

## APPENDIX A

### Table of Representative Statements and Contrary Evidence in the Statement of Facts in Wyoming's Renewed Motion for Summary Judgment

Representative Wyoming Statement	Representative Contrary Evidence
<p>“Mr. Moy ultimately made that distinction, testifying that Montana’s oral complaints in the 1980s and 2000s occurred outside of the irrigation seasons in reaction to drought but were not calls for curtailment within the irrigation seasons.” <i>Wyo. Renewed Mot. at 4 (citing Moy Dep. at 105:5 – 107:5).</i></p>	<p>Q. Do you know whether these complaints occurred, for example in the irrigation season where the statement is made this year this is happening, you’ve got to do something about it Wyoming? A. Yes. Moy Dep. 99:2-6</p> <p>Q. And then in response to a question from Mr. Michael, you indicated that there were no calls made during the irrigation seasons. Is that a fact that you know about? A. No. I think that there were probably calls made during the irrigation season. Moy. Dep. 226:1-6.</p>
<p>“First, Mr. Moy testified that in its complaints, Montana sought more water from Wyoming. But Mr. Moy meant this in the general sense of Montana complaining that without an administrative protocol Montana would not receive its share of water under Article V.” <i>Wyo. Renewed Mot. at 6-7 (citing Moy Dep. at 101:13 – 107:5; 105:5 - 106:23).</i></p>	<p>Q. It’s a call. What was the meaning, definition of that word? Do you know what that meant in that letter, what it was intended to mean, the word call? A. The word call is we think Wyoming should shut off and make sure they’re not developing or using post-’50 water. And the call was to ensure water was to cross the border to satisfy our pre-’50 water rights. Q. Was there a contact previously in the 80’s . . . where the call was made on Wyoming in that sense of the word? A. Yes. Moy Depo. 105:11-25.</p> <p>Q. But you personally said we want you to curtail post-1950 [water users]? . . . Did you say that?</p>

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<p>“He stated that the complaints Montana made in the 1980s were different than the curtailment call that Montana made in May 2004.” Wyo. Renewed Mot. at 4 (citing Moy Dep. at 101:13 – 105:4).</p>	<p>A. Did I say that, yes. I said it. Moy Depo. 230:12-19. See Moy Depo. 102:7 – 105:24, 230:12-19.</p> <p>Q. But would you agree with me, when you describe the kind of complaints and the process in the ‘80s versus what happened in 2004, where you got together, you wrote a letter you got the governor’s approval and sent a letter mentioning the governor’s name and so forth, that was a different kind of request? A. No. It was actually, from my perspective, it was the same.</p> <p>... Q. But did you make the same kind of demand? A. Verbally, yes. ... Moy Depo. 103:13-15.</p>
<p>“When asked directly whether Montana complained for more water in the sense of a demand on Wyoming officials to curtail diversions and send more water downstream during an irrigation season, Mr. Moy denied complaints of that nature” Wyo. Renewed Mot. at 7 (no citation)</p>	<p>See citations above.</p>
<p>“Mr. Moy reiterated that Montana did not ‘demand’ curtailment, but that he had made ‘requests’ at compact commission meetings or technical meetings.” Wyo. Renewed Mot. at 8 (citing Moy Depo. at 227:2 – 231:20); <i>see also id</i> at 8.</p>	<p>See citations above.</p>
<p>“Although he used the word ‘call,’ he defined it to cover complaints made at annual meetings, long after the end of a water year.” Wyo. Renewed Mot. at 7 (citing Moy Dep. At</p>	<p>Q. It’s a call. What was the meaning, definition of that word? Do you know what that meant in that letter, what it was intended to mean, the word call? A. The word call is we think Wyoming should shut off and make sure they’re not developing or using post-’50 water. And the call was to ensure water was to cross</p>

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<p>105:14 – 106:23).</p>	<p>the border to satisfy our pre-'50 water rights.  Q. Was there a contact previously in the 80's . . . where the call was made on Wyoming in that sense of the word?  A. Yes.  May Depo. 105:11-25.</p>
<p>"[Mr. Stults] did not make a demand but instead questioned the amount of water being diverted in Wyoming." Wyo. Renewed Mot. at 14-15 (citing Stults Depo. at 86:6 – 90:1).</p>	<p>Q. Well, my question was, did you personally make a call or demand to Wyoming, a official, saying that we, Montana, want you to – whether you say demand or whatever, but we want you to curtail water use in Wyoming so that this season, in the near future from when I'm making this demand, more water is available to Montana users?  A. I made it clear to them that we felt that they were taking more water than they were entitled to, and that they should – that some of that water should be coming across the state line to Montana.  Stults Depo. at 87:14-24.</p>
<p>"[Mr. Stults] did deny that he had sought Compact enforcement for Montana." Wyo. Renewed Mot. at 15 (citing Stults Depo. at 99:25 – 100:4).</p>	<p>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.  Stults Depo. at 90:21-24.  Q. And in the May 18<sup>th</sup> letter, you also intended to convey that Montana was now asserting its rights under the compact, correct?  A. Correct.  Q. That was the – that was the step up from the process you previously described correct?  A. Well, I don't think that you can ever say that a conversation between two commissioners from two different states is not having to do with the compact. It may not be a formal action invoking the compact, but it's never out of context to the compact.  Q. No, and I didn't say that. I didn't say it didn't have to do with the compact.</p>

