

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

---

WYOMING'S POST-TRIAL REPLY BRIEF

PETER K. MICHAEL\*  
Attorney General

JAY JERDE  
Special Assistant Attorney General  
JAMES KASTE  
Deputy Attorney General  
CHRISTOPHER BROWN  
Senior Assistant Attorney General  
MATTHIAS SAYER  
Assistant Attorney General  
ANDREW KUHLMANN  
Assistant Attorney General  
123 Capitol Building  
Cheyenne, WY 82002  
(307) 777-6196

*\*Counsel of Record*

## TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES .....	ii
ARGUMENT .....	1
CONCLUSION .....	6

## TABLE OF CASES AND AUTHORITIES

### Cases

<i>Bagnell v. Lemery</i> , 657 P.2d 608 (Mont. 1983) .....	3
<i>Cook v. Hudson</i> , 103 P.2d 137 (Mont. 1940) .....	1, 2
<i>Fed. Land Bank v. Morris</i> , 116 P.2d 1007 (Mont. 1941) .....	2
<i>Grimsley v. Estate of Spencer</i> , 670 P.2d 85 (1983) .....	1
<i>Irion v. Hyde</i> , 105 P.2d 666 (Mont. 1940) .....	4
<i>McDonald v. State</i> , 722 P.2d 598 (Mont. 1986) .....	2
<i>Mont. Power Co. v. Broadwater-Missouri Water Users' Ass'n</i> , 50 F. Supp. 4 (D. Mont. 1942) .....	2
<i>Navair, Inc. v. IFR Americas, Inc.</i> , 519 F.3d 1131 (10th Cir. 2008).....	4
<i>Quigley v. McIntosh</i> , 290 P. 266 (Mont. 1930) .....	2
<i>Rivera v. Peri &amp; Sons Farms, Inc.</i> , 735 F.3d 892 (9th Cir. 2013).....	4
<i>Schlinger v. McGhee</i> , 268 P.3d 264 (Wyo. 2012) .....	4
<i>Snider v. Kirchhefer</i> , 115 P.3d 1 (Wyo. 2005) .....	5
<i>Tin Cup Cnty. Water and/or Sewer Dist. v. Garden City Plumbing &amp; Heating Inc.</i> , 200 P.3d 60 (Mont. 2008) .....	4

*Worley v. U.S. Borax and Chem. Corp.*,  
428 P.2d 651 (N.M. 1967)..... 1, 2

**Statutes**

Mont. Code Ann. § 85-2-305 ..... 5

Wyo. Stat. Ann. § 41-3-907 ..... 5

Pursuant to Case Management Order No. 14, the State of Wyoming submits the following post-trial reply brief:

### ARGUMENT

The familiar arguments in Montana's Post-Trial Brief merit little response. Much of Montana's reasoning is belied by a few simple principles of the doctrine of appropriation and contract law. Those points not otherwise made in Wyoming's principal brief are set forth below in the general order in which they appear in Montana's Post-Trial Brief.

First and foremost, Montana ignores the basic proposition that junior appropriators have the right to divert as much water as they can put to beneficial use within their water right until they are called off by a senior appropriator. *See, e.g., Worley v. U.S. Borax and Chem. Corp.*, 428 P.2d 651, 654 (N.M. 1967); *Cook v. Hudson*, 103 P.2d 137, 146 (Mont. 1940) (disapproved of on other grounds by *Grimsley v. Estate of Spencer*, 670 P.2d 85 (1983)). Wyoming water users have every right to store and irrigate until a call is made, and therefore, Montana cannot claim damages for the entirety of any year. *See* MT Br. at 95. An August shortage in Montana does not make July irrigation or January storage in Wyoming wrongful retroactively. Were it otherwise, Wyoming would be effectively prevented from using any water under post-1950 appropriations.<sup>1</sup>

---

<sup>1</sup> It is worth noting that Montana never attempted to prove the date of any of the alleged calls before 2004. *See Mem. Op. Regarding Wyoming's Mot. for Part. Summ. J. (Montana's Supplemental Evidence)* at 14 (Dec. 22, 2012) (requiring Montana to prove the timing of notice).

Accordingly, the entirety of this case relates to the periods after May 18, 2004, and July 28, 2006, as the Special Master and the Court are no longer required to humor Montana's claims that calls were made in years before 2004. Recognizing that it made no calls before 2004, Montana asserts that Wyoming knew that Montana has pre-1950 water rights. *See* MT. Br. at 9-11. But knowledge of the existence of a paper water right in and of itself does not prove unmet demand under the doctrine of appropriation. *See, e.g., Quigley v. McIntosh*, 290 P. 266, 268 (Mont. 1930); *Cook*, 103 P.2d at 146; *McDonald v. State*, 722 P.2d 598, 602 and 605 (Mont. 1986); *Worley*, 428 P.2d at 654. Nor do Montana's internal beliefs—such as Montana's perception of Wyoming's interpretation of the Compact, Montana's internal investigations and communications, and Montana's frustration with Wyoming's refusal to agree to an administrative scheme at odds with the Compact—excuse Montana from actually calling the river. *See* MT Br. at 11-19. Nothing prevented Montana from taking the simple step necessary to assert its rights prior to 2004, and the very existence of the 2004 and 2006 call letters demonstrate how easy it is for Montana to fulfill this condition precedent.

Montana also goes to great lengths to avoid the one-fill rule clearly adopted by the Montana Supreme Court in *Federal Land Bank v. Morris*. *See* MT Br. at 116-22 (citing *Fed. Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941)). For example, Montana cites *Montana Power Co. v. Broadwater-Missouri Water Users' Association*, but there is no indication that the one-fill rule was ever raised in that case by either party or the court. *See* MT. Br. at 118 (citing *Mont. Power Co. v. Broadwater-Missouri Water Users' Ass'n*, 50 F. Supp. 4, 8 (D. Mont. 1942), *rev'd with instructions to dismiss for lack of*

*jurisdiction*, 139 F.2d 998 (9th Cir. 1944)). Montana also asserts that the court in *Bagnell v. Lemery* found that an appropriator was entitled to more than one fill. *See* MT Br. at 119 (citing *Bagnell v. Lemery*, 657 P.2d 608 (Mont. 1983)). If that were true, it seems odd that the court would specifically explain that the actions of the defendant did “not constitute a double filling of the reservoir.” *Bagnell*, 657 P.2d at 612. The plain fact is, as a matter of law, Montana follows the one-fill rule. However, as a matter of practice, Montana officials ignore the law. But ignoring the one-fill rule has no more effect on the rule than routinely speeding affects the speed limit.

Turning to the evidence of post-1950 use in Wyoming, Montana asserts that “[i]t is presumed that Wyoming water users are using their adjudicated amounts of water, absent a showing by Wyoming of regulation or lack of actual historic beneficial use.” *See* MT Br. at 159. Montana itself contradicts this assertion on page 165 of its brief where it states that senior water users in Wyoming do not call for regulation when they have no need for the water.<sup>2</sup> Even the parenthetical explanations offered by Montana in its brief for these cases rebut this assertion. MT Br. at 159. Those cases stand for the proposition that a paper water right is evidence of the appropriator’s right, but they say nothing about a presumption that he is using a particular amount of water at any particular time. Montana must prove there was use in Wyoming under post-1950 appropriations after the calls. Montana’s attempt to shirk this burden should be rejected.

