



Office of the Attorney General

Governor
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August 17, 2012

Barton H. Thompson, Jr.
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Environment & Energy Building, MC-4205
473 via Ortega
Stanford, CA 94305-4205

Re: MT v. WY: Supreme Court of the United States No. 137
Submission of Supplemental Authority on Summary Judgment Standard

Dear Mr. Thompson,

You requested that the parties provide supplemental authority to help you determine how to deal with the “relatively vague, unspecific statements” submitted by the State of Montana in support of its claims that it made adequate calls for water on the State of Wyoming. In response to your request, Wyoming offers the following authorities explaining the shifting burdens between the parties and addressing the treatment of vague unspecific evidence in summary judgment proceedings.

With its motion, Wyoming places at issue whether Montana put Wyoming on adequate notice that Montana was not receiving enough water to satisfy its pre-1950 appropriations. This is an essential element of Montana’s claim, and it is critical for Montana to identify the specific dates which it provided adequate notice or made curtailment calls.¹ Unless Montana can identify specific call dates, it is impossible to determine the veracity of the calls, Montana’s diligence in

¹ Proof that a call was made on a specific date is essential, because a call by its very nature is a present demand for water in response to the existing conditions and demands on the river and not an after the fact complaint for damage. “ ‘A call is placed on a river when a senior appropriator forces upstream juniors to let sufficient water flow to meet the requirements of the senior priority.’ ” *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1145 n.5 (Colo. 2001) (quoting *USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 171 n.2 (Colo. 1997)).

making the calls, Wyoming's liability, Montana's damages, or the potential futility of the alleged calls. In these summary judgment proceedings, Wyoming discharges its burden as the moving party by showing that there is an absence of evidence to support Montana's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).² To do this, Wyoming need not fully negate Montana's claim, but must simply identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323; *See also, Pope v. Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 261 (N.D. Miss. 1988) (laying out a roadmap of the parties' burdens with regard to summary judgment).

Wyoming has satisfied this burden. Wyoming came forward with the affidavits of Wyoming water officials unequivocally stating that Montana never made a curtailment call prior to 2004. Wyoming also supplied Montana's interrogatory responses which provide no details related to the alleged calls, and in particular, offer no specific dates when the calls were allegedly made. Similarly, Wyoming supplied the deposition testimony of Montana water officials which provides only vague and unspecific statements about its alleged calls and fails to identify any date when an alleged call was made. Finally, Wyoming points to the Compact Commission's annual reports which not only fail to identify specific call dates, but fail to mention anything whatsoever about Montana ever making curtailment calls prior to 2004.

Accordingly, because Wyoming has properly supported its motion for summary judgment, and Montana has had full opportunity to conduct discovery, the burden shifts to Montana to present affirmative evidence in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Pope v. Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 262 (N.D. Miss. 1988). Montana "must do more than simply show there is some metaphysical doubt as to the material facts," it must come forward with evidence sufficient to establish the existence of an element essential to its case. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) (citing *Celotex Corp.*, 477 U.S. at 322). Montana cannot rely on allegations in the pleadings, beliefs, or conclusory assertions, it must come forward with specific facts sufficient to create a factual dispute. *Dobbs v. Wyeth Pharmaceuticals*, --- F. Supp. 2d ---, 2012 WL 975733, 2 (W.D. Okla. 2012); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

Montana has failed to satisfy its burden. Montana has not come forward with specific evidence sufficient to establish that it made adequate calls. Prior to 2004, Montana has provided

² *See also Carr v. Deeds*, 453 F.3d 593, 608 (4th Cir. 2006); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989); *Green v. Whiteco Industries, Inc.*, 17 F.3d 199, 201 (7th Cir. 1994); *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1543 (9th Cir. 1989); *Adams v. American Guarantee and Liability Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000).

only conclusory assertions that it made curtailment calls. As you have already noted, these relatively vague and unspecific statements by Montana water officials often fail even to identify the years in which Montana claims it made curtailment calls and are otherwise completely lacking in specific facts, including failing to ever identify particular call dates. In light of Wyoming's strong and unequivocal evidence, these vague and unspecific statements are not enough to create a genuine issue of material fact about whether Montana ever put Wyoming on adequate notice.

