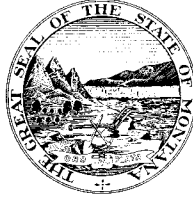


**ATTORNEY GENERAL**  
STATE OF MONTANA

Steve Bullock  
Attorney General



Department of Justice  
215 North Sanders  
PO Box 201401  
Helena, MT 59620-1401

August 17, 2012

**VIA FIRST CLASS AND E-MAIL**

Barton H. Thompson  
Susan Carter, Assistant  
Jerry Yang and Akiko Yamakazi  
Environment and Energy Building, MC 4205  
473 via Ortega  
Stanford, CA 94305-4205

RE: *Montana v. Wyoming and North Dakota*  
No. 137, Orig., U.S. Supreme Court  
*Summary Judgment Case Citations*

Dear Special Master Thompson:

On July 27, 2012, counsel for Wyoming and Montana presented oral argument on Wyoming's renewed motion for partial summary judgment on the issue of damages under Section V(A) of the Yellowstone River Compact (Compact). During the argument, you requested that the parties provide you with additional information and authorities illustrating how motions for summary judgment have been resolved under similar factual circumstances as those presented in this case. This letter brief is submitted in response to your request and provides an overview of the summary judgment standard, as well as a list of authorities applying that standard in cases which are factually analogous to those at hand. It is Montana's contention that the record evidence is sufficient to allow the factfinder to resolve the question of whether Montana is entitled to damages in any given year. To that end, Montana has prepared a chart setting forth the findings and reasonable inferences that could be made from the record evidence. *See* Appendix A, attached.

**I. RELEVANT PROCEDURAL BACKGROUND**

On September 12, 2011, Wyoming filed the motion, pursuant to Case Management

Order No. 8, Aug. 19, 2011, ¶ 2, seeking to preclude the State of Montana from claiming damages or other relief based on Section V(A) of the 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 sought partial summary judgment precluding Montana from claiming damages or other relief for those days in the years 2004 and 2006 that preceded Montana's notifications in those years. A hearing was held on Montana's motion in Denver, Colorado on September 30, 2011, and the Special Master issued a Memorandum Opinion on the issue on December 11, 2011. The Memorandum Opinion held that Montana was required to provide notice to Wyoming in order to claim damages under Section V(A), but that "Montana's notice to Wyoming did not have to take any particular shape or form" (Memorandum Opinion, Pg. 7). The memorandum opinion did not resolve the question of whether notice was or was not provided for specific years, but the Special Master granted Wyoming permission to renew its motion for partial summary judgment on the issue of damages after further discovery on the notice issue had been completed.

On June 15, 2012, Wyoming filed a renewed motion for partial summary judgment. Oral argument was heard on the issue before the Special Master on July 27, 2012. The gist of Wyoming's argument is that summary judgment should be granted on the issue of damages because Montana has failed to produce evidence that it gave notice of water shortages during the years in question, and that notice is a necessary prerequisite to asking for damages. In support of its motion Wyoming has submitted affidavits testifying that Wyoming did not receive notice and further claims that sworn testimony from former Montana employees indicating that they did give notice of water shortages to Wyoming are insufficient as a matter of law to warrant submission to a factfinder. During the argument, the Special Master requested that parties submit additional research identifying cases where the summary judgment standard has been applied under similar factual circumstances. Below is a discussion of the summary judgment standard and the relevant burdens of proof, and a summary of cases applying the standard to facts similar to the ones in this case.

## **II. GENERAL SUMMARY JUDGMENT RULE**

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FRCP 56).

"Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). "[W]hen a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962).

"[S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. The substantive law of the case will determine which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* "[T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. *Id.*, 477 U.S. at 255. "[T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 248-49. Thus, at the summary judgment stage, "the judge does not weigh conflicting evidence with respect to a disputed material fact," and nor "does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions," because "[t]hese determinations are within the province of the factfinder at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

In determining whether the evidence proffered by the nonmoving party is sufficient to withstand a motion for summary judgment, the Supreme Court has stated that "[o]ur opinions on summary judgment subsequent to *Anderson* and *Matsushita* have honored the difference between weighing direct evidence and refusing to draw unreasonable inferences from circumstantial evidence. *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988). In *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d at 631-32, the court explained the different approaches necessary when evaluating circumstantial evidence offered by the nonmovant versus direct evidence:

If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. The nonmoving party's evidence must be taken as true. Inferences from the nonmoving party's "specific facts" as to other material facts, however, may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are *otherwise permissible under the governing substantive law*. This inquiry ensures that a "genuine" issue of material fact exists for the factfinder to resolve at trial.

(Emphasis added.)

### III. CASES APPLYING THE SUMMARY JUDGMENT STANDARD UNDER SIMILAR FACTS

Montana submits the following as representative cases where the summary judgment standard was applied under similar factual scenarios.

***Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)**: Plaintiff brought a civil rights action after she was arrested in a restaurant and she alleged a conspiracy between the restaurant and the police to not serve her and have her arrested because she was in the company of black people. Plaintiff could only offer circumstantial evidence of the conspiracy in the form of her own testimony which stated that the police officer had been in the restaurant when she arrived and seemed to be communicating with the restaurant staff prior to her being refused service and arrested. Defendants moved for summary judgment stating that plaintiff's evidence of conspiracy was insufficient to create a genuine issue of fact in light of affidavits submitted by the restaurant owner and the police that stated that there was no

conspiracy. The court of appeals reversed the trial court's grant of summary judgment in favor of the defendants on the grounds that the trial court failed to read the evidence in the light most favorable to the non-moving party. The court of appeals reasoned that the plaintiff's allegations of conspiracy were themselves sufficient to create a disputed genuine issue of material fact given that the defendants had failed to meet their summary judgment burden by not submitting evidence to negate the plaintiff's contention that the police officer had been in the restaurant prior to plaintiff entering. ("Because on summary judgment the inferences to be drawn from the underlying facts contained in the moving party's materials must be viewed in the light most favorable to the party opposing the motion, [and] we think respondent's failure to show there was no policeman in the store requires reversal.")