---

<sup>2</sup> The discussion on page 165 about seniors foregoing their right to divert when they do not need the water also demonstrates that Montana’s assertion that Wyoming uses trigger flows to initiate regulation is false. *Compare* MT Br. at 136.

With regard to causation Montana again asserts that it is not obligated to prove that diversions in Wyoming under post-1950 rights after the calls were made caused injury to pre-1950 appropriations in Montana.<sup>3</sup> See MT Br. at 82. Instead, Montana claims Wyoming must disprove the causal connection. *Id.* Consistent with its overarching view that this is not a real contract case, Montana’s contention ignores basic contract law. The rule in Montana, and everywhere else, is “[a] party may not recover damages for breach of contract unless the party proves that the breach of contract proximately caused the damages, or that the damages likely resulted from the breach of contract.” *Tin Cup Cnty. Water and/or Sewer Dist. v. Garden City Plumbing & Heating Inc.*, 200 P.3d 60, 68 (Mont. 2008). See also *Schlinger v. McGhee*, 268 P.3d 264, 268 (Wyo. 2012) (plaintiff must prove entitlement to damages); *Navair, Inc. v. IFR Americas, Inc.*, 519 F.3d 1131, 1137 (10th Cir. 2008) (plaintiff must prove damages caused by the breach); *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013) (plaintiff must prove damage as a result of the breach).

Montana cites *Irion v. Hyde* in an attempt to avoid its burden of proof, but that case is not applicable here. See MT Br. 82 (citing *Irion v. Hyde*, 105 P.2d 666, 673 (Mont. 1940)). In *Irion*, no contract existed between the two appropriators and, therefore,

---

<sup>3</sup> The Special Master has plainly held that Montana must prove causation to prevail on its claims. *Mem. Op. of the Special Master on Wyoming’s Mot. for Summ. J.* at 27 (Sept. 16, 2013) (“Montana must also demonstrate a causal connection between [its unsatisfied pre-1950 appropriative rights and diversions by post-1950 appropriators in Wyoming].”); *Clarification Regarding Mem. Op. of Sept. 16, 2013 on Wyoming’s Mot. for Summ. J.* at 1 (Montana must prove causal connection between post-1950 use in Wyoming and pre-1950 shortage in Montana).



the elements of the claims in that case were different than the elements of the claims made in this case. In the Compact, Montana and Wyoming promised to abide by the “laws governing the acquisition and use of water under the doctrine of appropriation.” Article V(A). Thus, the doctrine of appropriation defines the duties of each party under the Compact, but the nature of the relationship between the parties remains contractual. As a result, to prevail in this litigation, Montana must prove all of the essential elements of a breach of contract claim, including causation.

In its discussion of coal bed methane (CBM) impacts, Montana asserts that “no depletion of streamflow is too small when the purpose is to protect a senior water right from unauthorized interference by a junior water user.” MT Br. at 172. To the contrary, both states allow certain small groundwater depletions to occur without priority regulation for the benefit of senior surface appropriators. Montana does this by excepting certain wells, such as CBM wells, from its permitting requirements. Mont. Code Ann. § 85-2-305. While Wyoming accomplishes much the same result by assigning a preference to domestic and stock wells. Wyo. Stat. Ann. § 41-3-907.

More importantly, the very case cited by Montana for its assertion actually supports the opposite proposition. In support of its assertion that no depletion is too small, Montana purports to recount the holding of the Court in *Snider v. Kirchhefer*, 115 P.3d 1, 6 (Wyo. 2005). MT Br. at 172. The language quoted by Montana is not the holding of the Court. Instead, the quoted language describes the findings of the Board of Control in the proceedings below. *Id.* The Court never considered the propriety of this statement by the Board. Rather, the Court looked at whether the plaintiffs had standing

to bring an abandonment action against the defendant. The Court found that the plaintiffs did not have standing “because they did not show that their water right would be affected in some discernible manner.” *Id.* at 8. Similarly, the amount of CBM water actually at issue in this case is indistinguishable from zero, and therefore, not “discernible” by any water user in Montana. See Ex. W15 at 2. Accordingly, the Court can and should find that the Compact does not concern itself with such immaterial depletions. *See, e.g.*, Article V(E) (excluding domestic and most stock water uses).

Finally, Montana’s brief contains numerous factual assertions that misstate the evidence. Some of these misstatements are trivial, but others relate to serious matters. Rather than discuss each misstatement in detail in this brief, Wyoming has compiled the attached 90 page appendix identifying factual assertions by Montana and comparing them to the actual testimony of the witness at trial or the specific language of the exhibit. These misstatements speak volumes about Montana’s credibility, and the Special Master and the Court should verify the record before relying on any statement in Montana’s Post-Trial Brief.

As nothing else in Montana’s Post-Trial Brief warrants further discussion, Wyoming relies on the contents of its principal brief.

## **CONCLUSION**

The Preamble to the Compact makes clear that it was intended “to provide for an equitable division and apportionment” of the waters of the Yellowstone River system. Montana’s claims in this case seem to proceed instead from the proposition that the Compact was designed to solve all of Montana’s water problems at Wyoming’s expense.

It is hard to imagine a litigant taking less responsibility for its own conduct than Montana has taken in this case. Wyoming will meet the obligations it incurred when it entered the Compact and it will accept any ramifications resulting from the use of post-1950 water after its refusal to honor the calls in 2004 and 2006. But Montana must be accountable for the consequences of actions over which it has exclusive control, such as discretionary reservoir operations and the terms of its agreement with the Northern Cheyenne Tribe. When the burden of Montana's decisions is properly placed on Montana and the undistorted evidence is considered, Montana's claims inevitably fail. Accordingly, this case should be dismissed without further ado.

//

//

//

//

//

//

//

//

//

//

//


//

WHEREFORE the State of Wyoming requests that the Special Master recommend that Montana's Bill of Complaint be dismissed with prejudice.

Dated this 25th day of April, 2014.

Respectfully submitted,

THE STATE OF WYOMING



---

Peter K. Michael\*  
Attorney General  
Jay Jerde  
Special Assistant Attorney General  
James Kaste  
Deputy Attorney General  
Christopher Brown  
Senior Assistant Attorney General  
Matthias Sayer  
Assistant Attorney General  
Andrew Kuhlmann  
Assistant Attorney General  
123 State Capitol  
Cheyenne, WY 82002  
307-777-6946

\*Counsel of Record

## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail and by placing the same in the United States mail, postage paid, this 25th day of April, 2014.

