57 percent, and 54 percent of average, respectively. Yellowstone River Compact Comm'n, Forty-Ninth Annual Report iii (2000). In his deposition, Mr. Kerbel specifically testifies that he asked Mike Whitaker in this year to regulate water use in Wyoming for the sake of Montana users:

> Q. So do you remember a conversation that you had with Mike Whitaker where the gist of what you said to him was Montana demands that Wyoming …
> A. No, it wasn't worded that way.
> Q. Or that Montana would like, pretty please – okay? And this is in an irrigation season.
> A. Uh-huh.
> Q. – Wyoming to regulate one or more water users in Wyoming so that more water shows up at the state line this year sometime in the near future?
> A. Correct.
> Q. You said that to him?
> A. Yes.
> Q. And what year was that?
> A. I'm sure it was '88. I'm thinking it was '88. *I know we talked about it in 2000 because 2000, 2001 were tough years as well, that whole period in there.*

Kerbel Declaration, supra, p. 286, lines 4-21 (emphasis added).

There is no clear testimony as to when any conversation took place in 2000. Earlier in his testimony, Mr. Kerbel discussed conversations between Montana and Wyoming officials at annual meetings of the Compact Commission (e.g., id. p. 102, lines 4-24), but the conversations between Mr. Kerbel and Mr. Whitaker in 2000 would appear to have taken place outside the context of an annual Commission meeting.

Given this testimony, Wyoming's motion for partial summary judgment is denied for the year 2000 (subject to the provision of more specific facts by Montana, as discussed below). Read in a light favorable to the nonmoving party, Mr. Kerbel's testimony establishes that in 1988 he requested that Wyoming provide additional water to address water scarcity issues in Montana. The fact that Mr. Kerbel requested rather than demanded that Wyoming regulate uses to allow

more water to flow into Montana does not undercut the relevance of the notice; the bottom line is that Mr. Kerbel's conversation with Wyoming officials, read in the light most favorable to Montana, would have placed Wyoming on notice that it might need to reduce any post-1950 diversions to meet its obligations under Article V(A) of the Compact. This ruling does not mean that I or the Court ultimately will conclude that Montana is entitled to damages in 2000 even if it was denied water to which it was entitled under Article V(A), since Wyoming is free at trial to challenge Mr. Kerbel's testimony and his authority to issue notice under the Compact.

2001

2001 was an even drier water year, with flows in the Bighorn, Tongue, and Powder being only 51 percent, 34 percent, and 31 percent of average, respectively. Yellowstone River Compact Comm'n, Fiftieth Annual Report iii (2001) (hereinafter "2002 Comm'n Report"). The only deposition testimony regarding 2001 is the testimony of Mr. Kerbel just quoted in connection with 2000: "I know we talked about it in 2000 because 2000, 2001 were tough years as well, that whole period in there." This testimony is ambiguous regarding the relevance of the year 2001. Mr. Kerbel's testimony could be read as stating simply that 2001 was a tough year. Or it could be read as stating that he talked to Mike Whitaker in both 2000 and 2001. The next page of Mr. Kerbel's testimony increases the confusion. Mr. Wechsler, counsel for Wyoming, asks Mr. Kerbel whether he recalled any conversations with Mike Whitaker other than "the two you just said," referring to 1988 and 2000. After counsel for Montana objects that the witness had already answered that question, Mr. Kerbel responds ambiguously. "Yeah. I mean, we talked other years too. But I mean, those were the few worst years: 2004, 2002, and 2006." As in 2000, there is no indication as to when any conversation took place in 2001.

Although the question is a very close one, I conclude that Wyoming's motion for partial summary judgment should be denied for 2001 (subject to the provision of additional facts as discussed below). Read in the most favorable light for Montana, the 2001 Annual Report of the Compact Commission would seem to add some support for Mr. Kerbel's testimony that he did have discussions with Wyoming representatives in 2001. Thus, Mr. Stults (the Montana representative) in light of the drought

> recommended that discussions and close communications among technical people be *maintained* to deal with water availability during 2002, particularly in the Tongue River basin. Mr. Tyrell [the Wyoming representative] concurred and requested that Mr. Kerbel and Ms. Sue Lowry, and possibly others, *continue discussions* and provide findings and recommendations to the Commission by the end of January 2002.