**McLaughlin v. Liu, 849 F.2d 1205 (9th Cir. 1988):** The Secretary of Labor brought action against an employer for violation of overtime provisions of Fair Labor Standards Act and the trial court granted summary judgment for the Secretary. The Court of Appeals reversed stating that plaintiff's "sworn statements that he calculated and paid overtime in accordance with the requirements of law are direct evidence of the central fact in dispute," and that where the party opposing summary judgment presents direct evidence of a central fact in dispute, summary judgment is inappropriate because the "nonmoving party's evidence must be taken as true."

**Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987):** An employee brought an action under the Jones Act for injuries that he allegedly sustained during the course of his employment as a seaman and the employer moved for summary judgment, arguing that the employee was not a "seaman" under the Act. The employer submitted employment records showing that the employee spent the majority of his time not working on sea vessels and the employee opposed the motion by submitting testimony from himself and co-workers that indicated he spent the majority of his time on sea vessels. The trial court granted summary judgment for the employer and the appeals court reversed stating that "[t]he district judge erred in basing his decision on finding Dixie Well's documentary evidence inherently more 'reliable' or 'accurate' than Leonard's and his co-workers' testimony and sworn statements from memory. The party opposing a motion for summary judgment, with evidence competent under Rule 56, is to be believed; it is for the jury at trial, not for the judge on a pretrial motion, to decide whose evidence is more credible. A judge assessing the 'persuasiveness' of evidence presented on a motion

for summary judgment may discount such evidence as unspecific or immaterial, but not as unbelievable."

**Wilson v. Chicago, Milwaukee, St. Paul, & Pac. R. Co., 841 F.2d 1347 (7th Cir. 1988)**: A railroad employee sued his employer under the Federal Employers' Liability Act after being paralyzed as the result of an accident which occurred during the workday when a fellow employee fell asleep while driving a car in which employee was a passenger. The employer moved for summary judgment and relied on the employee's own testimony to argue that he was not "acting within the scope of employment" for the purposes of the statute. The employee pointed to other portions of his deposition testimony from which it could be inferred that he was acting within the scope of employment, but the trial court disregarded the employee's interpretation of the evidence and granted summary judgment to employer. The judgment was reversed in favor of the employee with the appeals court stating that "[s]elf-serving as it may be, [the employee's] testimony is not inherently incredible, and sets up a conflict in the facts that a jury must sort out."

**Wright v. Coughlin, 132 F.3d 133 (2d Cir. 1998)**: Prisoner brought action against prison officials for alleged violations of his due process and constitutional rights in relations to disciplinary. In order to show that his confinement was atypical and significant, the prisoner relied only on his own testimony as evidence of the conditions he was subject to. The prison officials moved for summary judgment and relied on their own sworn testimony regarding the conditions of confinement which conflicted with the prisoner's testimony. The trial court adopted the prison official's version of the facts and granted summary judgment. The court of appeals reversed stating that "[b]ecause the district court did not assess the record in the light most favorable to the non-moving party, [the prisoner], and instead resolved disputed issues of fact by crediting [the prison official's] assertions, summary judgment was improper."

**T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626 (9th Cir. 1987)**: Individual electric companies brought an antitrust lawsuit against an electrical trade association alleging conspiracy among other antitrust violations. The appeals court affirmed the lower court's grant of summary judgment for the trade association by relying on the distinction between how direct and circumstantial evidence were to be evaluated on a motion for summary judgment in light of the substantive law governing the case. The court of appeals stated that

"[i]f the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party." The court noted that the plaintiffs had only offered circumstantial evidence and thus inferences in plaintiff's favor will "be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law." The court found that under the heightened evidentiary standards of antitrust conspiracy law, the court could not infer the possibility of conspiratorial action based on the circumstantial evidence provided.

**Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990):** The court granted summary judgment for the defendant because under the substantive law of the case, the plaintiff would have had to prove that mining activities on federal lands adversely affected them, and in opposing the motion for summary judgment, the plaintiff's affidavit failed to identify specific facts that would show adverse impact, such as failing to identify the specific geographic location of the mining activities in relation to the tracts of land used by plaintiff. The court clarified how conflicts of fact are to be resolved on a motion for summary judgment, stating that "[i]n 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."

**St. Pierre v. Dyer, 208 F.3d 394, 405 (2d Cir. 2000):** An individual brought suit against an insurer and various agents seeking indemnification and contribution for a previous judgment against him. The defendants moved for summary judgment on the grounds that the plaintiff had waived defenses available to him in the previous action and thus was barred from seeking indemnity and contribution. In support of their motion they submitted affidavits from a legal expert who had no personal knowledge of the case, which stated that the plaintiff had waived legal defenses available to him in the previous action and plaintiff submitted his own testimony that he had not waived his defenses. The court of appeals reversed the summary judgment on the grounds that: 1) the movant had failed to carry his burden on the motion by submitting testimony from someone with no personal knowledge in the case, and 2) the trial judge failed to resolve the factual disputes in favor of the non-moving party. ("We note that although the district court termed [plaintiff's] submissions 'self-serving,' the self-serving nature of a witness's statements goes not to their admissibility but to their weight. The weighing of [plaintiff's] evidence is a

matter for the finder of fact at trial; it was not the prerogative of the court on a motion for summary judgment.") (Internal citations omitted.)

**Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1289 (9th Cir. 1987)**: Employee brought wrongful termination suit against employer alleging that his firing contravened public policy because he had been discharged for refusing to perform work that would have been in violation of insurance regulations. The employer moved for summary judgment stating that the employee had failed to provide evidence that would show that he was discharged for refusing to do work that would have been in violation of the insurance regulations. To oppose the motion, the employee submitted his own testimony stating that he had been fired for refusing to disregard the insurance regulations, and internal memos which referred to him as a problem employee who was causing trouble and needed to be dealt with. The trial court granted summary judgment for the employer stating that it could not be inferred from the employee's own testimony and the internal memos that the employee had been improperly fired. The court of appeals reversed on the grounds that the trial court had improperly weighed the non-moving party's evidence against the moving parties in trying to resolve factual disputes raised by the motion instead of submitting the issue to the jury ("the non-moving party's evidence is to be taken as true and all inferences are to be drawn in the light most favorable to the non-moving party. Moreover, if the non-moving party adduces direct evidence of a genuine issue of fact, such evidence is not to be weighed against the moving party's conflicting evidence, but rather is to be submitted to the trier of fact for resolution") (internal citations omitted).