Jeanne S. Whiteing  
Whiteing & Smith  
1628 5th Street  
Boulder, CO 80302  
jwhiteing@whiteinglaw.com

Cory J. Swanson  
Montana Attorney General's Office  
P.O. Box 201401  
Helena, MT 59620-1401  
coswanson@mt.gov

Jeffrey Wechsler  
Montgomery & Andrews  
325 Paseo de Peralta  
Santa Fe, NM 87501  
jwechsler@montand.com

Jennifer Verleger  
North Dakota Attorney General's Office  
500 North Ninth Street  
Bismarck, ND 58501  
jverleger@nd.gov


John B. Draper  
Draper & Draper  
325 Paseo de Peralta  
Santa Fe, NM 87501  
john.draper@draperllc.com

Michael Wigmore  
Vinson & Elkins  
2200 Pennsylvania Ave. NW, Suite 500W  
Washington, DC 20037  
mwigmore@velaw.com

James J. 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

Solicitor General of the United States  
US Department of Justice  
950 Pennsylvania Avenue, Room 5614  
Washington, DC 20530-0001  
SupremeCtBriefs@usdoj.gov

Barton H. Thompson Jr.  
Susan Carter, Assistant  
Jerry Yang and Akiko Yamazaki  
Environment & Energy Building, MC-4205  
473 via Ortega  
Stanford, CA 94305-4205  
Susan.carter@stanford.edu

  
Wyoming Attorney General's Office

## Appendix to Wyoming's Post-Trial Reply Brief

This Appendix identifies instances in which the record in this case differs from the characterizations contained in Montana's Post-Trial brief. The fact that a particular citation in Montana's Post-Trial Brief does not appear in this Appendix should not be construed as Wyoming's agreement with the accuracy of the omitted citation.

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p><b>Page 1, last paragraph:</b></p> <p>“The Special Master has held that, to demonstrate a Compact violation in any given year, Montana must establish the following elements: (1) insufficient water entered Montana to satisfy Montana's pre-1950 appropriative rights; and (2) Wyoming provided water to its post-1950 users when Montana's pre-1950 rights were not being satisfied. <i>See, e.g.</i>, First Interim Report of the Special Master at 29 (Feb. 10, 2010) (“FIR”); Transcript of Telephonic Status Hearing Before Special Master Barton Thompson at 25:25-26:4 (July 29, 2011) (“Hearing Transcript”).”</p>	<p>The Special Master's decisions require that Montana prove a causal link between unsatisfied Montana pre-1950 rights and post-1950 Wyoming use, as identified in the two citations from Montana:</p> <p><b>First Interim Report of the Special Master at 29 (Feb. 10, 2010):</b></p> <p>“Protection of pre-1950 appropriations under Article V(A), by contrast, requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana.”</p> <p><b>Transcript of Telephonic Status Hearing Before Special Master Barton Thompson at 25:25-26:4 (July 29, 2011):</b></p> <p>[Special Master] “So you're absolutely right. They would have to show at a minimum both at least some 1950 appropriative rights are unsatisfied and that they went unsatisfied <b>because</b> Wyoming instead delivered that water to post-1950 appropriators.” (emphasis added).</p>

Citation in Montana’s Post-Trial Brief	Reference to Citation Source
<p><b>Page 3, middle paragraph:</b></p> <p>“It is Wyoming's responsibility under the Compact to regulate off all post-Compact storage and direct flow rights in Wyoming when the pre-Compact direct flow rights of Montana are not being satisfied. See FIR at 89; <i>Montana v. Wyoming</i>, 131 S. Ct. 1765, 1771 (2011).”</p>	<p>As above, Montana fails to recognize that Wyoming must regulate off its post-1950 use only if that use prevents sufficient water from reaching pre-1950 uses in Montana.</p> <p><b>First Interim Report of the Special Master at 89 (Feb. 10, 2010):</b></p> <p>“4. Article V of the Compact clearly protects Montana’s pre-1950 appropriations from irrigation of new acreage in Wyoming if that irrigation prevents sufficient water from reaching the pre-1950 uses.”</p> <p><b><i>Montana v. Wyoming</i>, 131 S. Ct. 1765, 1770-71 (2011):</b></p> <p>Wyoming was unable to find the proposition cited by Montana on the page identified, other than the Court’s following reference to the Special Master’s findings:</p> <p>“The Special Master found that ‘Article V of the Compact protects pre-1950 appropriations in Montana from new surface and groundwater diversions in Wyoming, whether for direct use or for storage, that prevent adequate water from reaching Montana to satisfy those pre-1950 appropriations.’ Report 14-15.”</p>
<p><b>Page 7, No. 14:</b></p> <p>“The Compact definition of “Beneficial use,” however, “does not change the scope of the pre-1950 appropriative rights that it protects in both States.” <i>Montana v. Wyoming</i>, 131 S. Ct. at 1777-79.”</p>	<p><b><i>Montana v. Wyoming</i>, 131 S. Ct. at 1777-79:</b></p> <p>Montana mischaracterizes the Court’s reference to the Compact’s definition of beneficial use:</p> <p>“We agree with the Special Master that the definition of beneficial use in the Compact is unremarkable. Article V(A) does not change</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	the scope of the pre-1950 appropriative rights that it protects in both States.”
<p><b>Page 9, No. 22:</b></p> <p>“The record shows, however, that the States have exchanged numerous documents over the years regarding water rights in both States. Tr. 5040:2-5 (Lowry).”</p>	<p><b>Tr. 5040:2-5 (Lowry):</b></p> <p>Montana's characterization of “numerous” documents is not supported by the referenced testimony:</p> <p>[Mr. Wechsler] “Over the years, Ms. Lowry, the states have exchanged documents regarding water use and water rights in the various states; is that correct? [Ms. Lowry] A. Generally, I'd say that's true, yes.”</p>
<p><b>Page 9, No. 23:</b></p> <p>“The Engineering Report, which was produced as part of the Compact negotiations, contains detailed information about the water rights on the Tongue and Powder Rivers in each State. See Ex. W266.”</p>	<p><b>Ex. W266:</b></p> <p>Exhibit W266 does not contain detailed information about water rights. The only page of the Engineering Report which appears to discuss water rights at all is WY020821. It states in its entirety:</p> <p style="text-align: center;">“WATER RIGHTS</p> <p>The States of Wyoming and North Dakota maintain central records of water appropriations from which it is possible to tabulate all the water rights on each stream, with the quantity of water appropriated and the date of appropriation. The State of Montana has in recent years collected similar data, and is now in the process of correlating water rights with actual use.</p> <p>To tabulate, classify, and analyze the data available in the three states concerning water right priorities would be a tremendous job, and one that the committee feels is not justified. The problems attending any attempt</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>to use such data for compact purposes would be considerable, due to differences in state diversion allowances, differences in adjudication proceedings, and other factors. It would be difficult to arrive, for example, at a definition of a water right that could be applied in all three states.”</p> <p>With regard to water use, page WY020810, first paragraph, states: “The committee has defined irrigated land as arable land for which facilities have been constructed capable of delivering a reasonably adequate and continuing water supply. In other words, it includes both land actually irrigated and the additional land under constructed systems that could be irrigated.”</p> <p>With regard to the Tongue River Reservoir capacity, page WY020833 indicates the capacity of the Reservoir is 69,440 acre feet.</p>
<p><b>Page 9, No. 24:</b></p> <p>“In 1958 Montana provided Wyoming with water resources reports documenting water uses and irrigation practices in the nine counties within the Yellowstone River Basin affected by the Compact. Ex. M16.”</p>	<p><b>Ex. M16:</b></p> <p>Wyoming was unable to locate a reference in Exhibit M16 which indicates that the Montana water resource reports were provided to Wyoming in 1958.</p> <p>The 1958 Compact Commission annual report (Ex. J8) contains the following:</p> <p>“The Commissioner for Montana submitted the first detailed list of water-right filings that may be pertinent in that State.” Ex. J8 at 2.</p> <p>“The Montana representative furnished a list of recorded water-right filings in the Yellowstone River basin in Montana since January 1, 1950 as were available to about November, 1958. It must be understood the</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>quantities used are probably far less than the amount indicated in the permit or filing, particularly in Montana where a filing is often a declaration of intent which may be inconsistent with the ability to use or the probable supply." Ex. J8 at 4.</p>
<p><b>Page 9, No. 24:</b></p> <p>"The water resources reports provide detailed and accurate information concerning Montana's pre-Compact water rights. Tr. 2566:21 – 2570:9 (Moy); Tr. 4952:8 – 4953:5 (Lowry)."</p>	<p><b>Tr. 4952:8 – 4953:5 (Lowry):</b></p> <p>The following examination cited by Montana does not relate to the Montana water resource reports, but instead relates to the 1980's and information exchanged between Mr. Ashenberg from Montana and Dr. Allen from Wyoming:</p> <p>[Mr. Wechsler] "Some of the information in those reports had to do with existing water rights and water use in each state; correct?"</p> <p>[Ms. Lowry] A. I'm sorry. I didn't quite -- doing what with water?</p> <p>Q. Some of the information that was exchanged or contained in those reports had to do with water use in both Wyoming and Montana; correct?</p> <p>A. Well, it's my understanding that they -- at least Mr. Allen's look at available water supply at multiple places throughout the basin. I guess when I hear the term water use, that refers -- I think more of what's going on with an individual water right. And I don't know how much of that work that Mr. Allen did. It may have been water use, but I don't know.</p> <p>Q. So you don't think that they looked at individual water rights. Did they look at collectively how much the water supply and collectively the amount of water used in each of the states?</p> <p>A. Again, I believe they looked for sure at water supply. I don't know about the water</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	use part. They may or may not have. I don't know those reports that well."
<p><b>Page 9, No. 26:</b></p> <p>"In 1978 Montana provided a report to Wyoming and the Compact Commissioners containing "estimates of irrigated lands, irrigation requirements, and number of reservoirs in the Montana portion of the Tongue River Basin." Ex. M260. That report contained information regarding the amount of water necessary for pre-1950 Montana irrigators at the headgate, and indicated that 19,755 acres of pre-1950 land was being irrigated in Montana and required 57,913 acre feet of water. The report also provided information on pre-1950 reservoirs and monthly streamflow data for 1971 to 1976. <i>Ibid.</i>; Ex. J28."</p>	<p><b>Ex. M260:</b></p> <p>At the time Montana provided the report in 1978 it admitted that the information contained in the report was not accurate. The April 26, 1978, cover letter from Gary Fritz states: "Since adjudication is not complete in the Tongue River Basin it was impossible to accurately determine pre- and post-1950 water use and rights. Pre-1950 water use for irrigation was estimated by using irrigated land acreage from water resource surveys. Present irrigation use was estimated by reconnaissance level estimates of presently irrigated land. All information presented here should be considered preliminary estimates." Ex. M260, Bates No. WY084393.</p> <p><b>Ex. J28 (Compact Commission 1978 Annual Report):</b></p> <p>The 1978 Compact Commission annual report also references the fact that Montana water right information is incomplete:</p> <p>"The documentation of pre-1950 water rights has been completed in Wyoming. The 1973 Montana Water Use Act is assisting that State in its documentation, although it is still incomplete." Ex. J28 at V.</p>
<p><b>Page 10, No. 27:</b></p> <p>"By the 1980s, and likely much earlier, Montana provided Wyoming with a copy of the 1914 Miles City Decree. Tr. 5041:-10 (Lowry); Tr. 5059:4-10 (Lowry); Ex. M243."</p>	<p>The cited testimony of Ms. Lowry lends no support to Montana's assertion that the 1914 Miles City Decree was provided to Wyoming in the 1980s or earlier.</p>