2001 Comm'n Report, supra, at iv (emphasis added). This language suggests that communications between Mr. Kerbel and Ms. Lowry had already taken place.

Once again, my ruling does not mean that I or the Court ultimately will conclude that Montana is entitled to damages in 2001 even if Montana was denied water to which it was entitled under Article V(A). At trial, Wyoming may be able to establish that Mr. Kerbel did not provide adequate notice to Wyoming in 2001, or that he did not have the authority to do so under the Compact.

2002

2002 was an even drier year. The flows in the Bighorn, Tongue, and Powder rivers were only 36 percent, 17 percent, and 21 percent of average. Yellowstone River Compact Comm'n, Fifty-First Annual Report iii (2002) (hereinafter "2002 Comm'n Report"). Two deponents addressed communications between Montana and Wyoming officials during this year. As noted above, Mr. Kerbel testified that 2002 was one of the "few worst years" and that "I know we [Mr. Kerbel and Mike Whitaker] had those conversation [sic] in those years, by my recollection."

Kerbel Declaration, p. 287, lines 20-23. As before, there is no indication as to when any such conversation took place.

Jack Stults, who was the Water Resource Division Administrator of the Montana DNRC at this time, also testified that he had discussed Montana's pre-1950 water needs with Wyoming officials in both 2002 and 2003:

> Q. …. Did you do something that you intended to be: I want them to understand that I'm demanding – Montana is demanding that Wyoming curtail water users in the immediate future so that more water will actually cross the border?
>
> A. I did not use those words.
>
> Q. Did you use words where you thought you were conveying that intent, that we were making a demand, in that water year, for curtailment?
>
> A. Yes.
>
> Q. Okay. And –
>
> A. That – I truly believe that I was saying something would convey that message and that they would understand.
>
> Q. And I need specifics now. I need you to tell me who you made – who you conveyed that to, where, when.
>
> A. Well, time's not out friend on this one. But it would have been to Pat and Sue, individually or jointly.
>
> Q. And dates.
>
> A. I don't – I couldn't give you dates. I cannot give you dates. I can't remember dates.
>
> Q. Times of the year.
>
> A. It would have been in June and May.
>
> Q. Of what years?
>
> A. 2002, 2003.
>
> Q. And where?
>
> ….
>
> A. It could have been on the phone; it could have been in Western States Water Council meetings; it could have been at the compact – either the compact meeting or the compact tour. I can't remember any more specifically than that.

Deposition of Jack Stults, April 25, 2011, p. 90, line 15 to p. 91, line 24.

According to Mr. Stults, he did not view his demands as seeking a "formal" compact enforcement. Id., p. 99 line 25 to p. 100, line 4. But he believed that he

> *was making a call*, and it was … within the context of the compact, but I was not asking that we go down the formal structure of enforcing the compact in the

> context of what you might see in the Colorado compact or something like that, where you get into this big structure of enforcing a compact, of going through a structured, formal dispute resolution process, et cetera. *I was wanting them to deliver water that was ours and we felt they were using, and they should release it to us.*

Id., p. 231, lines 3-12 (emphasis added).

Based on the minutes of the 2001 Compact Commission annual meeting, conversations between Montana and Wyoming in 2002 would have been expected. At the 2001 annual meeting, Mr. Moy "asked if new irrigation or changes in irrigation methods have occurred in the Tongue River basin in Wyoming since 1950," and Roger Muggli (a representative of the Tongue River Water users Association) "expressed concern about apparent decreases in flow in the lower Tongue River and the effects on maintaining fishery resources and irrigation capability." 2001 Comm'n Report, supra, at iv. At a technical meeting on the Tongue River basin on January 16, 2002, Montana also started the meeting by noting that "they are receiving inquiries from irrigators and other water users along the Tongue River about Wyoming's water use" and expressed concern about the drought conditions. 2002 Comm'n Report, at vi.