**Howlett v. Birkdale Shipping Co., 512 U.S. 92 (1994)**: The district court granted summary judgment to the shipping company because Plaintiff offered no proof that defendant had actual knowledge of a hazard on the ship's deck. The hazard in question was the presence of plastic sheeting on the deck's surface in the loading area, rather than the usual plywood and paper. Plaintiff slipped on the plastic while unloading the ship and sustained serious injuries. The district court declined to infer actual knowledge from circumstantial evidence, i.e., that the deck crew had been provided with plastic sheeting by the shipping company or saw plastic on the deck while unloading took place. The Supreme Court reviewed the case to clarify the shipowner's duty to warn of latent hazards under the Longshoremen Act. After clarifying that standard, the Supreme Court remanded the case to the federal court for further proceedings, declaring: "There is sufficient evidence in the record to support a permissible inference that, during the loading process, some crew



members, who might have held positions such that their knowledge should be attributed to the vessel, did in fact observe the plastic on the tween deck."

**International Stamp Art, Inc. v. United States Postal Service, 2005 U.S. Dist. LEXIS 42073 (N.D. Ga. 2005)**: To obtain damages for trademark infringement under the Latham Act, a Plaintiff must have given notice of the registration of the trademark. USPS moved for summary judgment claiming ISA did not provide actual or statutory notice until November 2001, and was thus barred from recovering damages for any infringement prior to that date. USPS claimed there are only three valid ways to fulfill the actual notice requirements of the Act, and that ISA fulfilled none of those requirements. The district court granted USPS's motion. On appeal, the court disagreed that the three methods of providing notice were exclusive. The court noted that "ISA presents evidence suggesting that the postal service was aware of its mark as early as 1996," which included oral notification, use of the mark in presentations before the USPS, and delivery of a card to the USPS licensing administrator identifying the stamp design as a trademarked product of ISA. The court held that this evidence, taken together, "is sufficient to establish a genuine question of fact as to whether the Postal Service had actual notice of ISA's registered mark as early as 1996," and that "summary judgment on the issue of damages is improper at this time."

**Palermo v. Brennan, 672 N.E.2d 540 (Mass. 1996)**: The trial court granted summary judgment in plaintiff's case brought in 1988 alleging her psychiatrist mistreated her by maintaining a sexual relationship with her between 1975 and 1979, based on plaintiff's conflicting admissions as to whether she knew or should have known of her cause of action earlier, thereby triggering the statute of limitations. The appellate court reversed, concluding that the question of knowledge was one of fact that should have been decided by the trier of fact. According to the court, the patient's admissions did not establish as a matter of law that modicum of knowledge required to trigger the statute of limitations. Rather, the court held that while the patient may have known, before 1988, that she suffered harm as a result of what she perceived to be an affair with the psychiatrist, it was by no means clear that the patient believed that she had been harmed by the psychiatrist's psychotherapeutic treatment." The court observed that conflicting evidentiary admissions must be resolved by the jury, because to give dispositive weight to such isolated and vague evidence in deciding a motion for summary judgment is to engage in inappropriate fact finding.

#### **IV. ORIGINAL JURISDICTION CASES DISCUSSING “COURSE OF DEALING”**

At oral argument on the Renewed Motion for Summary Judgment, Montana referenced the “course of dealing doctrine” that has been applied in original jurisdiction cases. (7/27/12 Tr. at 101). The Special Master requested any relevant citations to cases discussing that doctrine. The following citations are provided in that regard:

Alabama v. North Carolina, 130 S.Ct. 2295, 2309 (2010): Original jurisdiction action filed by Alabama and other states alleging that North Carolina breached an interstate compact dealing with radioactive waste by failing to obtain a license to operate a waste storage facility. In deciding this question, the Court looked to the language of the Compact, as well as the parties’ “course of performance” under the Compact, stating: “In determining whether, in terminating its efforts to obtain a license, North Carolina failed to take what the parties consider “appropriate” steps, the parties’ course of performance under the Compact is highly significant.” *Id.* at 2309, citing New Jersey v. New York, 523 U.S. 767 (1998); Restatement (Second) of Contracts, § § 202(4), 203 (1979).

Kansas v. Colorado, 533 U.S. 1, 24 (2001) (O’Connor, dissenting): In addressing the propriety of awarding pre-judgment interests as part of damages in an original jurisdiction case over the Arkansas River Compact, Justice O’Connor observed the compact history and the notion that neither party “would have reacted with marked surprise to the notion that the Compact rendered its signatories liable for an award of prejudgment interest such as that sanctioned by the Court today. As both the Compact itself and the parties’ post-Compact course of dealing make clear, the “fair intentment” of the Compact very probably was simply for the in-kind recovery of water as a remedy for its breach.” *Id.* at 24.

#### **V. CONCLUSION**

In conclusion, Wyoming's motion for summary judgment should be denied. The evidence on record must be read in Montana's favor and any inferences that can be drawn from that evidence must be viewed in the light most favorable to Montana. The only evidence Wyoming submitted to contest Montana's assertion that it provided notice to Wyoming for the years in question are affidavits stating that Wyoming did not get notice. These affidavits conflict with the testimony of

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Montana's witnesses which state that they did give notice to Wyoming in certain years. In addition, the evidence, at a minimum, would allow a factfinder to infer that Montana provided proper notice to Wyoming in the years claimed and/or in any given year when shortages were experienced. As the cases discussed above illustrate, where there are competing reasonable inferences that can be drawn from the evidence, summary judgment is inappropriate and the question should be submitted to the trier of fact.

Sincerely yours,



JENNIFER M. ANDERS  
Assistant Attorney General

John B. Draper  
Counsel of Record  
Jeffrey J. Wechsler  
Special Assistant Attorney General  
State of Montana

Enc.

cc: (U.S. Mail & Email)  
Peter K. Michael, Esq.  
Jennifer Verleger, Esq.  
James J. DuBois, Esq.  
Jeanne S. Whiteing, Esq.  
James Joseph Dragna, Esq.  
Michael Wigmore, Esq.