Citation in Montana’s Post-Trial Brief	Reference to Citation Source
	<p><b>Tr. 5041:-10 (Lowry):</b></p> <p>[Mr. Wechsler] “You've seen the Miles City Decree; correct?  [Ms. Lowry] A. I have.  Q. How about the water resources surveys from the state engineer's office? Have you seen those?  A. The Montana state engineer's office?  Q. Yes.  A. I was in the room when Mr. Moy did his testimony, and he referred to those. I'm fairly certain we have a copy in our library. But they're not documents I've looked at any time recently.”</p> <p><b>Tr. 5059:4-10 (Lowry):</b></p> <p>[Mr. Wechsler] “You, over the years, have been given some information about Montana water rights; correct?  [Ms. Lowry] A. Yes.  Q. Including the 1914 decree?  A. Yes.  Q. Including information about the adjudication?  A. Yes.”</p> <p><b>Ex. M243:</b></p> <p>Wyoming was unable to find any reference in Exhibit M243 as to when Montana provided a copy of the 1914 Miles City Decree to Wyoming.</p>
<p><b>Page 10, No. 29:</b></p> <p>“By no later than the early 2000s, and likely before, Montana informed Wyoming that it sought the information about Wyoming's pre-Compact water use</p>	<p><b>Tr. 2689:13-2690:2 (Moy):</b></p> <p>The cited testimony from Mr. Moy clearly indicates he was referencing the 2000s, not before as Montana suggests.</p>