Given the deposition testimony of both Mr. Kerbel and Mr. Stults, Wyoming's motion for partial summary judgment is denied for 2002 (subject to the provision of additional facts as discussed below). Wyoming argues that any communication between Mr. Stults and Wyoming officials could not have provided adequate notice because Mr. Stults, by his own testimony, was not seeking formal enforcement under the Compact. Read in context, however, Mr. Stults appears to be saying that he was not seeking to trigger formal dispute resolution under the Commission rules; however, he was informing Wyoming of water shortages in Montana and seeking to "call" for Wyoming to meet its commitment under Article V of the Compact. As before, my ruling does not mean that I or the Court ultimately will conclude that Montana is

entitled to damages in 2000 even if Montana was denied water to which it was entitled under Article V(A), since Wyoming is free at trial to challenge the testimony of both Mr. Kerbel and Mr. Stults and Mr. Kerbel's authority to issue notice under the Compact.

2003

Drought conditions continued in 2003. The flows of the Bighorn, Tongue, and Powder rivers were higher than in the prior two years, but still below average, being measured at 43 percent, 65 percent, and 48 percent of average, respectively. Yellowstone River Compact Comm'n, Fifty-Second Annual Report ii (2003). At the annual meeting of the commission, Mr. Stults (who was the Montana representative at this time) "stated that Montana continues to experience drought conditions statewide and the impacts on livestock and crops have been severe." Id. iii.

As just noted in connection with the year 2001, Mr. Stults testified in his deposition that he also talked to Wyoming officials in May and June of 2003. For the same reasons discussed in connection with 2002, Wyoming's motion for partial summary judgment is denied for 2003 (subject to the provision of additional facts as discussed below). As for prior years, Wyoming is free to challenge Mr. Kerbel's testimony at trial and show that Wyoming was not provided with adequate notice.

2004 & 2006

Wyoming apparently concedes that Montana provided adequate notice in 2004 and 2006 and therefore does not seek to bar Montana from seeking any legitimate damages for the entirety of those years. The evidence presented in connection with this motion establishes that the letters from Montana to Wyoming in those years was adequate to place Wyoming on notice of Montana's water shortages and its obligation to comply with Article V(A). The question

remains, however, whether Montana can seek damages for periods in these years before it submitted its letters (as discussed in the next section).

C. The Need for Additional Information

I have concluded that Wyoming's motion for partial summary judgment should be denied for 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006. Wyoming, however, objects that Montana has failed to provide specific enough facts regarding the dates of any notices or calls in many of these years and that, without such information, it is impossible to know the periods in each year for which Montana can seek damages. Wyoming is correct that little information is currently available regarding the dates of any notices. Perhaps because of the passage of time, Montana officials were extremely vague about dates in their deposition testimony. Other aspects of the notices that Montana officials claim were given are also uncertain or vague.

To ensure that Wyoming is not required to defend against damages for periods in which it did not receive adequate notice and to guarantee an orderly trial, I therefore order Montana to provide by affidavit or declaration of competent witnesses the following information for each year, other than 2004 and 2006, for which I am denying Wyoming's motion for partial summary judgment:

1. The names and positions of any Montana official(s) who provided notice to Wyoming officials in that year.
2. The names and positions of the Wyoming official(s) to whom the notice was provided.
3. The substance of the notice(s), including the specific tributary or tributaries to which the notification(s) applied.
4. The date(s), as specifically as the witness can recall, of when the notice(s) was or were provided.

5. The authority of the Montana official(s) to provide the notice.

Such information shall be provided on or before December 1, 2012 and shall be as specific as possible. If Montana fails to provide the required information for any specific year or if the information that is provided fails to confirm that there is a genuine issue of material fact that Montana provided adequate notice in the year, Wyoming will be awarded partial summary judgment as to damages in that year. Although I have concluded that partial summary judgment currently is unwarranted for these years, the question was often close, and more specific information will ensure that time is not spent trying liability in years in which there in fact is not a genuine issue of material fact.