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	<p>Surely it did. A. Okay.</p> <p>Stults Depo. at 149:8-21</p> <p>Q. Were you also making those requests as a signatory of the compact? A. Yeah, there was no question that they understood that I was speaking about water that is under the compact.</p> <p>Q. And I believe you were asked the question: "Did you view that as seeking to have the compact enforced?" meaning did you view those oral – as I understood it, did you view those oral requests or calls as seeking to have the compact enforced, and I believe you answer was no, and I was wondering if you would clarify that. A. Well, I talked a lot about this one term that's been used, "practical approach." I like to call it a hydrologic or scientific approach. And so I'm cautious and was cautious at the time, about invoking the compact and making it appear as though I was asking that the compact to be formally enforced under the dispute resolution structure, et cetera, of the compact commission.</p> <p>So I was – I'm getting tired, I guess. I was making a call, and it was in the compact – 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.</p> <p>Q. And that was water that was yours under the compact. A. Correct.</p> <p>Q. So one of your concerns was, really, you didn't want to be going – marching down the road towards litigation. A. Correct.</p> <p>Stults Depo. at 230:11 – 231:19.</p> <p>Q. Are you aware of any instance prior to May 18<sup>th</sup> of 2004 when a representative</p>
<p>"But [Mr. Kerbel] denied making a demand</p>	

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<p>that Wyoming curtail diversions to comply with the Compact." Wyoming Renewed Motion 18 (quoting Kerbel Depo. 100:13 – 111:12; 144:3 – 147:21; 278:7-279:5; 286:4 – 288:3).</p>	<p>of Montana DNRC said to a representative of the State of Wyoming we want you – the State of Montana would like you to curtail water use on the Tongue River and the Powder River to allow more water to pass the state line into Montana?</p> <p>A. Well, maybe not in those exact words, but pretty much every doggone annual meeting that I went to – we basically – in different words, basically said – and we tried to work with Wyoming to make sure that we have water coming from Wyoming into Montana to satisfy our water needs.</p> <p>Kerbel Depo. 101:22 – 102:9.</p> <p>Q: And as you recall, I heard you testimony earlier, you were talking about the period from 1987 to 1989, a couple of years in the 1990s and the 2000s. Did I miss any years?</p> <p>A. 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 discussed showing our frustration. And they, basically, came back and they had the same frustration I did too.</p> <p>So I knew for a fact when we were talking about trying to get water and making [a] 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.</p> <p>Q. During those – did you communicate to [Carmine LoGuidice, Mike Whittaker, and Bill Knapp] that Montana was needing water during those water-short years?</p> <p>A. Of course.</p> <p>Q. And those are the same water-short years that we talked about earlier?</p> <p>A. Yes.</p> <p>Kerbel Depo. 272:9 – 273:25</p>

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<p>“Mr. Kerbel testified that he had few contacts with Wyoming officials during the 1990s and, because they were good water years, those contacts did not include complaints.” (citing Kerbel Depo. at 278:3-25; 281:19 – 283:2).</p>	<p>See Kerbel Depo. 272:9 – 273:25</p> <p>A. . . . So the bottom line is, is that, yes, we've had conversation[s] 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, where I've talked to the guys in Wyoming and that's the conversation we had.</p>
	<p>Kerbel Depo. 142:11-16</p>
	<p>Q. [M]y question was: In a particular time, did Montana, to your knowledge, make a communication with Wyoming?</p>
	<p>A. We made a concerted effort, all the while I was hired in my present capacity, to talk to Wyoming. And I talked to Sue, and I talked to Mike, and I've talked to Carmine. I've talked to all of those folks from different times in different years. I don't have a specific year. But I know those conversations existed in the 80s, a couple years in the 90s and 2000s trying to get water down to our side of the river. I mean we really tried.</p>
	<p>Kerbel Depo. 144:3 – 145:7</p>
	<p>Q. How about in the 1990s? Did he ever initiate a call to you in the '90s?</p> <p>A. Yeah, we did.</p>
	<p>Kerbel Depo. 281:17-21</p>