<b>Citation in Montana’s Post-Trial Brief</b>	<b>Reference to Citation Source</b>
<p>because it was concerned that Wyoming was using more than its share of the water. Tr. 2689:13-2690:2 (Moy).”</p>	<p>[Special Master] “And did you explain to Wyoming why you wanted the information?  [Mr. Moy] A. You know, I think -- on this study here specifically?  Q. No. No when you said you'd previously asked for information about pre-1950 --  A. Oh, yes. Even our technical meetings in the '20s when we met with them, the interest was trying to establish an understanding of how they used water. We actually went to Wyoming to try to get that information and try to figure that out.  Q. And when would that have been?  A. When would that have been?  Q. Yes.  A. 2001, 2002, 2000.”</p>
<p><b>Page 11, No. 33:</b></p> <p>“Wyoming's longstanding position was that Wyoming had no obligation under the Compact to provide water to satisfy Montana's pre-Compact water rights. Ex. J65; Ex. J69; Ex. M183 at 2; Ex. M157; Ex. W76; Tr. 689:15-23 (Stults); Tr. 2631:12-21 (Moy) (describing ‘Wyoming's position from day one’); Tr. 4991:6-16 (Lowry); Tr. 4995:23-49096:2 (Lowry).”</p>	<p><b>Ex. M183:</b></p> <p>Exhibit M183 was not offered or admitted into evidence. The document was, however, admitted as Ex. W313. Exhibit W313 is dated June 9, 2004, and expresses Wyoming’s position as follows:</p> <p>“The compact is clear that pre-1950 rights were not to be administered or allocated under the provisions of the Compact. If the framers had intended for the pre-1950 rights to be somehow administered without regard for the stateline, they would have said so explicitly as was done in the Upper Colorado River Compact (1948) and the Bear River for lower division emergency”</p> <p><b>Ex. M157:</b></p> <p>Wyoming’s position expressed in Exhibit M157, like Exhibit W313, responds to Montana’s position in 2004 that the Compact requires interstate apportionment where</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>Montana's pre-Compact rights would be interwoven with Wyoming's pre-Compact rights ignoring the state line. In that regard, Wyoming's position was stated as:</p> <p>"The Compact negotiations considered interstate apportionment of pre-Compact rights and rejected it, knowing that there was sufficient water produced by the watershed to satisfy all pre-Compact rights. However, MT needed to construct storage to make use of their part. What storage they have is up to MT to manage for their uses. MT has not constructed the storage they need."</p> <p><b>Ex. W76:</b></p> <p>Exhibit W76 are emails dated June 8 and 9, 2004, and they do not express Wyoming's position, just that the states discussed the issue in the 1980s.</p> <p><b>Tr. 689:15-23 (Stults):</b></p> <p>The testimony Montana cites from Mr. Stults does not suggest that Wyoming's position was that it had no obligation under the Compact to provide water to satisfy Montana's pre-Compact water rights :</p> <p>[Mr. Stults] "But that they felt that there was a concept of supplemental rights and that this expansion had something to do with exercising that part of the compact that they had some -- that gave them some right to some kind of supplemental development.</p> <p>[Mr. Swanson] Q. And do you recall who would have communicated that message to you from Wyoming?</p> <p>A. Jeff, Pat, Sue, and Mike in different circumstances."</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p><b>4991:6-16 (Lowry):</b></p> <p>This cited testimony from Ms. Lowry relates to Wyoming's position in 2004 and refers to Montana's 2004 call letter:</p> <p>[Ms. Lowry] "A. I believe Wyoming's interpretation of that at that time was that we did not have that obligation to move that storage water down as they are suggesting in this paragraph.</p> <p>[Mr. Wechsler] Q. But you did understand this to be – from Montana's perspective it was a request for water; you understood that; right?</p> <p>A. Yes.</p> <p>Q. It's just that you disagreed as to whether or not the compact provided for that; right?</p> <p>A. That's correct."</p> <p><b>Tr. 4995:23-4996:2 (Lowry):</b></p> <p>Like above, this cited testimony from Ms. Lowry relates to Wyoming's position in 2004:</p> <p>[Mr. Wechsler] "Q. And you understood that to mean that if Wyoming was regulating its water rights according to Wyoming law, that you were in compliance with the compact?</p> <p>[Ms. Lowry] A. That's correct."</p>
<p><b>Page 12, No. 36:</b></p> <p>"Wyoming's position on the related issues of Article V(A) and interstate calls was so entrenched that the Wyoming Water Commissioners did not 'receive any direction from the state engineer with regard to what action to take, if any, in</p>	<p><b>Tr. 2000:4-11 (LoGuidice):</b></p> <p>Mr. LoGuidice was asked about guidance from the state engineer only with regard to the 2004 and 2006 calls. Additionally, Montana quoted Wyoming counsel but appears to attribute the quotation to Mr. LoGuidice:</p>