While memories may be tarnished for at least some of these years, documents or other information may help to refresh officials' recollections. I recognize that some officials may still be uncertain as to the dates of conversations even after efforts to refresh their recollection. Because Montana was responsible for providing adequate notice, however, Wyoming should not suffer where Montana is unable to provide more specific information regarding the dates of conversations. 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. Any other assumptions would prejudice Wyoming in its defense in the liability phase of this case.

As discussed in earlier in this opinion and in my memorandum opinion of December 20, 2011, Montana can seek damages in any given year for the period prior to providing Wyoming with adequate notice, but only if and to the extent that Montana acted diligently in learning of

pre-1950 deficiencies and notifying Wyoming of those deficiencies. This issue did not receive significant treatment in Wyoming's renewed motion for partial summary judgment, and I therefore am not addressing it in this ruling. The issue, however, could assume importance at trial to the degree that Montana seeks damages for periods before it notified Wyoming in any given year. In this regard, the burden to show due diligence lies with Montana in any such instance.

III. EXCEPTIONS TO THE NOTICE REQUIREMENT

In my original ruling on Montana's motion for partial summary judgment, I suggested that there were two (and possibly three) exceptions to the notice requirement. First, I indicated that Montana did not need to furnish notice in any year in which Wyoming had made it clear that it would not alter its water use in response to Montana's concerns and therefore notice was futile. As I noted, the concept of futility seems directly applicable, although no case appears to have applied it to the call requirement under prior appropriation law (nor is it likely to often arise).[6] Futility is an established exception to the requirement of exhaustion of administrative remedies. See McCarthy v. Madigan, 503 U.S. 140, 146-148 (1992) (exhaustion of administrative remedies is unnecessary "where the administrative body is shown to be biased or has otherwise predetermined the issue before it"). And the requirement that administrative remedies be exhausted prior to seeking judicial relief is closely akin to the requirement that a call be made before seeking judicial relief under the prior appropriation doctrine.

Second, I suggested that Montana should be free to pursue damages or other relief, despite its failure to provide notice to Wyoming, during any period when Wyoming had other

[6] As Wyoming notes, the quite different concept of "futile call" provides that an upstream junior appropriator need not reduce its water use even in the face of a call by a downstream senior when the reduction would not provide the downstream senior with the water that it needs. See Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, Legal Control of Water Resources: Cases and Materials 128 & n. 7 (4th ed. 2006).

clear reason to believe that insufficient water was reaching Montana to satisfy Montana's pre-1950 appropriative rights. In such situations, the purposes animating the call requirement would have been met, and a call thus would have been unnecessary. Finally, in a footnote, I also suggested that the notice requirement might not apply if there were evidence that Wyoming prevented the adoption of a rule or process for enforcing Montana's rights under Article V(A) without the need for a call or notice.

Montana argues that all three potential exceptions are applicable here and thus provide justification, absent any notice by Montana to Wyoming in a given year, to deny Wyoming's motion for partial summary judgment. As explained below, I conclude that the evidence presented by Montana in connection with Wyoming's motion does not support the application of any of the exceptions in this case.

A. The Futility Exception

All of the Montana officials for whom deposition testimony was submitted in connection with this motion expressed frustration in trying to obtain additional water from Wyoming to meet pre-1950 uses in Montana. For example, Mr. Kerbel reports that his efforts to get Wyoming to permit more water to flow into Montana was "a frustrating part of my job"; according to his testimony, the message that he received from Wyoming was that such efforts were "futile." Kerbel Deposition, supra, at p. 108 lines 12 & 22. "How many times do I have to ask for water? How many times do I have to go out there and tell them we're short of water?" Id., p. 143, lines 1-5. When he would talk Mike Whitaker, he was told that Mr. Whitaker "didn't have the authority to shut anybody off on a call to Montana." Id., p. 145, lines 14-16. He also found it frustrating walking away from annual meetings of the Compact Commission: "Wyoming always had the upper hand because they're upstream." Id., p. 106, lines 4-6.