With this framework in mind, Wyoming will turn the results of its search for analogous summary judgment cases. Wyoming has not located any new water law cases that are factually similar to this case, largely because the issue of whether a call was made is not generally a subject in dispute. In fact, in most cases where a call is discussed it is merely noted as an event that occurred in the history of the dispute and as the temporal basis for the accrual of damages. *See, e.g., Kerbs v. Walck*, 229 P.3d 974, 976 and 980 n.4 (Wyo. 2010) (noting dates when two calls were made, and noting that no damages were claimed for and criminal conviction was overturned for acts occurring before the defendant had knowledge of the second call). Cases from other areas of the law are, of course, distinguishable in some respects, but there are many cases in which courts have refused to allow vague and unspecific evidence to prevent the entry of summary judgment.

For example, Wyoming located a number of analogous employment discrimination cases where proof of the specific date that an event at issue occurred was lacking. One such case, *Hernandez v. Spacelabs Medical Inc.*, 343 F.3d 1107 (9th Cir. 2003), discussed whether the facts asserted by an employee were sufficient to demonstrate that the alleged discriminatory acts occurred during the statutory limitations period. After reviewing the specific evidence offered by the employer demonstrating that the alleged acts occurred outside the limitations period, the court explained:

Hernandez asserts that several of these incidents occurred in "late 1998" or 1999. However, he offers no support for these asserted dates other than his declaration. Indeed, he offers no specific dates for any of the actions. Hernandez's conclusory allegations, unsupported by facts, are insufficient to survive a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Spacelabs therefore is entitled to summary judgment on Hernandez's failure to promote claims.

Id. at 1116. Other helpful employment law cases include: *Brown v. Chicago Transit Authority Retirement Plan*, 197 Fed. App'x. 475, 482 (7th Cir. 2006) (holding that a statement made by an unspecified person at an unspecified time and place in unspecified words was inadmissible because proper foundation for a conversation must include information as to when and where the conversation occurred, who was present, and who said what to whom); and *Scott v. City of New*

York Dept. of Correction, 641 F. Supp. 2d 211, 227-28 (S.D.N.Y. 2009) (finding that deposition testimony lacking in description of incidents, names, or dates was far too conclusory to meet the plaintiff's burden on summary judgment).

Wyoming also located cases from other areas of the law which demonstrate that Montana's evidence is insufficient to create a genuine issue of material fact. In the case of *Bank of the West v. Shima*, 2010 WL 2757330 (Iowa App. 2010), the trial court gave the loan guarantors two chances to supplement their opposition to the bank's summary judgment motion in a foreclosure action with specific evidence. In response, the guarantors

submitted two further affidavits, but both rested on mere generalizations, and neither contained the straightforward declarative statement the district court had requested.

We agree with the district court that this was not enough. Bank of the West provided copies of original, signed, continuing blanket guaranties, as well as acknowledgments signed by the Shimas as late as November 20, 2008, that several of the promissory notes at issue remained covered by "each guaranty executed by the undersigned in favor of [Bank of the West]." To avoid summary judgment in a situation where they bore the burden of proof, the Shimas should have provided "specific facts," *see* Iowa R. Civ. P. 1.981(5), such as particular dates, names, actions, and communications, as well as legal authority, to support their claim that the bank had actually relieved them from the stated effect of those guaranties. Instead, Randall's affidavits only set forth conclusory statements regarding the bank's alleged past practices and did not even meet the district court's minimum requirement of a definitive statement that they had received back *all* of the executed guaranties marked paid, terminated, or satisfied. Having failed to meet the demands of rule 1.981(5), we believe the Shimas cannot complain of the summary judgment entered against them.

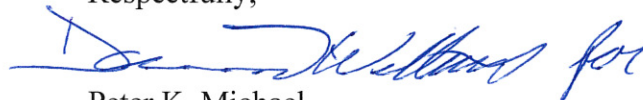
Id. at 4-5. Additional helpful cases include: *Deschaine v. McLaughlin*, 2010 WL 935662, 9 (D. Colo. 2010) (holding that the plaintiff had to provide more than his unsupported, unsworn conclusory allegation based upon a statement made by an unknown person to create a genuine issue of material fact); *Hilgraeve, Inc. v. Symantec Corp.*, 271 F. Supp. 2d 964, 974 (E.D. Mich. 2003) (finding that the conclusory statement of a witness in an affidavit was not enough, and requiring citation to specific concrete facts establishing the truth of the matter asserted); *BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1101 (10th Cir. 1999) (stating that affidavits which contain sweeping, conclusory statements but do not mention any single transaction, date, or person fall well short of the degree of specificity needed to be admissible in a summary judgment context).