Citation in Montana’s Post-Trial Brief	Reference to Citation Source
<p>response to calls from the State of Montana.’ Tr. 2000:4-11 (LoGuidice).”</p>	<p>[Mr. Kaste] “All Right. Now, we talked with Mr. Whitaker about this, and I’m going to ask you, essentially, the same question. As the assistant superintendent, or even as the hydrographer commissioner, in either 2004 or 2006, did you receive any direction from the state engineer with regard to what action to take, if any, in response to calls from the State of Montana? [Mr. Loguidice] A. None whatsoever.”</p>
<p><b>Page 12, No. 38:</b>  Montana references Exhibit M59.</p>	<p><b>Exhibit M59 was not offered or introduced into evidence.</b></p>
<p><b>Page 13, No. 39:</b>  “Mr. Williams presented a proposed model to the Commission in 1971, Ex. J21, but it was inconsistent with Wyoming’s position on Article V(A), and was never adopted. <i>See</i> Ex. J22.”</p>	<p><b>Ex. J21:</b>  Wyoming was unable to find reference to a proposed model in Exhibit J21. The exhibit does reference a “preliminary computational procedure” as follows:  “At the request of the Commission, the U.S. Geological Survey evaluated data requirements in terms of Compact provisions and Commission needs. The result was an informal report that outlined data deficiencies and made some recommendations for improvement. On the basis of the analysis, a preliminary computation procedure was devised by the chairman and presented to the Commission for consideration.” Ex. J21 at 4.  <b>Ex. J22:</b>  Wyoming was unable to find any reference to a proposed model in Exhibit J22, or any reference to the “preliminary computational procedure” referenced in the 1971 annual report. The 1972 annual report contains no</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	statement that any such model was inconsistent with Wyoming's position on Article V(A), or that it was not adopted because of Wyoming's position as Montana implies.
<p><b>Page 13, No. 40:</b></p> <p>“The 1971 Annual Report indicates that ‘[d]uring 1971, a large amount of time and effort was devoted to the exchange of views on provisions of the Compact.’ Ex. J21 at 3.”</p>	<p><b>Ex. J21:</b></p> <p>The context of Montana's citation implies that the referenced time and effort were devoted to Article V(A). However, the 1971 annual report is clear that the discussions focused on Article X:</p> <p>“In addition to the two Commission meetings, State representatives met at two other meetings to discuss the action necessary to facilitate use of water for development of coal resources. A large part of the discussion at all of the meetings concerned the need to obtain unanimous approval by the signatory States for diversion of water from the Yellowstone River basin.” Ex. J21 at 3.</p>
<p><b>Page 13, No. 41:</b></p> <p>““Again during 1972, a large amount of time and effort was devoted to the exchange of views on provisions of the Compact.’ Ex. J22 at 3. ‘Because it is absolutely necessary that all parties have the same interpretation of Compact terms, the Commission has also focused attention on the ambiguity of some parts of the Compact.’ <i>Id.</i> at 4. The States did not agree on the interpretation of the Compact or a method for administration.”</p>	<p><b>Ex. J22:</b></p> <p>Montana again implies that the referenced time and effort were devoted to Article V(A). However, the 1972 annual report is equally clear that the discussions focused on Article X:</p> <p>“A large part of the discussion at the annual meeting concerned the need for unanimous approval by the signatory States for diversion of water from the Yellowstone River basin . . . . Because it will be necessary for the Commission to act on applications for water to be used outside of the basin in the near future, the Commission attempted to promote action on development of a procedure for</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>gaining the unanimous consent of the signatory States as required by Article X of the Compact." Ex. J22 at 3.</p> <p>The second sentence Montana quotes appears nowhere in Exhibit J22. The sentence does appear in Exhibit J21, again in reference to Article X and state statutory provisions which conflict with Article X. The States' focus on Article X during this time is even more pointedly described in the 1973 annual report. Ex. J23 at 3.</p> <p>There is no reference in Exhibit J22 which indicates that the States disagreed on the interpretation of the Compact or a method for administration. Instead, the 1972 annual report states:</p> <p>"There were no incidents during the year that required administration of water in accordance with the provisions of the Compact. At the present level of water-resources development, the Commission feels that a program of intensive water-use regulations is not necessary." Ex. J22 at 2.</p>
<p><b>Page 13, No. 42:</b></p> <p>"In 1974, Montana's Commissioner Orrin Ferris suggested that the YRCC adopt procedures for calculating allocation of water under the Compact."</p>	<p>Montana did not cite to any evidence in support of the assertion that Montana's Commissioner suggested adoption of procedures, and Wyoming was unable to find any support for the assertion in the 1974 or 1975 annual reports. The 1974 annual report states:</p> <p>"The Commission feels that due to the potential for large scale use of water associated with coal development that joint allocation and development studies should be</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	carried out in the near future.” Ex. J24 at 3.
<p><b>Page 13, No. 43:</b></p> <p>“In 1977 a special Compact administration subcommittee was formed to discuss differences in the interpretation of the Compact. Ex. J27.”</p>	<p><b>Ex. J27:</b></p> <p>The subcommittee Montana refers to was formed to resolve differences in definition of compact terms and develop a conceptual design of a model:</p> <p>“A Compact Administration Subcommittee, composed of two representatives each from Montana and Wyoming and the Commission chairman, was formed and given a charge to continue to resolve differences in definition of Compact terms and develop a conceptual design of a model of the Yellowstone River Basin, with special emphasis on the Tongue River at the beginning of the effort.” Ex. J27, at 3.</p>
<p><b>Page 13, No. 44:</b></p> <p>“In 1978 the YRCC continued to focus on procedures for implementing and enforcing the Compact. Ex. J28.”</p>	<p><b>Ex. J28:</b></p> <p>Wyoming was unable to find discussion in the 1978 minutes regarding procedures for enforcement of the Compact:</p> <p>“This special meeting was called to continue discussions of water-right procedures in Montana and Wyoming, definition of terms in the Compact, and to respond to Intake Water Company's petition to the Commission requesting permission to divert water out of the Yellowstone River Basin.” Ex. J28 at III.</p> <p>“The Commission feels that due to the potential for large scale use of water associated with coal development, joint allocation and development studies should be carried out in the near future. To this end, special meetings of the Commission and the Compact Administration Subcommittee,</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>conducted as work sessions, will be scheduled to continue to document understandings and to develop procedures for implementation of Article V of the Compact." Ex. J28 at V.</p>
<p><b>Page 14, No. 45:</b></p> <p>"In 1980 the YRCC indicated that there was a need to administer the Compact, but the YRCC was not in a position to do so. A proposal for a grant to assist with administration of the Compact was discussed. Ex. J29."</p>	<p><b>Ex. J29</b></p> <p>The YRCC did not indicate there was a need to administer the Compact in 1980:</p> <p>"There were no incidents during the year that required administration of the water in accordance with the provisions of the Compact. At the present level of water-resources development, the Commission feels that a program of intensive water-use regulations is not necessary." Ex. J29 at IV.</p> <p>The Commission did indicate it felt the need to develop procedures for future Compact administration:</p> <p>"However, the attention of the Commission is continuing to focus on the need to define the detailed procedures for implementing Compact provisions previous to the time when development of water within the Yellowstone River Basin requires that these provisions be enforced." <i>Id.</i></p>
<p><b>Page 14, No. 46:</b></p> <p>"In 1981 Wyoming rejected Montana's request to regulate Wyoming water rights for the benefit of the Tongue River Reservoir and other post-Compact rights. Ex. M136."</p>	<p><b>Ex. M136:</b></p> <p>Exhibit M136 is primarily a collection of notes taken by Wyoming water officials. Those notes are clear that Mr. Fritz was wondering if Wyoming would regulate post-1939 and/or post 1950 water rights for the benefit of Tongue River Reservoir because it was low at the time. None of the notes state that Wyoming rejected Montana's inquiry,</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>but instead indicate the need for additional discussions.</p> <p>“The Tongue River reservoir with priority of 1939 is low in storage 20,000 acre feet, due to safety problems. Montana is wondering if the junior to 1950 rights in Wyoming can be regulated to provide water to supply Tongue River Res.” Ex. M136 at WY048187.</p> <p>“Discussed whether or not water rights pre-1950 in Wyoming, post 1939 could be regulated &amp; also can post 1950 rights in Wyo be regulated for Montana 1939 right.” Ex. M136 at WY0481194.</p> <p>Additionally, Mr. Fritz from Montana recognized that the states were discussing the issue, and suggested postponement of those discussions:</p> <p>“We had discussed last year the need to address the problems of interstate regulation of the Tongue River. The more urgent need to come to an agreement on an enlarged Tongue River Reservoir water supply has overshadowed the regulation question. I suggest we postpone further discussion of that question until we have the resources to deal with it properly.” Ex. M136 at WY048184.</p> <p>The evidence is also clear that Tongue River Reservoir filled in 1981:</p> <p>“Montana voiced its concern that during low-flow years Wyoming needs to regulate its post-1950 water rights more carefully so that Montana can use its pre-1950 water. Montana, in turn, must notify Wyoming when it is not able to obtain its pre-1950</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>water. A situation developed during the spring of 1981 in which Montana was almost unable to fill the Tongue River Reservoir even though it has a pre-1950 water right." Ex. J32 at IV.</p>
<p><b>Page 14, No. 47:</b></p> <p>"In 1982, at Montana's request, the YRCC formed a technical committee to determine and agree on storable inflows for the Tongue River Reservoir. Montana proposed studies of the Tongue River in the hope of providing information to assist in the development of an administrative procedure for administering Article V. Montana also developed the Tongue River Model, which was discussed by the YRCC. Ex. J32."</p>	<p><b>Ex. J32:</b></p> <p>The 1982 annual report does not indicate that Montana requested the formation of a technical committee. The report provides:</p> <p>"Another technical committee was formed to determine and agree on the storable inflows to the Tongue River Dam that Montana is entitled to under the Yellowstone River Compact." Ex. J32 at IV.</p> <p>Additionally, nothing in the 1982 annual report suggests that Montana proposed studies of the Tongue River in the hope of providing information to assist in the development of an administrative procedure for administering Article V. Furthermore, the report does not state that Montana developed a Tongue River Model, but a model associated with the Little Bighorn River:</p> <p>"The Little Bighorn Technical Committee reported that a base accounting model (OPSTUDY) has been developed by Montana for the river." Ex. J32 at v.</p> <p>With regard to the Tongue River, the 1982 report states:</p> <p>"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</p>

