No. 137, Original

In The
Supreme Court Of The United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

Before the Honorable Barton H. Thompson, Jr.
Special Master

Montana's Response to Wyoming's Request for Clarification

STEVE BULLOCK
Attorney General of Montana

JENNIFER ANDERS
Assistant Attorneys General
ANNE YATES
Special Assistant Attorney General
215 North Sanders
Helena, Montana 59620-1401

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
LARA KATZ
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
jdraper@montand.com
*Counsel of Record

December 19, 2012

The State of Montana hereby submits this Response to Wyoming's Notice of Objection and Request for Clarification ("Request"), filed on December 17, 2012.

In its Request, Wyoming seeks a modification of the Supplemental Memorandum Opinion that would specify the dates when calls will be considered to have been made by Montana in the years 2000, 2001, 2002, and 2003. Wyoming states that, based on prior rulings in this case and the testimony of Mr. Stults, the following dates should be assumed to be the dates when calls were made: September 30, 2000, or the end of the irrigation season that year, whichever is later; September 31, 2001,[1] or the end of the irrigation season that year, whichever is later; July 1, 2002; and July 1, 2003.

Wyoming's Request for Clarification is inappropriate for two reasons: (1) the issue of when notification was made in a given year is not appropriate for summary judgment; and (2) Wyoming has misconstrued the evidence for purposes of setting the dates to be considered. Wyoming's request is therefore more appropriately addressed at trial, after all the evidence has been presented, including what dates constitute the "irrigation season."

SUMMARY JUDGMENT STANDARD

Because Wyoming's Request arises in the context of a summary judgment motion, the Rule 56 standard applies:

> On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for the factfinder. Rather, the court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial. Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. [Courts] must look therefore at the evidence as a jury might, construing the record in the light most favorable to the nonmovant and avoiding the temptation to decide which party's version of the facts is more likely true.

Payne v. Pauley, 337 F.3d 767, 770-71 (7th Cir. 2003) (quotations, citations omitted).

[1] Montana assumes that Wyoming meant September 30, 2001.

DISCUSSION

I. The Establishment of Specific Dates on Which Notification Was Given Is Not Appropriate on Summary Judgment

Wyoming's Request presumably refers to the following language in the Supplemental Memorandum Opinion issued September 28, 2012:

> 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. Supp. Mem. Op. at 34.

Montana understands this language to refer to an assumption that would be applied at trial. While Montana disagrees that this assumption should apply at trial, it is most certainly inappropriate on summary judgment, as it requires an inference that an act occurred at the end of a period instead of the beginning. In this case, such an inference stands in direct contradiction to the basic standard set by Rule 56, which requires all inferences to be resolved in favor of the non-movant on summary judgment.

Furthermore, the determination of when notification was given in the years at issue requires additional evidence that is not before the Special Master on summary judgment. For instance, Wyoming requests that September 30th be the date set for the year 2000, based on the testimony that notification was given during the "irrigation season" in that year. Wyoming thus assumes that the testimony refers to the end of the irrigation season, which it suggests (without evidence) is September 30, 2000. But Wyoming requests this inference in its favor, without any indication or explanation in the testimony as to what the witnesses intended "irrigation season"

to mean. Further evidence, which must be produced at trial, is therefore necessary to establish what the witness meant by "irrigation season." For the purposes of summary judgment, the Special Master must construe this term in the light most favorable to Montana.

In sum, the establishment of specific dates that notification was given by Montana that its pre-1950 rights were not being satisfied is not properly resolved on summary judgment and is an issue that should be left for trial.

II. Wyoming Misconstrues the Testimony Regarding When Notification Was Given

Even if application of the assumption outlined in the Supplemental Memorandum Opinion were proper on summary judgment – which Montana strongly disputes – the dates suggested by Wyoming for the years 2000, 2001, 2002, and 2003 are based on a misapplication of the summary judgment standard to the testimony submitted by Montana, and a misreading of that testimony.

As an initial matter, Montana notes that the dates put forth by Wyoming are based solely on the declaration of Jack Stults, and do not take into account the Second Declaration of Rich Moy or the deposition testimony of Mr. Stults, Mr. Moy, or Keith Kerbel. Regardless, even considering only the declarations submitted as part of Montana's Supplemental Evidence Pursuant to the Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Summary Judgment, the latest dates that notification could be said to have been given in the years at issue would not be those suggested by Wyoming.

In his declaration, Mr. Stults generally recalled communications with Wyoming regarding water shortages in Montana in 2000, 2001, 2002, and 2003. Stults Declaration, ¶¶ 7, 11, 15, 18, 21. He testified that these communications took place during the "irrigation season," and more specifically, during "the spring and summer" of those years, when Montana was

experiencing drought. *Id.*, ¶ 18. With respect to 2002 and 2003, Mr. Stults testified that he personally notified Wyoming officials of water shortages in the Tongue and Powder River Basins in Montana in "May and June." *Id.*, ¶ 20.