Montana claims that Wyoming disavowed any obligation to comply with Article V(A) on several occasions. The first occasion was in 1952 when the Wyoming State Engineer reportedly said that the "compact only divided the unappropriated waters, and left division of the appropriated waters for later settlement by the Courts." Letter from D. Ewart to F. Buck of April 15, 1952, Exhibit H, p. 1.

In 1976 and 1977, the Wyoming State Engineer and the Administrator of the Montana Resources Division exchanged letters regarding various issues and questions under the Yellowstone River Compact. In an April 13, 1977 letter, the Wyoming State Engineer opined that the Compact does not require water from interstate tributaries to be made available to meet main-stem senior water rights. Letter from G. Christopulos to O. Ferris of April 13, 1977, Exhibit Q, p. 4.

In 1988, the Wyoming State Engineer wrote to the Montana Administrator of the Water Resources Division with comments on the Ashenberg Compact Administration Proposal. The letter enclosed a 1986 report by a former Water Resources Engineer. As Montana notes, that report commented that "Paragraph A has the effect of excluding appropriative rights for water use that existed as of January 1, 1950, (pre-compact, or pre-1950) from allocation under the Compact." Letter from G. Fassett to G. Fritz, Sept. 9, 1988, Exhibit W, p. 4. In the next paragraph, however, the report also observed that section V(B) of the Compact "allocates that portion of the 'unused and unappropriated waters of the Interstate tributaries' to each State necessary to supply supplemental water to the rights described in Paragraph A. This quantity of water is to 'make whole' the pre-1950 rights; and the intent to exclude it from the allocation calculations is obvious." Id.

In January 3, 1984, the Governor of Montana wrote the Governor of Wyoming to express concerns about new storage proposals in Wyoming. In his letter, Montana's Governor noted that the Compact "provides for the protection of all pre-1950 irrigation water rights and the supplemental water associated with those rights. All pre-1950 rights and their supplemental supplies must be satisfied before streamflow is available for allocation on a percentage basis between the states." Letter from T. Schwinder to E. Herschler of Jan. 3, 1984, Exhibit Z, p. 1. In reply, the Wyoming Governor noted, "In general, the position I have taken in the past and will continue to take is that the State of Wyoming is entitled to develop its water in all of the tributaries of the Yellowstone River, provided its compact allocations are not exceeded." Letter from E. Herschler to T. Schwinden of April 10, 1984, Exhibit AA, p.1. The letter, however, also notes the value of working together to develop a water management plan for the Yellowstone River Basin.

None of these incidents constitute a clear statement on behalf of Wyoming that it would not alter its water use in response to a legitimate request by Montana pursuant to the Compact. Many of the comments, moreover, would appear to address issues other than the Article V(A) issue at issue in this case. For example, the 1952 statement by the Wyoming State Engineer that the "compact only divided the unappropriated waters, and left division of the appropriated waters for later settlement by the Courts," would appear to address division of pre-1950 rights and not the protection of pre-1950 rights from post-1950 uses.

The first clear indication in the Commission minutes of a split between the states regarding pre-1950 rights was at the December 6, 2004 Commission meeting. Montana "specifically requested that Wyoming release post-1950 stored water so that pre-1950 users in Montana could satisfy their rights," but "Wyoming indicated that this call would not be heeded

as Wyoming believes there is no legal basis for making such deliveries." Id. at viii. At the 2006 meeting, the participants discussed Montana's July 28, 2006 call, with Wyoming's representative noting that the call and corresponding letters "harken back differences the two States have had in interpreting pre-1950 rights since 2004, and probably earlier." The evidence thus does not justify denying Wyoming's motion for partial summary judgment for any years prior to 2004 on the basis of futility.