Citation in Montana’s Post-Trial Brief	Reference to Citation Source
	assumptions used.” Ex. J32 at V.
<p><b>Page 14, No. 48:</b></p> <p>“In 1983, hydrologist Dan Ashenberg of the Montana Department of Natural Resources and Conservation (“DNRC”) prepared a draft report entitled ‘A Cooperative Plan to Administer the Yellowstone River Compact.’ Ex. M88.”</p>	<p><b>Ex. M88:</b></p> <p>The title of the draft report represented by Exhibit M88 is:</p> <p>“Proposal for the Formulation of a Cooperative Plan Based on Stream Flow Forecasting to Administer the Yellowstone River Compact.” Ex. M88 at WY Doc 000126.</p>
<p><b>Page 15, No. 49:</b></p> <p>“Montana informed Wyoming that one of the reasons that it was interested in developing a methodology was to ensure that it protected Montana's pre-Compact water rights. Tr. 2564:14 - 6 (Moy); Tr. 2565:18 - 2566:6 (Moy). Wyoming recognized that this was Montana's purpose. Tr. 1798:11-17 (Whitaker); Tr. 5057:19-5058:1 (Lowry).”</p>	<p><b>Tr. 1798:11-17 (Whitaker):</b></p> <p>Mr. Whitaker testified that he thought Montana’s goal was to ensure that both states got their proper share under the Compact:</p> <p>[Mr. Wechsler] “Q. This would have been a methodology to ensure that both states got their proper share under the compact; right? [Mr. Whitaker] A. I think that was his goal, yes.”</p> <p><b>Tr. 5057:19-5058:1 (Lowry):</b></p> <p>Montana’s citation to Ms. Lowry cuts off half of her answer where she explains her personal knowledge:</p> <p>Mr. Wechsler] “Q. So you gave a helpful description of the history. I think my question was: Did you understand that one reason Montana was interested in developing a methodology was to make sure that it got its share of water? [Ms. Lowry] A. And I guess what I was trying to explain was that in reading the old minutes from the mid-'80s, that appears to be the case. But by the time I became personally</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	involved, I believe that the focus shifted somewhat to them working on this issues document. And then both states then did edit that document. We met on it in 1990. And then I think the commission started work on a multitude of other topics. And that document was never really finalized." Tr. 5057:19-5058:7 (Lowry).
<p><b>Page 15, No. 50:</b></p> <p>"Montana's efforts to develop a methodology reached an impasse. Tr. 4258:12-21 (Fassett). The States were unable to agree to a methodology because Wyoming was not interested in developing any administrative procedure and maintained its position that Article V(A) did not obligate Wyoming to curtail post-Compact use. Ex. M69; Ex. W76; Tr. I 069:19-1070:7 (Fritz); Tr. 2561 :II - 2562:18 (Moy); Tr. 2564:11-13 (Moy); Tr. 2603:9-13 (Moy); Tr. 2707:15 - 2708:10 (Moy)"</p>	<p><b>Tr. 4258:12-21 (Fassett):</b></p> <p>Mr. Fassett testified that there were proposals made by both states, not just efforts by Montana:</p> <p>[Mr. Swanson] "Q. So it's possible that Montana did, in fact, discuss how to meet their pre-1950 water right the year before you came?</p> <p>[Mr. Fassett] A. There were proposals on both sides. I mean, that's what I recall. This is Montana's.</p> <p>Q. And at an impasse, so you'd agree that Wyoming didn't appear to be agreeing with Montana's proposal?</p> <p>A. Apparently not. It didn't go anywhere, and none of this continued on during most of my tenure."</p> <p><b>Ex. W76:</b></p> <p>These are emails dated June 8 and 9, 2004, and they say nothing about Wyoming not being interested in developing any administrative procedure. Exhibit M82, previously cited by Montana in Paragraph No. 48, confirms that Wyoming had also offered its position on administration required by the Compact:</p> <p>"I am in receipt of a letter dated June 30,</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>1983, in which Lou Allen presents a summary of the Article V apportionment and notes on a calculation procedure for allocating water." Ex. M82 at 1.</p> <p>Mr. Moy also acknowledged during his testimony that Wyoming advanced administrative procedures but that Montana did not agree with those procedures because they were based upon the language of the Compact:</p> <p>[Mr. Kaste] "Do you recall that Wyoming created an alternative proposed methodology, and a man named Lou Allen did that?"</p> <p>[Mr. Moy] A. Oh, yes. Lou Allen. He did not do that. He did talk about doing it. He put some information together, but he did not do that. What he was pushing for was going back to the original what is stated in the actual language of the compact, to my knowledge. And he was trying to figure out a way to make the original language of the compact work, and it did not work.</p> <p>Q. So Wyoming's position throughout the course of the 1980s was we had to live with and abide by the language of the compact?</p> <p>A. Yes." Tr. 2702:2-16 (Moy).</p>
<p><b>Page 16, No. 52:</b></p> <p>"By 1985, the YRCC's meeting minutes began reflecting Montana's frustration with Wyoming's lack of cooperation. Ex. J35."</p>	<p><b>Ex. J35:</b></p> <p>Wyoming was unable to find any reference in Exhibit J35 suggesting that Montana was frustrated or that Wyoming was not cooperating. Montana did raise questions with regard to the Middle Fork reservoir project at the 1985 annual meeting, but that Powder River project and its associated issues were unrelated to development of an Article V administrative process. The 1985 annual report states the following with regard</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>to Article V discussions:</p> <p>“Article V - An ad hoc group was established to finalize an acceptable administrative procedure for apportioning the Yellowstone tributary flows based on Article V of the Compact. Although the group did not officially meet this year, work has progressed on a prototype administrative model for the Tongue River. This group will meet (May 6 and 7, 1986, in Cody, Wyoming) to: 1) Discuss the Tongue River model and forge a mutual consensus on required assumptions for administration of Article V; 2) Examine the pros and cons of other apportionment procedures (such as the Milk River) and compare them with the Tongue River prototype; 3) Develop recommendations for a mutually acceptable administrative model that can be applied to all Yellowstone Compact tributaries.” Ex. J35 at IV.</p>
<p><b>Page 16, No. 54:</b></p> <p>“The 1988 YRCC report reflects that the States were still in disagreement about how to administer Article V: ‘Wyoming has developed an application method and Montana developed an administrative model for the administration of water rights under Article V.’ Ex. J38 at 4. Despite previous efforts, the federal chairman suggested that another ‘management committee’ and ‘technical committee’ be established to develop ‘an acceptable approach.’ Mr. Fritz emphasized that a ‘sincere effort’ must be made to develop an acceptable procedure, although he questioned whether administrative models would be of any value in extremely dry years. <i>Id.</i></p>	<p><b>Ex. J38:</b></p> <p>Montana’s selective citation to the 1988 annual report mischaracterizes the Article V discussion reflected in the report. Accordingly, portions of the report cited by Montana state in their entirety as follows:</p> <p>“The Commissioners discussed issues concerning development of a methodology to administer terms of the YRCC. Wyoming has developed an application method and Montana developed an administrative model for the administration of water rights under Article V. The two methods have been exchanged between the states for review.</p> <p>Mr. Moore suggested that a management committee and technical committee be</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>Nonetheless, Montana offered to prepare a statement on the scope of work for the technical committee, including a framework for administration of water rights. <i>Id.</i> at 5.”</p>	<p>established to develop an acceptable approach.</p> <p>Gary Fritz stated that a sincere effort must be made to develop an acceptable procedure to administer water rights. He suggested that the technical committee prepare a report for the entire basin that would describe the existing water rights in Wyoming and Montana, show the priority dates, and compare water rights with water availability. He said a better understanding of the water rights situation was needed to give some guidance for the administrative process.</p> <p>....</p> <p>Mr. Fritz remarked that when Montana experiences water-supply problems, Wyoming has already begun restricting water use to pre-1950 rights. Administrative models may be of little value. He asked if the Compact should be addressing water shortages and noted that perhaps the only issues the Compact can address are the new projects or post-1950 rights.</p> <p>Mr. Fritz indicated Montana would prepare a statement on the scope of work for the technical committee that would include framework of water rights. A hypothetical situation will be included to test current proposals from Montana and Wyoming.” Ex. J38 at IV-V”</p> <p>The following year, Montana explicitly acknowledged that the Compact was designed to address post-1950 use:</p> <p>“Mr. Fritz commented that discussion of administrative methods was premature. Mr.</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>Fritz stated that the Compact was formulated to guide the two States in sharing water on four streams in terms of post-1950 use. However, the expected development in the area has not occurred so the Compact may not address contemporary issues. Perhaps the problems the Compact originally meant to resolve are not the problems that exist today.” Ex. J39 at IV.</p>
<p><b>Page 17, No. 56:</b></p> <p>“[Ex. J56] at xii (‘Wyoming's point of view is that the proposed resolution is not an instrument of discussion. The resolution is a commitment to positions that we have disagreed upon relatively strenuously’).”</p>	<p><b>Ex. J56:</b></p> <p>There can be no doubt that Montana intentionally excluded the end of the final sentence it quotes from the 2006 annual report:</p> <p>“Wyoming’s point of view is that the proposed resolution is not an instrument of discussion. The resolution is a commitment to positions that we have disagreed upon relatively strenuously <b>for 2 years.</b>” Ex. J56 at xii. (emphasis added).</p> <p>Montana appears to have excluded the “for 2 years” portion of the citation because immediately following this quotation Montana asserts that the states had a longstanding disagreement.</p>
<p><b>Page 20, No. 64:</b></p> <p>“A call in Wyoming need not be in writing, Tr. 1705:2-21 (Whitaker); Tr. 2232:12-18 (Boyd); Tr. 2074:20-24 (Knapp); Tr. 2007:17-23 (LoGuidice), and need not take any particular form, Tr. 2232:23-2233:4 (Boyd) (‘Q. And it's not necessary for a water user to use any specific words, correct, when he's telling you he's short of water? A. No’).”</p>	<p><b>Tr. 1705:2-21 (Whitaker):</b></p> <p>Montana only cites to a portion of an answer from Mr. Whitaker. The following provides the complete answer.</p> <p>[Mr. Wechsler] “Q. That call can be in writing? [Mr. Whitaker] A. We had the ability to do that, yes. And there's a form for it. And I understand that the current policy is to get</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>those forms signed if you're requesting regulation. Early in my tenure, we took the call over the phone if we knew the party. If it was a routine call that happened every year and we were very familiar with that particular ditch and the people on it, we'd go out and verify they were short in taking everything. But we wouldn't for the writing, the written receipt.</p> <p>Q. Ever have a call that occurred in person, meaning the water user told you in person where it's time to regulate?</p> <p>A. Yes.</p> <p>Q. And of those ones that were done in person, did you require -- every time, did you require them to submit a written request?</p> <p>A. Not every time, no. Like I said, if we knew the calling party and it was somebody that routinely called every year on a particular ditch and we knew the situation on the stream, something that we were on almost daily, we didn't necessarily need anything in writing to instigate that. We knew it happened, and we could see it coming. And we would respond to the call." Tr. 1704:22-1705:2-21 (Whitaker).</p> <p><b>Tr. 2074:20-24 (Knapp):</b></p> <p>Mr. Knapp's testimony cited by Montana does not reference calls for regulation at all, but instead references regulation tags:</p> <p>[Mr. Kaste] "Q. And I think we've heard from a number of witnesses that you don't always put tags on the headgates; right?</p> <p>[Mr. Knapp] A. No, I do not. In my district it's been verbal most of the time."</p>