These representative cases considered evidence that was just as vague and unspecific as the evidence of calls offered by Montana in this case, and the courts uniformly held that such evidence is insufficient to prevent the entry of summary judgment. The same result should follow in these proceedings. Montana shoulders the burden to put forth evidence that it made adequate calls, including evidence establishing the date those calls occurred. It has not satisfied that burden for any years prior to 2004. Accordingly, as a matter of law, Wyoming's motion should be granted.

As a final matter, Wyoming previously provided you with materials responsive to your request for information on the process for making intrastate calls in Wyoming on July 31, 2012. Montana also provided you with materials it considered relevant to the process for making intrastate calls in Montana on August 13, 2012. In the interest of completeness, enclosed with this letter are documents Wyoming believes are responsive to your previous request for materials governing intrastate calls for water in Montana.³ As is apparent from Wyoming's prior submission and the attached materials both Wyoming and Montana require their water users to submit a document in writing before either state engages in administrative regulation.

I hope you find these citations and materials helpful.

Respectfully,



Peter K. Michael
Chief Deputy Attorney General

Cc: By U.S. Mail and E-mail
John B. Draper
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James J. Dubois
Solicitor General of the United States
Jennifer Verleger
Michael Wigmore

³ *Water Rights in Montana*, p. 40, dated April 2012, located at <http://leg.mt.gov/content/publications/environmental/2012-water-rights-handbook.pdf>. *Water Right Dispute Options* located at http://www.dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/609-ins.pdf. *Water use Complaint* located at http://www.dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/609.pdf.

Water Rights in Montana

April 2012



This document has been updated to reflect Montana statute and rules as of April 2012.

commissioner supervises the other commissioner(s) in distributing water rights (section 85-5-102, MCA).

Upon petition of water rights holders (owning at least 51% of the water rights on a watercourse), the court may direct a commissioner to maintain and repair ditches, canals, and other structures necessary to distribute water rights. Owners are responsible for all maintenance expenses (section 85-5-106, MCA).

Dispute Resolution and Enforcement

If a water user feels that a water right is being adversely affected by the actions of another water user, the parties should talk to each other to see if the matter can be settled. If the matter cannot be settled, there are various options under Montana law for resolution.

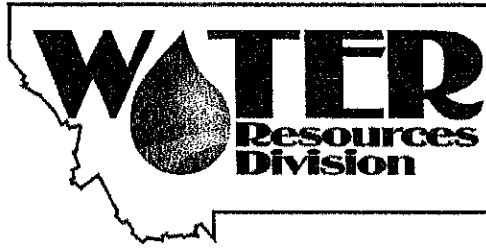
These options include petitioning the District Court to appoint a water commissioner or filing a temporary restraining order or preliminary INJUNCTION in District Court. If water is not reaching an appropriator's point of diversion, the appropriator can make a "call" on junior appropriators, which means contacting junior appropriators and documenting the request for water. Complaints may be filed with the DNRC. A water rights holder who is successful in going to court to stop someone without a water right from using water will be awarded attorney fees by the District Court.

A District Judge may also appoint Water Masters to handle some disputes. County attorneys or the Attorney General may bring suit to stop illegal water use (section 3-7-311, MCA). County attorneys may also request assistance from the Attorney General in water right cases.

Which option is best depends on the particular circumstance, how fast the matter needs to be settled, and the cost of the action.

For specific details of options, refer to the Water Right Dispute Options handout available at the water resources regional offices or on the DNRC website at:

dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/609-ins.pdf



Water Right Dispute Options

Controversy over water rights is a common occurrence in this semi-arid state, especially in times of drought. When a water right dispute arises, the Department of Natural Resources and Conservation (DNRC) urges the parties to first talk to each other to see if the matter can be settled. It is surprising how many water disputes can be settled once the parties just start talking.

If you are a water user who feels your water rights are being adversely affected by the actions of another water user, and you cannot resolve the matter with the offending water user yourself, you have the following options, and possibly others, available to you under Montana law. Which option is best for you depends on your particular circumstances, how fast you want the matter settled, and how much money you are willing to spend. You should consider consulting an attorney to find out which option is best for you.