## APPENDIX A

### Table of Findings and Inferences and Supporting Evidence

#### I. EVIDENCE FROM WHICH A FACTFINDER COULD FIND OR INFER THAT MONTANA NOTIFIED WYOMING OF SHORTAGES IN PARTICULAR YEARS

FINDING OR INFERENCE	FACTS
<p><b>A. Montana notified Wyoming of water shortages in 1981</b></p>	<p>1981 Annual Report: Streamflow in Tongue River was 71% of average, and 59% of average in the Powder River (General Report at 2).</p> <p>1983 Annual Report at IV: indicating that 1981 was a dry year</p> <p>Moy Declaration, ¶ 4: “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.” (App. A. attached to MT’s Response to Mot. for Summ. J.)</p> <p>Moy Depo at 49-50: Moy confirms the statements in ¶ 4 of his Declaration concerning dealings in 1981</p> <p>Moy Depo at 92, 99: Montana complained to WY about shortages whenever there was a drought or flows were very low</p> <p>Moy Depo at 94-95: Complaints were made to the WY state engineer in the early 1980’s</p> <p>Moy Depo at 104: Communications during the 1980’s were verbal, not in writing</p> <p>Moy Depo at 109: At a special meeting of the commission in April 1982, “Montana voiced its concern that during low flow years Wyoming needs to regulate its post-’50 water rights more carefully, so that Montana case use its pre-1950 water.”</p>

FINDING OR INFERENCE	FACTS
	<p>Moy Depo at 109: “A situation developed during the spring of 1981 in which Montana was almost unable to fill the Tongue River Reservoir, even though it had a pre-1950 water right.”</p> <p>Moy Depo at 110: Communications in 1981 were verbal, not in writing.</p> <p>Moy Declaration: “During the period 1981-2000, 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.” App. A attached to Montana’s Response to Wyoming’s Mot. for Summ. J.</p> <p>Ex. R (6/1/81 Memo from R. Moy to G. Fritz): Moy advises Fritz that post-1950 rights can be administered to protect pre-1950 rights as stated in Article V.</p> <p>Ex. HH at 2 (12/15/86 Memo from R. Moy to G. Fritz) Moy expresses his concern that Montana may have been harmed by the lack of an administrative process to apportion the flows of the interstate tributaries during low flow years.</p>
<p><b>B. Montana notified Wyoming of water shortages in 1982</b></p>	<p>1982 Annual Report: Streamflow in the Tongue River was 68% of average and 71% of average in the Powder River (General Report at 2).</p> <p>Moy Declaration, ¶ 4: “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.” (App. A. attached to MT’s Response to Mot. for Summ. J.)</p> <p>Moy Depo at 49-50: Moy confirms the statements in ¶ 4 of his Declaration concerning dealings in 1982<sup>s</sup></p> <p>Moy Depo at 50: 1982 was a dry year</p> <p>Moy Depo at 92, 99: Montana complained to WY about shortages whenever there was a drought or flows were very low</p>

FINDING OR INFERENCE	FACTS
	<p>Moy Depo at 94-95: Complaints were made to the WY state engineer in the early 1980's</p> <p>Moy Depo at 104, 105: Communications during the 1980's were verbal, not in writing</p> <p>Moy Depo at 109: At a special meeting of the commission in April 1982, "Montana voiced its concern that during low flow years Wyoming needs to regulate its post-'50 water rights more carefully, so that Montana case use its pre-1950 water."</p> <p>Moy Declaration: "During the period 1981-2000, 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." App. A attached to Montana's Response to Wyoming's Mot. for Summ. J.</p> <p>Ex. HH at 2 (12/15/86 Memo from R. Moy to G. Fritz) Moy expresses his concern that Montana may have been harmed by the lack of an administrative process to apportion the flows of the interstate tributaries during low flow years.</p>
<p><b>C. Montana notified Wyoming of water shortages in 1985</b></p>	<p>1985 Annual Report at III: The flows this year were 39-66% of those in 1984 and 47-70 % of those for the period of record.</p> <p>Moy Declaration, ¶ 4: "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." (App. A. attached to MT's Response to Mot. for Summ. J.)</p> <p>Moy Depo at 49-50: Moy confirms the statements in ¶ 4 of his Declaration concerning dealings in 1985</p> <p>Moy Depo at 59: Confirming that 1985 was a year in which Montana experienced shortages, as well as "a lot of other years."</p>

FINDING OR INFERENCE	FACTS
	<p>Moy Depo at 92, 99: Montana complained to WY about shortages whenever there was a drought or flows were very low</p> <p>Moy Depo at 94-95: Complaints were made to the WY state engineer in the early 1980's</p> <p>Moy Depo at 104, 105: Communications during the 1980's were verbal, not in writing</p> <p>Moy Declaration: "During the period 1981-2000, 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." App. A attached to Montana's Response to Wyoming's Mot. for Summ. J.</p> <p>Kerbel Depo (Ex. Y) at 272: "I know '85 was a dry year"</p> <p>Ex. CC (10/25/86 Tr. at 6): Montana officials express frustration that Wyoming was not responding to Montana's requests to administer the compact</p> <p>Ex. HH at 2 (12/15/86 Memo from R. Moy to G. Fritz) Moy expresses his concern that Montana may have been harmed by the lack of an administrative process to apportion the flows of the interstate tributaries during low flow years.</p>
<p><b>D. Montana notified Wyoming of water shortages in 1987</b></p>	<p>1987 Annual Report at V: streamflow at the four Compact gaging stations was "significantly below normal."</p> <p>Kerbel Depo at 272: "The fall of '87 things really went downhill from then on. And then kind of climbed back out in the early 90's. '89 was a better year, but '88 was the worst year."</p> <p>Kerbel Depo at 107: 1987 was a dry year</p> <p>Kerbel Depo at 109: Montana would likely have communicated shortages in 1987, 1988 or 1989 ("I would guess if it happened at any time before 2000, it would have happened in '87, '88 or '89")</p>

**FINDING OR INFERENCE**

**FACTS**

Kerbel Depo at 142: "So the bottom line is, is that, yes, we've had conversations historically about shortages that occurred in the late 80's and the early 2000s. And there was a couple years in the 1990s, but I don't remember the years, where I've talked to the guys in Wyoming and that's the conversation we had."

Kerbel Depo at 145: "I know those conversations existed in the 80's, a couple years in the 90's, and 2000s trying to get water down to our side of the river."