Likewise, Mr. Moy stated that during the irrigation season in May or June of 2000, 2001, 2002, and 2003 he informed Wyoming that Montana was water short and that the two States "needed to administer the Compact." Moy Second Declaration ¶ 27; *see also id.* at ¶¶ 28-30, 36; Moy Third Declaration ¶ 22. Mr. Moy also specifically testified that he personally informed Wyoming that Montana was unable to fill the Tongue River Reservoir in May or June of 2001 and 2002. Moy Second Declaration ¶¶ 35-36.[2]

On the sole basis of the Stults Declaration, Wyoming proposes that the following limitations should apply:

a. In the year 2000, any calls should be considered to have been made on September 30, 2000, or the end of the irrigation season that year, whichever is later;
b. In the year 2001, any calls should be considered to have been made on September 30, 2001, or the end of the irrigation season that year, whichever is later;
c. In the year 2002, any calls should be considered to have been made on July 1, 2002;
d. In the year 2003, any calls should be considered to have been made on July 1, 2003.

Wyoming thus proposes that "spring and summer" be construed to mean the end of September, and "May and June" be construed to mean the end of June. This is a fundamental misreading of the testimony.

Mr. Stults' testimony was inclusive of both "spring and summer" in 2000 and 2001, and "May and June" in 2002 and 2003. Wyoming's proposed dates require Mr. Stults' testimony to be construed in the disjunctive, i.e., "spring **or** summer" and "May **or** June," as if he were unsure when the conversations took place. In fact, Mr. Stults was explicit that these conversations took

[2] This Response does not attempt to collect all of the relevant evidence on 2000, 2001, 2002 or 2003, including the evidence from the depositions. *See, e.g.*, Kerbel Deposition at 142:11 – 143:5, 144:24 – 146:5, 272:9 – 274:15 (testifying to calls made in the 2000s).

place in both May **and** June of 2002 and 2003, and in the spring **and** summer of 2000, 2001, 2002, and 2003. Applying the Special Master's previous ruling, which would assume that the notifications were given at the end of the general periods Mr. Stults testified to, and resolving inferences in favor of Montana, which would look to the earlier of these periods (i.e., spring instead of summer, May instead of June), the latest the notifications could be considered to have been made would be as follows:

a. For the year 2000: June 20, 2000 (taking June 21st as the first day of summer, June 20th as the last day of spring);
b. For the year 2001: June 20, 2001;
c. For the year 2002: May 31, 2002;
d. For the year 2003: May 31, 2003.

The above analysis ultimately demonstrates that the evidence before the Special Master is simply too incomplete to establish specific dates when notification was given, and highlights the need for such issues to await resolution following the presentation of evidence at trial.

CONCLUSION

Wyoming's request that the Special Master establish, in the context of summary judgment, specific dates when Montana will be considered to have notified Wyoming that its pre-1950 rights were not being satisfied should be rejected.

Respectfully submitted,

STEVE BULLOCK
Attorney General of Montana

JENNIFER ANDERS
Assistant Attorney General
ANNE YATES
Special Assistant Attorney General
215 North Sanders
Helena, Montana 59620-1401

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
LARA KATZ
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
*Counsel of Record

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Montana's Response to Wyoming's Request for Clarification was served by electronic mail on this 19th day of December, 2012, and by placing the same in the U.S. mail on December 20, 2012, to the following:

Peter K. Michael
Chief Deputy Attorney General
Jay Jerde
Christopher M. Brown
David Willms
Matthias Sayer
Andrew Kuhlmann
James C. Kaste
The State of Wyoming
123 Capitol Building
Cheyenne, WY 82002

James Joseph Dragna
Bingham, McCutchen LLP
355 South Grand Avenue Suite 4400
Los Angeles, CA 90071
jim.dragna@bingham.com

Michael Wigmore
Bingham McCutchen LLP
2020 K Street NW
Washington, DC 20006-1806
michael.wigmore@bingham.com

peter.michael@wyo.gov
jjerde@wyo.gov
chris.brown@wyo.gov
matthias.sayer.wyo.gov
david.willms@wyo.gov
andrew.kuhlmann@wyo.gov
james.kaste@wyo.gov

Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteinglaw.com

Jennifer L. Verleger
Assistant Attorney General
North Dakota Attorney General's Office
500 North 9th Street
Bismarck, ND 58501-4509
jverleger@nd.gov

Solicitor General of the United States
U. S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5614
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov

James DuBois
United States Department of Justice
Environmental and Natural Resources
Division of Natural Resources Section
999 18th St. #370 South Terrace
Denver, CO 80202
james.dubois@usdoj.gov

Barton H. Thompson, Jr., Special Master
Susan Carter, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 Via Ortega
Stanford, CA 94305-4205
(Original and 3 copies of Certificate of Service only by Email and U.S. Mail)
susan.carter@stanford.edu

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

Jeffrey J. Wechsler