1. You can file a court action in the appropriate district court asking for a temporary restraining order and preliminary injunction. See MCA § 27-19-101, 201, 314. This will probably be the fastest way to obtain relief, but it is also the most expensive, as for most water uses it will require the hiring of an attorney. This option is very formal and often polarizes the parties after one party "wins".
2. If an *old* (pre-July 1, 1973) decree exists, you can petition the district court pursuant to MCA § 85-5-101 to have a water commissioner appointed. For those fortunate enough to have a decreed water right, this can be a fairly inexpensive way to settle a water distribution problem. A water commissioner distributes water according to the decree, and any disputes with the way the water is distributed can be brought up with the local district court judge who appointed the water commissioner. MCA § 85-5-301. How fast a water commissioner would be appointed depends on your local district court and how often a water commissioner has been appointed in the past.
3. When a water distribution controversy arises upon a source of water in which *not all* existing (pre-July 1, 1973) water rights have been conclusively determined by the Water Court, any party to the controversy may petition the district court to certify the matter to the Chief Water Judge for a determination of the existing rights that are involved in the controversy MCA § 85-2-406 (2)(b). The district court from which relief is sought retains exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights certified to the Chief Water Judge. Certified controversies must be given priority by the Chief Water Judge over all other adjudication matters. After determination of the matters certified, the Chief Water Judge returns the decision to the district court with a tabulation or list of the existing rights and their relative priorities which can be enforced by the district court.
4. When the existing water rights of all appropriators from a source or in an area have been determined in a temporary preliminary decree, preliminary decree, or final decree issued by the Water Court under the new adjudication statutes (since July 1, 1973), the judge of the district court may upon application by both the DNRC and one or more holders of valid water rights in the source appoint a water commissioner. The water commissioner shall distribute to the appropriators the water to which they are entitled. MCA § 85-5-101 (2). (A temporary preliminary decree or preliminary decree or a *portion* of a temporary preliminary decree or preliminary decree as modified after objections and hearings is enforceable and administrable according to its terms.) If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water judge shall upon referral

from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities. MCA § 85-2-406(4).

5. You can petition the district court pursuant to MCA § 85-5-110 for the appointment of a water mediator. It is important to know that the mediator does not have the power to order any water user to do anything, but rather would be able to discuss proposed solutions. The DNRC has a list of mediators who have attended educational programs specifically offered for water mediators. This option may represent the best way for water users to start talking about a solution as an alternative to expensive and time-consuming litigation. How fast a mediator is appointed depends on your local district court. Although this may not represent the fastest solution, it may represent the one that may leave you talking with your neighbor when the matter is finally settled.

6. You can contact the nearest DNRC Regional Office. The DNRC has jurisdiction over water users wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use water, or otherwise violating provisions of the Montana Water Use Act. MCA § 85-2-114. If your situation involves your water not reaching your point of diversion, the DNRC requires you to contact the offending party to make a "call" for your water, document the call, and file a formal written complaint. Although, the DNRC can fine violators of the Water Use Act and take them to court to make them stop, the necessary investigations and decisions to take enforcement action may not come soon enough to solve your immediate problem. Whether the DNRC takes enforcement action also depends on the facts of your situation. In addition, it depends on what budget and staff limitations exist at a particular time, and how many other priority enforcement actions are pending. You should be prepared to initiate enforcement of your own.

You may have other options available to you depending on your particular circumstances.

WEBSITE: <http://www.dnrc.mt.gov/wrd>

WATER RESOURCES REGIONAL OFFICES

BILLINGS:

AIRPORT INDUSTRIAL PARK
1371 RIMTOP DR., BILLINGS MT 59105-1978
PHONE: 406-247-4415 FAX: 406-247-4416
SERVING: Big Horn, Carbon, Carter, Custer, Fallon, Powder River, Prairie, Rosebud, Stillwater, Sweet Grass, Treasure, and Yellowstone Counties

BOZEMAN:

2273 BOOT HILL COURT, SUITE 110
BOZEMAN MT 59715
PHONE: 406-586-3136 FAX: 406-587-9726
SERVING: Gallatin, Madison, and Park Counties

GLASGOW:

222 6TH STREET SOUTH, PO BOX 1269
GLASGOW MT 59230-1269
PHONE: 406-228-2561 FAX: 406-228-8706
SERVING: Daniels, Dawson, Garfield, McCone, Phillips, Richland, Roosevelt, Sheridan, Valley, and Wibaux Counties

HAYRE:

210 6TH AVENUE, PO BOX 1828
HAYRE MT 59501-1828
PHONE: 406-265-5516 FAX: 406-265-2225
SERVING: Blaine, Chouteau, Glacier, Hill, Liberty, Pondera, Teton, and Toole Counties

HELENA:

1424 9TH AVE., PO BOX 201601,
HELENA MT 59620-1601
PHONE: 406-444-6999 FAX: 406-444-9317
SERVING: Beaverhead, Broadwater, Deer Lodge, Jefferson, Lewis and Clark, Powell, and Silver Bow Counties