Kerbel Depo at 279: He had telephone calls with Mike Whitaker during the summer of 1987, 1988 and 1989 about shortages

Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp

Kerbel Depo at 274: Those conversations would have occurred during phones calls, most likely in August "when we were all frustrated as hell."

Moy Declaration: "During the period 1981-2000, 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." App. A attached to Montana's Response to Wyoming's Mot. for Summ. J.

**E. Montana notified Wyoming of water shortages in 1988**

1988 Annual Report at III): All reporting stations had less flow than in 1987.

Kerbel Depo at 272: "The fall of '87 things really went downhill from then on. And then kind of climbed back out in the early 90's. '89 was a better year, but '88 was the worst year."

Kerbel Depo at 107: 1988 was a dry year

Kerbel Depo at 109: Montana would likely have communicated shortages in 1987, 1988 or 1989 ("I would guess if it happened at any time before 2000, it would have happened in '87, '88 or '89")



**FINDING OR INFERENCE**

**FACTS**

Kerbel Depo at 142: "So the bottom line is, is that, yes, we've had conversations historically about shortages that occurred in the late 80's and the early 2000s. And there was a couple years in the 1990s, but I don't remember the years, where I've talked to the guys in Wyoming and that's the conversation we had."

Kerbel Depo at 145: "I know those conversations existed in the 80's, a couple years in the 90's, and 2000s trying to get water down to our side of the river."

Kerbel Depo at 279: He had telephone calls with Mike Whitaker during the summer of 1987, 1988 and 1989 about shortages

Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp

Kerbel Depo at 274: Those conversations would have occurred during phone calls, most likely in August "when we were all frustrated as hell."

Kerbel Depo at 108: "I know we talked about trying to get water in '88 down to Montana."

Moy Declaration: "During the period 1981-2000, 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." App. A attached to Montana's Response to Wyoming's Mot. for Summ. J.

**F. Montana notified Wyoming of water shortages in 1989**

1989 Annual Report at III): Streamflow at the monitoring sites was below average in the Bighorn, Tongue and Powder Rivers. Streamflow in the Powder River was the second lowest of record, exceeded only by the extreme drought of 1961. Wyoming reported that "[s]nowpack has been below normal for about the last 10 years."

Kerbel Depo at 272: "The fall of '87 things really went downhill from then on. And then kind of climbed back out in the early 90's. '89 was a better year, but '88 was the worst year."

Kerbel Depo at 107: 1989 was a dry year

FINDING OR INFERENCE	FACTS
	<p>Kerbel Depo at 109: Montana would likely have communicated shortages in 1987, 1988 or 1989 (“I would guess if it happened at any time before 2000, it would have happened in ’87, ’88 or ’89”)</p> <p>Kerbel Depo at 142: “So the bottom line is, is that, yes, we’ve had conversations historically about shortages that occurred in the late 80’s and the early 2000s. And there was a couple years in the 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 at 145: “I know those conversations existed in the 80’s, a couple years in the 90’s, and 2000s trying to get water down to our side of the river.”</p> <p>Kerbel Depo at 279: He had telephone calls with Mike Whitaker during the summer of 1987, 1988 and 1989 about shortages</p> <p>Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp</p> <p>Kerbel Depo at 274: Those conversations would have occurred during phone calls, most likely in August “when we were all frustrated as hell.”</p> <p>Moy Declaration: “During the period 1981-2000, 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.” App. A attached to Montana’s Response to Wyoming’s Mot. for Summ. J.</p>
<p><b>G. Montana notified Wyoming of water shortages in 1992</b></p>	<p>1992 Annual Report at V: Annual streamflow was 71% of average for the Tongue River and 59% of average for the Powder River</p> <p>1992 Annual Report at 6 (Montana commented that “post-1950 use” is affecting Montana’s “utilization of water in the basin” and that the impacts “do not occur every year but they do occur”)</p> <p>Kerbel Depo at 142: Montana would have had conversations with Wyoming regarding water shortages in the late 1980’s, the early 2000’s, and “a couple years in 1990s.”</p>

FINDING OR INFERENCE	FACTS
<p><b>H. Montana notified Wyoming of water shortages in 1994</b></p>	<p>Kerbel Depo at 145: "I know those conversations existed in the 80's, a couple years in the 90's, and 2000s trying to get water down to our side of the river."</p> <p>Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp</p> <p>Kerbel Depo at 274: Those conversations would have occurred during phones calls, most likely in August "when we were all frustrated as hell."</p> <p>Moy Declaration: "During the period 1981-2000, 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." App. A attached to Montana's Response to Wyoming's Mot. for Summ. J.</p> <p>1994 Annual Report at II: Mr. Moreland reported that all flows in the interstate tributaries were below average during July, August, and September.</p> <p>Kerbel Depo at 142: Montana would have had conversations with Wyoming regarding water shortages in the late 1980's, the early 2000's, and "a couple years in 1990s."</p> <p>Kerbel Depo at 145: "I know those conversations existed in the 80's, a couple years in the 90's, and 2000s trying to get water down to our side of the river."</p> <p>Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp</p> <p>Kerbel Depo at 274: Those conversations would have occurred during phones calls, most likely in August "when we were all frustrated as hell."</p> <p>Moy Declaration: "During the period 1981-2000, 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." App. A attached to Montana's Response to Wyoming's Mot. for Summ. J.</p>

**FINDING OR INFERENCE**

**I. Montana notified Wyoming of water shortages in 1998**

**FACTS**

1998 Annual Report at II: Streamflow during water year 1998 was 70 % of average on the Tongue River.

Stults Depo (Ex. II) at 86-87: While he was commissioner between 1997 and 2003, Stults recalled stating that “we’re having a tough time in Montana, and it appears to us – it seems quite obvious that we’re in less good shape under these climactic circumstances right now, these weather circumstances, than you guys are, say, around Dayton.”

Stults Depo at 88: In response to questioning about when those communications might have occurred, Stults said “it would have been at the same time that I was in contact with Art Hayes and Keith Kerbel.”

Stults Depo at 89: “I was clear as I could be that we were in a situation where we believed more water was being diverted in Wyoming than should be, and that our guys were suffering because of it.”

Kerbel Depo at 142: Montana would have had conversations with Wyoming regarding water shortages in the late 1980’s, the early 2000’s, and “a couple years in 1990s.”