B. The "Other Sufficient Reason" Exception

I also conclude, based on the evidence submitted in connection with this motion, that there is not adequate evidence to conclude that Wyoming had other sufficient information reason to believe or know that insufficient water was reaching Montana to satisfy Montana's pre-1950 appropriative rights. The January 19, 1950 Report of the Engineering Committee of the Yellowstone River Compact Commission, Exhibit A, did not include information on water rights in Montana. The committee noted that Montana has recently collected data on water rights and was "in the process of correlating water rights with actual use." The Report did estimate consumptive use of water in all areas of the Yellowstone River Basin based on the Lowry-Johnson method, but such information would not have provided Wyoming with sufficient information to know when it needed to reduce post-1950 water uses in Wyoming in order to comply with Article V(A)

As Montana notes, it has provided Wyoming with significant information about Montana water use over the years. In 1958, for example, Montana sent Wyoming water resources reports for the Yellowstone River basin. Letter from P. Rechard to F. Buck of Jan. 29, 1958, Exhibit C. In 1962, Montana sent the Compact Commission a list of *post-1950* water rights filing. Memo from C. Heidel to F. Stermitz of Oct. 4, 1962, Exhibit D. A similar report of filings from

January 1, 1950 to October 1966 was furnished to the Commission four years later. Yellowstone River Compact Commission, Annual Report iv (1966). Again, however, none of this information would have provided Wyoming with the information that it needed to comply with Article V(A) without notice from Montana of shortages facing pre-1950 appropriators.

In 1978, Montana provided the Compact Commission with a report on the estimated irrigated lands and irrigation requirements within the Montana portion of the Tongue River. Letter from G. Fritz to W. Scott of April 26, 1978, Exhibit E. According to the July 13, 2012 Declaration of Chuck Dalby, an expert witness for Montana,

> Report includes information on Montana's Pre- and Post irrigated acreage, crops, reservoirs, and consumptive use. Although that information is outdates (e.g., short period of hydrologic record) and methods used do not reflect the current state-of-the-art), it would have been sufficient for an irrigation specialist (e.g., agricultural engineer, hydrologist, soil scientist) to estimate the stateline delivery required to satisfy Montana's pre-1950 rights. In fact, the report … estimates a pre-1950 farm water requirement (delivery at the headgate) of 57, 913 ac-ft/year; the report assumed a 70% conveyance efficiency to translate this to a stateline demand of 82,732 ac-ft/yr.

July 13, 2012 Declaration of Chuck Dalby, Exhibit F, ¶ 2. However, as Wyoming notes, even detailed information about pre-1950 uses would have been inadequate without additional information such as the availability of water downstream of the state line.

As the annual reports Yellowstone River Compact Commission make clear, moreover, Montana had not yet quantified its pre-1950 water rights during many of the years at issue in this motion. Wyoming completed the documentation of its pre-1950 water rights by 1981. 1981 Comm'n Report, supra, at iii. At that point, however, Montana's documentation was "still incomplete." Id. In 1982, the Commission noted that Montana's water rights were "still in the process of adjudicat[ion]" and discussed the "importance of having accurate data on both pre- and post-1950 water rights." 1982 Comm'n Report, supra, at iv-v.

The first decree was issued in 1983 for the Powder River. Montana sent a copy of the decree to the Wyoming in May. Letter from G. Fritz to G. Christopolus of May 12, 1983, Exhibit G, p. 1. Some twenty years later, however, adjudications for the Bighorn and Little Bighorn were still "being evaluated," and adjudication for the Tongue River basin had not yet begun. 2002 Comm'n Report, supra, at iv. Only a year before, one of Montana's water officials had suggested at the annual meeting of the Compact Commission that "an evaluation of pre-1950 water rights in both Montana and Wyoming might prove useful." 2001 Comm'n Report, supra, at iv.

C. The Potential Exception for Preventing Compact Administration

Finally, even assuming that an exception would exist if Wyoming had prevented the adoption of a rule or process for enforcing Montana's rights under Article V(A) without the need for a call or notice, there is not sufficient evidence that Wyoming did so. The depositions of the various Montana officials submitted in connection with this motion suggest that they became extremely frustrated over the years by their claimed inability to get Wyoming to agree to an effective mechanism to administer the terms of the Compact. According to Mr. Moy, he "became extremely frustrated over the years, not being able to move forward with Wyoming at all on developing administrative procedures for Article 5." Moy Declaration, supra, at p. 91, lines 8-11. This frustration apparently dates back as early as the 1980's. Id., p. 95, lines 20-23. According to Mr. Moy, the parties could not even agree on what uses were actually pre-1950 uses. Id. at p. 78, line 19 to p. 79, line 22. In a 1986 intradepartmenal memo, Mr. Moy commented that, despite Montana's efforts to work out differences with Wyoming, "Wyoming always attempts to stifle the process. For example, Montana has developed an administrative process that we think will work. We can't even get Wyoming to attend meetings to discuss the