KALISPELL:

655 TIMBERWOLF PARKWAY, SUITE 4
KALISPELL MT 59901-1215
PHONE: 406-752-2288 FAX: 406-752-2843
SERVING: Flathead, Lake, Lincoln, and Sanders Counties

LEWISTOWN:

613 NORTHEAST MAIN ST., SUITE E
LEWISTOWN MT 59457-2020
PHONE: 406-538-7459 FAX: 406-538-7089
SERVING: Cascade, Fergus, Golden Valley, Judith Basin, Meagher, Musselshell, Petroleum, and Wheatland Counties

MISSOULA:

2705 SPURGIN RD., BLDG. C, PO BOX 5004
MISSOULA MT 59806-5004
PHONE: 406-721-4284 FAX: 406-542-5899
SERVING: Granite, Mineral, Missoula, and Ravalli Counties

For Mailing, Use Post Office Box Number.

Date Received _____

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
WATER RESOURCES DIVISION

WATER USE COMPLAINT

Mail completed form to the Regional Office serving your county on the back page.

Name of Party Filing Complaint: _____		
Address: _____		
City _____	State _____	Phone _____
Name of Party Causing Harm: _____		
Address: _____		
City _____	State _____	Phone _____

1. **Water right(s) being affected:** (see DNRC records for your water right nos.)

2. **Source of water:** _____
(USGS named stream, unnamed tributary to a USGS named stream, well, spring)

3. **Location of your diversion or use:** (Attach a scaled map or aerial photo showing the location of your diversion and use and the other appropriator's diversion and use.)

___ 1/4 ___ 1/4 ___ 1/4 Sec. ___ Twp. ___ N/S Rge. ___ E/W County _____

4. **Location of the other appropriator's diversion or use:**

___ 1/4 ___ 1/4 ___ 1/4 Sec. ___ Twp. ___ N/S Rge. ___ E/W County _____

5. **Describe the nature of the problem, what the appropriator is doing and how it is affecting your use of water:**

6. **Have you made a call for your water or otherwise contacted the appropriator?**

YES NO

(In most instances, the DNRC will not act if the appropriator has not been contacted by the complainant.)

If Yes, what was the appropriator's response? (Attach a copy of your written "call for water".)

7. **Do you have any suggestion for a mediated resolution?**

8. **Signature of Complainant:** _____ **Date** _____

Water Resources Regional Offices

BILLINGS: AIRPORT INDUSTRIAL PARK, 1371 RIMTOP DR., BILLINGS MT 59105-1978

PHONE: 406-247-4415 FAX: 406-247-4416

SERVING: Big Horn, Carbon, Carter, Custer, Fallon, Powder River, Prairie, Rosebud, Stillwater, Sweet Grass, Treasure, and Yellowstone Counties

BOZEMAN: 2273 Boot Hill Court, Suite 110, BOZEMAN MT 59715

PHONE: 406-586-3136 FAX: 406-587-9726

SERVING: Gallatin, Madison, and Park Counties

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PHONE: 406-228-2561 FAX: 406-228-8706

SERVING: Daniels, Dawson, Garfield, McCone, Phillips, Richland, Roosevelt, Sheridan, Valley, and Wibaux Counties

HAVRE: 210 6TH AVENUE, PO BOX 1828, HAVRE MT 59501-1828

PHONE: 406-265-5516 FAX: 406-265-2225

SERVING: Blaine, Chouteau, Glacier, Hill, Liberty, Pondera, Teton, and Toole Counties

HELENA: 1424 9th Ave., PO BOX 201601, HELENA MT 59620-1601

PHONE: 406-449-0944 FAX: 406-442-9315

SERVING: Beaverhead, Broadwater, Deer Lodge, Jefferson, Lewis and Clark, Powell, and Silver Bow Counties

KALISPELL: 655 TIMBERWOLF PARKWAY, KALISPELL MT 59901-1215

PHONE: 406-752-2288 FAX: 406-752-2843

SERVING: Flathead, Lake, Lincoln, and Sanders Counties

LEWISTOWN: 613 NORTHEAST MAIN ST., SUITE E, LEWISTOWN MT 59457-2020

PHONE: 406-538-7459 FAX: 406-538-7089

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PHONE: 406-721-4284 FAX: 406-542-5899

SERVING: Granite, Mineral, Missoula, and Ravalli Counties