Kerbel Depo at 145: “I know those conversations existed in the 80’s, a couple years in the 90’s, and 2000s trying to get water down to our side of the river.”

Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp

Kerbel Depo at 274: Those conversations would have occurred during phones calls, most likely in August “when we were all frustrated as hell.”

Moy Declaration: “During the period 1981-2000, 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.” App. A attached to Montana’s Response to Wyoming’s Mot. for Summ. J.

**FINDING OR INFERENCE**

**J. Montana notified Wyoming of water shortages in 2000**

**FACTS**

2000 Annual Report at I: Streamflow in the Tongue and Powder River basins was reported to be below normal

Kerbel Depo at 142: “[T]he bottom line is, is that, yes, we’ve had conversations historically about shortages that occurred in the late 80s and the early 2000s.”

Kerbel Depo at 145: “I know those conversations existed in the 80’s, a couple years in the 90’s, and 2000s trying to get water down to our side of the river.”

Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp

Kerbel Depo at 274: Those conversations would have occurred during phones calls, most likely in August “when we were all frustrated as hell.”

2002 Annual Report at VI: Montana informed WY of its concern about low inflow to Tongue River Reservoir during “drought conditions in past years.”

Stults Depo. at 86-87: While he was commissioner between 1997 and 2003, Stults recalled stating that “we’re having a tough time in Montana, and it appears to us – it seems quite obvious that we’re in less good shape under these climactic circumstances right now, these weather circumstances, than you guys are, say, around Dayton.”

Stults Depo at 88: In response to questioning about when those communications might have occurred, Stults said “it would have been at the same time that I was in contact with Art Hayes and Keith Kerbel.”

Stults Depo at 89: “I was clear as I could be that we were in a situation where we believed more water was being diverted in Wyoming than should be, and that our guys were suffering because of it.”

Moy Declaration: “During the period 1981-2000, 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.” App. A attached to Montana’s Response to Wyoming’s Mot. for Summ. J.

**FINDING OR INFERENCE**

**K. Montana notified Wyoming of water shortages in 2001**

**FACTS**

2001 Annual Report at III: Streamflow was 34% of average for the Tongue River and 31% of average for the Powder River

2002 Annual Report, Summary of Technical Committee Meeting of January 16, 2002: Reported that 2001 was an “extremely dry year.”

Kerbel Depo at 142: “[T]he bottom line is, is that, yes, we’ve had conversations historically about shortages that occurred in the late 80s and the early 2000s.”

Kerbel Depo at 145: “I know those conversations existed in the 80’s, a couple years in the 90’s, and 2000s trying to get water down to our side of the river.”

Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp

Kerbel Depo at 274: Those conversations would have occurred during phone calls, most likely in August “when we were all frustrated as hell.”

Stults Depo. at 86-87: While he was commissioner between 1997 and 2003, Stults recalled stating that “we’re having a tough time in Montana, and it appears to us – it seems quite obvious that we’re in less good shape under these climactic circumstances right now, these weather circumstances, than you guys are, say, around Dayton.”

Stults Depo at 88: In response to questioning about when those communications might have occurred, Stults said “it would have been at the same time that I was in contact with Art Hayes and Keith Kerbel.”

Stults Depo at 89: “I was clear as I could be that we were in a situation where we believed more water was being diverted in Wyoming than should be, and that our guys were suffering because of it.”

2002 Annual Report at VI: Montana informed WY of its concern about low inflow to Tongue River Reservoir during “drought conditions in past years.”

<b>FINDING OR INFERENCE</b>	<b>FACTS</b>
<p><b>L. Montana notified Wyoming of water shortages in 2002</b></p>	<p>2002 Annual Report at III: Streamflow in the Tongue River was 17 percent of average and 21 percent of average in the Powder River; the Commissioners “discussed the need for and benefit of planning for the current and continuing drought situation.”</p> <p>2002 Annual Report at VI (Montana indicated at the annual meeting that it was receiving inquiries from irrigators in Montana about Wyoming’s water use)</p> <p>2002 Annual Report at VI: Montana informed WY of its concern about low inflow to Tongue River Reservoir during “drought conditions in past years.”</p> <p>Stults Depo at 90-91: Stults testified that he would have had communications with Wyoming officials in May or June of 2002 and 2003.</p> <p>Stults Depo. at 86-87 (Ex. ): While he was commissioner between 1997 and 2003, Stults recalled stating that “we’re having a tough time in Montana, and it appears to us – it seems quite obvious that we’re in less good shape under these climactic circumstances right now, these weather circumstances, than you guys are, say, around Dayton.”</p> <p>Stults Depo at 88: In response to questioning about when those communications might have occurred, Stults said “it would have been at the same time that I was in contact with Art Hayes and Keith Kerbel.”</p> <p>Stults Depo at 89: “I was clear as I could be that we were in a situation where we believed more water was being diverted in Wyoming than should be, and that our guys were suffering because of it.”</p> <p>Kerbel Depo at 145: “I know those conversations existed in the 80’s, a couple years in the 90’s, and 2000s trying to get water down to our side of the river.”</p> <p>Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp</p> <p>Kerbel Depo at 274: Those conversations would have occurred during phones calls, most likely in August “when we were all frustrated as hell.”</p>

**FINDING OR INFERENCE**

**M. Montana notified Wyoming of water shortages in 2003**

**FACTS**

2003 Annual Report at II: Streamflow was 65% of average in the Tongue River and 48% of average in the Powder River

Stults Depo at 90-91: Stults testified that he would have had communications with Wyoming officials in May or June of 2002 and 2003.

Stults Depo. at 86-87: While he was commissioner between 1997 and 2003, Stults recalled stating that “we’re having a tough time in Montana, and it appears to us – it seems quite obvious that we’re in less good shape under these climactic circumstances right now, these weather circumstances, than you guys are, say, around Dayton.”

Stults Depo at 88: In response to questioning about when those communications might have occurred, Stults said “it would have been at the same time that I was in contact with Art Hayes and Keith Kerbel.”

Stults Depo at 89: “I was clear as I could be that we were in a situation where we believed more water was being diverted in Wyoming than should be, and that our guys were suffering because of it.”

Kerbel Depo at 145: “I know those conversations existed in the 80’s, a couple years in the 90’s, and 2000s trying to get water down to our side of the river.”

Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp

Kerbel Depo at 274: Those conversations would have occurred during phones calls, most likely in August “when we were all frustrated as hell.”



**II. EVIDENCE FROM WHICH A FACTFINDER COULD FIND OR INFER THAT WYOMING HAD REASONS TO KNOW OF WATER SHORTAGES IN ANY YEAR OF LOW FLOWS**

	FACTS
	<p>Moy Declaration: “During the period 1981-2000, 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.” App. A attached to Montana’s Response to Wyoming’s Mot. for Summ. J.</p> <p>Moy Depo. (Ex. X) at 92: Moy testified that during the 1980’s Montana complained to Wyoming about shortages “every time there was a drought year or the flows were very low on the Tongue and Powder Rivers[.]” (Ex. X at 92). ;</p> <p>Moy Depo at 94-95: Complaints were made to the WY state engineer in the early 1980’s</p> <p>Moy Depo (Ex. X) at 99): Describing that Montana issued complaints “[g]enerally when the flows are to the point where people are not getting their irrigated water at the border.”</p> <p>Moy Depo at 104: Communications during the 1980’s were verbal, not in writing</p> <p>Moy Depo at 109: At a special meeting of the commission in April 1982, “Montana voiced its concern that during low flow years Wyoming needs to regulate its post-’50 water rights more carefully, so that Montana case use its pre-1950 water.”</p> <p>Moy Depo at 110: Communications in 1981 were verbal, not in writing.</p> <p>Moy Depo at 165: “There were very severe drought years between the 80’s and the 90’s up until 2004.”</p> <p>Moy Depo at 226: “[I]f we were suffering a severe drought and we are in a meeting with Wyoming, I would probably be pushing for a call verbally.”</p> <p>Moy Depo at 228: Describing Montana’s communications with Wyoming: “[T]he general sense of it was we really needed to protect, we need water across the border to protect pre-’50 rights. And if that meant you need to cut out your post-’50 rights, then yes.”</p>

## FACTS

Fritz Depo (Ex. JJ) at 37: "The best I can respond is in a general way, and that is that we knew there were shortages in Montana; and that, in general, we were – we spent a lot of time trying to come to the point where we could administer the compact and work with Wyoming in developing such a system to do that, and were never successful at that[.]"

Kerbel Depo at 142: Montana would have had conversations with Wyoming regarding water shortages in the late 1980's, the early 2000's, and "a couple years in 1990s."

Kerbel Depo (Ex. Y) at 144: In response to a question about years in which Montana had discussions with Wyoming regarding shortages, Kerbel testified: "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 80's, a couple years in the 90's, and 2000s trying to get water down to our side of the river."

Kerbel Depo at 145: "I know those conversations existed in the 80's, a couple years in the 90's, and 2000s trying to get water down to our side of the river."

Kerbel Depo (Ex. Y) at 269:

Q You remember during some of those annual commission meetings that you discussed with officials from Wyoming, Montana's need for water rights to satisfy early priority water ---

A. Oh, yeah. On water-short years, year, that's all we talked about.

Kerbel Depo at 273: During water short years he would have been in contact with Carmine LoGuidice, Mike Whitaker, and Bill Knapp

Kerbel Depo at 274: Those conversations would have occurred during phone calls, most likely in August "when we were all frustrated as hell."

Stults Depo. at 86-87: While he was commissioner between 1997 and 2003, Stults recalled stating that "we're having a tough time in Montana, and it appears to us – it seems quite obvious that we're in less good shape under these climactic circumstances right now, these weather circumstances, than you guys are, say, around Dayton."

## FACTS

Stults Depo at 88: In response to questioning about when those communications might have occurred, Stults said "it would have been at the same time that I was in contact with Art Hayes and Keith Kerbel."

Stults Depo at 89: "I was clear as I could be that we were in a situation where we believed more water was being diverted in Wyoming than should be, and that our guys were suffering because of it."

Ex. S (1983 Ashenburg Report): Ashenburg reports that "the demand for compact administration and irrigation water management has been growing." (Ex. S at 3). The report documents the need to quantify pre-1950, post-1950 and supplemental flow (Ex. S at 18), and to measure actual water uses because, without it, "the Yellowstone Compact will probably not be administered." (Ex. S at 35). The methodology proposed by Ashenburg accounted for pre-1950 use in both states. (Ex. S, Ex. 2, 3).

Ex. Z (1/3/84 Letter) stating Montana's position that "all pre-1950 rights and their supplemental supplies must be satisfied before streamflow is available for allocation on a percentage basis between the states"

Ex. U (10/27/83 Letter) MT emphasizes that ALL diversions need to be monitored in both states to prevent overuse by post-1950 appropriators

Ex. HH (12/15/86 Memo from Moy to Fritz) "Montana feels that we may have been harmed by the lack of an administrative process to apportion the flows of the interstate tributaries during low flow years."

1983 Annual Report at IV: Montana voiced its concern in 1982 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).

1992 Annual Report at 6 (MT commented that "post-1950 use" is affecting Montana's "utilization of water in the basin," and that the impacts "do not occur every year but they do occur.")

2002 Annual Report at VI (Montana indicated at the annual meeting that it was receiving inquiries from irrigators in Montana about Wyoming's water use)

2002 Annual Report at VI: Montana informed WY of its concern about low inflow to Tongue River Reservoir during "drought conditions in past years."

**FACTS**

Moy Declaration, attached to MT's Opening Brief at ¶ 4 ("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.")