process." Memo from R. Moy to G. Fritz of Dec. 15, 1986, Exhibit HH, p. 1. Gary Fritz reported similar frustrations; in his words, trying to develop a system for administering the compact was like "pushing a rock up the hill"; Montana officials "had a general feeling that Wyoming … thought that it would be in their best interests not to do that." Deposition of Gary Fritz, April 2, 2012, p. 7, lines 7-13.

The minutes of the annual meetings of the Compact Commission are replete with discussions of the need for procedures for implementing the Compact. See, e.g., 1985 Comm'n Report, supra, at iii ("The attention of the Commission is continuing to focus on the need to define the procedures for implementing Compact provisions …"). In some of the earlier years, the minutes suggest that both Montana and Wyoming were working to find procedures that might satisfy both sides, although significant differences in Compact interpretation existed. For example, the 1988 minutes note that both Wyoming and Montana had developed proposed methods and exchanged their respective models for review. 1988 Comm'n Report, supra, at iv-v.

By the drought year of 1992, Montana publicly expressed its frustration. In that year, as noted earlier, the Montana representative noted that his state was "frustrated by the absence of a methodology to administer the Compact." 1992 Comm'n Report, supra, at vi. He specifically raised concerns about post-1950 use in Wyoming, but said that "he was skeptical that the Commission would proactively establish an administrative method and process and, after years of attempting to have such a system adopted by the Commission, would no longer pursue such an action." While a "proactive approach to resolving long-standing issues" seemed "prudent," he worried that "the Commission has historically been unwilling to address issues other than in a crisis mode." Id. at vii. Wyoming, however, did not reject Montana's concerns out of hand.

Instead, Wyoming responded that it was "worried about the issues that Montana raised" and invited a further presentation on Montana's concern. Id. at vi-vii.

Despite Montana's frustrations, meeting minutes indicate that the two states continued to meet and discuss possible procedures. See, e.g., 2000 Comm'n Report, supra, at iii (noting agreement to establish a committee to provide recommendations on what efforts in order to administer the Compact). In 2001, the two states agreed to continue technical meetings "to address issues of water operations and management, focusing initially on the Tongue River basin." 2001 Comm'n Report, supra, at iv. In that connection, Mr. Moy "stated that an evaluation of pre-1950 water rights in both Montana and Wyoming might prove useful." Id. Technical meetings took place in 2002 , 2003, and 2004. 2002 Comm'n Report, supra, at vi-vii; 2003 Comm'n Report, supra, at vi-viii; 2004 Comm'n Report, supra, at ii-v. As late as the April 15, 2004 meeting of the Compact Commission, the minutes suggest that the parties were trying to develop agreeable procedures. Reporting on the April 14 meeting of the technical committee, "Mr. Kerbel reported that options were considered for developing a process or plan for managing and sharing water under the rules of the Compact, particularly for dry years." 2004 Comm'n Report, supra, at ii. Given the states continued efforts to find a mutually agreeable process (and the lack of any evidence showing that Wyoming was acting in bad faith), there is no justification to excuse Montana from the notice requirement.

IV. CONCLUSION

In conclusion, Wyoming is entitled to partial summary judgment precluding Montana from claiming damage or other relief for the violation of Article V(A) except for the years 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006. For the years 1987, 1988, 1989, 2000, 2001, 2002, and 2003, Montana is ordered to provide the additional information specified in

section III(C) of this opinion on or before December 1, 2012. I reserve the right to grant partial summary judgment in favor of Wyoming for any of these years if Montana fails to provide the required information for the year or if the information that is provided fails to confirm that there is a genuine issue of material fact that Montana provided adequate notice in that year.