Yellowstone Compact Commission Annual Reports from 1983, 1985, 1987, 1988, 1989, 1992, 1994, 1998, 2000, 2001, 2002, and 2003 documenting low stream flow conditions which coincide with testimony from Montana officials about years in which they recalled having communications with Wyoming regarding low flows or drought conditions

**III. EVIDENCE FROM WHICH A FACTFINDER COULD FIND OR INFER THAT THE NOTIFICATION REQUIREMENTS IMPOSED BY THE SPECIAL MASTER WOULD HAVE BEEN FUTILE**

	<b>FACTS</b>
	<p>Ex. H (4/15/52 Letter) reflecting WY position that “the compact only divided the unappropriated waters, and left the division of the appropriated waters for later settlement by the Courts”</p> <p>Moy Declaration, App. A to MT Opening Brief ¶ 4</p> <p>Ex. J (11/27/67 Letter) in which WY questions the need for agreement on water availability under the Compact</p> <p>Ex. L (5/11/72 Letter) rejecting BOR study regarding water availability, in part due to assumptions made regarding pre-compact rights</p> <p>Ex. M (7/14/71 Letter) WY State Engineer states his position regarding WY’s interpretation of the compact, stating that “if Montana does not like our interpretation and administration of Compact provisions they can take us to Court.”</p> <p>Ex. Q (4/13/77 Letter) stating WY’s position that “[t]he Compact makes no mention of providing water from interstate tributaries to meet main stem senior water rights.”</p> <p>Ex. T (6/30/83 Letter) criticizing Ashenburg’s compact administration proposal</p> <p>Ex. W (9/9/88 Letter) criticizing Ashenburg’s compact administration proposal</p> <p>Ex. X (Moy Depo) at 36: “[W]e couldn’t get Wyoming to move forward at all on accepting anything or accepting any assumptions, period. They had no desire to do anything.”</p> <p>Moy Depo at 58: “[T]here was a general perception by us who had been involved trying to get to administer the compact, in any given way, we were unable to – we were not successful even to get Wyoming to agree to basic assumptions. There was absolutely zero desire by Wyoming to administer the contract. Wyoming was very polite. They were very nice, very courteous to us. But when it came to actually administering the compact, they were not willing to do so.”</p>

Moy Depo at 163-64: "As I've said, Wyoming was very positive, very fun to work with, great cinnamon rolls, they were very congenial. Did we get anything done regarding the improvement of the administration of the compact, no."

Moy Depo at 165: "The only way we felt we could get Wyoming to sit and be, sit at the table and be truly honest in trying to resolve these issues was to take Wyoming to court."

Ex. AA (4/10/84 Letter) stating WY's view that it is "entitled to develop its water in all of the tributaries of the Yellowstone River, provided its compact allocations are not exceeded."

Kerbel Depo at 108: Describing efforts to work with Wyoming as "futile"

Kerbel Depo at 142: "And then the frustration, like said this morning, really develops because when you keep talking to these folks, it's like beating your head against the freaking wall, because the thing I hear over and over and over again is, on the Tongue, for example, you don't understand how the Bighorns work, Keith. They're not a rock."

Kerbel Depo at 143: "How many times do I have to ask for water? How many times to I have to go out there and tell them we're short of water?"

Kerbel Depo at 144: "We made a concerted effort, all the while I was hired in my present capacity, to talk to Wyoming."

Kerbel Depo at 145: Wyoming official told Kerbel that he "didn't have the authority to shut anybody off on a call[.]"

Kerbel Depo at 146: "[W]e were trying to get any water we could."

Kerbel Depo at 222-23: Describing fruitless efforts by Rich Moy to administer the compact and "work together to get water rights satisfied in Montana and Wyoming and work together to make sure that we're all on the same page and make this thing work."

Kerbel Depo at 262: By 2006, Kerbel "felt beaten down that even if we did make call, it wouldn't be heeded."

Kerbel Depo at 270-71: Kerbel's discussions with Wyoming officials produced no results: "But the reason we were there at every damn meeting was to try to—at least my purpose was, was to try to influence Wyoming to work with us, to try to get water in Montana. Did I think it would happen? Probably not, but it was worth a try. At least I could go back and tell water users in Montana that we gave it a valiant effort."

Kerbel Depo at 275: "I got the impression, from talking to the boys in Wyoming, that they couldn't do anything and they weren't going to do anything."

Fritz Depo (Ex. JJ) at 37: "The best I can respond is in a general way, and that is that we knew there were shortages in Montana; and that, in general, we were – we spent a lot of time trying to come to the point where we could administer the compact and work with Wyoming in developing such a system to do that, and were never successful at that[.]"

**IV. EVIDENCE FROM WHICH A FACTFINDER COULD FIND OR INFER THAT WYOMING HAD SUFFICIENT INFORMATION ABOUT ITS OWN WATER USES, OR THOSE IN MONTANA, TO ALLOW REGULATION FOR THE BENEFIT OF MONTANA**

	FACTS
	<p>Ex. A (Engineering Report): containing information on irrigated acreage in both states</p> <p>Ex. B (2/8/54 Letter from F. Stermitz to H.L. Buck) indicating that States had prepared approximations of diversions to assess allocable use</p> <p>Ex. C (1/29/58 Letter) indicating that MT provided WY with water resource reports documenting water uses and irrigation practices in relevant counties</p> <p>Ex. D (10/4/62 Memo) indicating Montana provided the Commission with post-1950 water rights</p> <p>1966 Annual Report at 4 (Montana presented a report to the Commission detailing all water right filings from 1950-66 in the basin)</p> <p>Ex. E (4/26/78 Letter) indicating that MT provided to the Commission a report containing estimated irrigated lands and irrigation requirements for the Tongue River, including 19,755 acres of pre-1950 irrigated land that required 57,913 a/f of water</p> <p>Ex. F, declaration of Chuck Dalby (stating that the 1978 Water Rights Report provided sufficient information for WY to calculate or determine the amount of water needed to reach MT to satisfy pre-1950 uses)</p> <p>1982 Annual Report at V: “The basic methodology for determining Montana’s share on the Tongue River has been developed. Discussions are continuing between Montana and Wyoming regarding refinements in the methodology and the assumptions used.”</p> <p>Ex. G (5/12/83 Letter) indicating that MT provided WY with the Powder River Decree</p> <p>Ex. K (1971 Compact Administration Proposal) which included a computational procedure for compact allocation, and clearly distinguished between pre-1950 and post-1950 uses in both states</p>



**FACTS**

Ex. O (3/2/76 Letter) proposing a water management study and methodology for administering the compact that would have provided water for pre-1950 uses in MT without the need for a priority call.

Ex. S (Ashenburg Report)

Ex. W: (9/9/88 Letter with Attachment) showing that Wyoming had information on water uses in the Tongue River of Montana

Ex. Z: (1/3/84 Letter) indicating that information Wyoming produced on Powder River uses is accurate  
1981 Annual Report at III: "The documentation of pre-1950 water rights has been completed in Wyoming."

2002 Annual Report at III: WY reported that despite low flows, "diversions in Wyoming in water year 2002 were about average and many water users tried to conserve usage."