<b>Citation in Montana's Post-Trial Brief</b>	<b>Reference to Citation Source</b>
<p><b>Page 21, No. 67:</b></p> <p>“During the periods 1987-1989, and 2000-2006, water supply and availability was a constant concern to Montana. Tr. 664:14-23 (Stults); Tr. 668:5-14 (Stults).”</p>	<p><b>Tr. 664:14-23 (Stults):</b></p> <p>Mr. Stults did not testify about 1987-1989.</p> <p>[Mr. Swanson] “Q. So let's talk about water quantity then. Did you have any concerns about water quantity or water supply in the Tongue River Basin in your time at DNRC?</p> <p>[Mr. Stults] A. Yes. For most of the years that I was in the division administrator position, I did. Prior to that, no. But especially beginning with the year 2000 and running all the way through until the time that I left the division in 2006, I was -- there was a constant concern about the issue of water availability in the basin. And the fact that we were in a significant -- one of the worst droughts that the state had ever experienced -- that the region had ever experienced made it a very critical issue.”</p> <p>Tr. 664:11-23 (Stults).</p> <p><b>Tr. 668:5-14 (Stults):</b></p> <p>[Mr. Swanson] “Q. And can you just briefly tell us, in those years, say the 2000, 2001, 2002 era, what were the water conditions on the Tongue River?</p> <p>[Mr. Stults] A. Very severely low. 2000 -- 2001 was one of the driest years in history. And 2002 was not much better. 2000 was dry as well.</p> <p>Q. Do you recall if you had an opinion at that time that Montana's pre-1950 water rights were being met on the Tongue River?</p> <p>A. Pre-'50 rights were not being met.”</p>
<p><b>Page 22, No. 71:</b></p> <p>“During the years 1981, 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and</p>	<p><b>Tr. 668:11-14 (Stults):</b></p> <p>Montana cites to testimony from Mr. Stults which relates to no year other than years</p>

<b>Citation in Montana's Post-Trial Brief</b>	<b>Reference to Citation Source</b>
<p>2006, Montana's pre-Compact rights were not satisfied. Tr. 668:11-14 (Stults); Tr. 690:14-20 (Stults)."</p>	<p>2000, 2001 and 2002.</p> <p>[Mr. Swanson] "Q. And can you just briefly tell us, in those years, say the 2000, 2001, 2002 era, what were the water conditions on the Tongue River?</p> <p>[Mr. Stults] A. Very severely low. 2000 -- 2001 was one of the driest years in history. And 2002 was not much better. 2000 was dry as well.</p> <p>Q. Do you recall if you had an opinion at that time that Montana's pre-1950 water rights were being met on the Tongue River?</p> <p>A. Pre-'50 rights were not being met." Tr. 668:5-14 (Stults).</p> <p><b>Tr. 690:14-20 (Stults):</b></p> <p>[Mr. Swanson] "Q. Do you know if Montana had water commissioners on the Tongue River in 2002?</p> <p>[Mr. Stults] A. We did.</p> <p>Q. So did you have a view whether all of Montana's pre-1950 water rights were being satisfied on the Tongue River?</p> <p>A. They were not."</p>
<p><b>Page 22, No. 74:</b></p> <p>"In the early 2000s Montana inquired about expanded irrigation and water use in Wyoming. Ex. J51 at IV; Tr. 4972:7-24 (Lowry)."</p>	<p><b>Tr. 4972:7-24 (Lowry):</b></p> <p>With this assertion Montana appears to be claiming that Montana officials inquired about whether there was an expansion of irrigated acres in Wyoming. However, Montana's inquiry at the time related to the conversion of flood irrigation to sprinkler irrigation.</p> <p>[Mr. Wechsler] "Q. Turn, please, to page Roman IV of that same exhibit, Exhibit J51. Second full paragraph begins, 'Mr. Moy asked if new irrigation or changes in</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>“For example, Mr. Kerbel investigated Wyoming post-Compact water use. He inquired about Wyoming water use and specific Wyoming water rights. Tr. 4208:19-20 (Fassett); Tr. 4976:5-24 (Lowry).”</p>	<p>irrigation methods have occurred in the Tongue River Basin in Wyoming since 1950’; do you see that?  [Ms. Lowry] A. I do.  Q. Do you recall that changes in irrigation methods and new irrigation was an issue that was expressed by Montana in the early 2000s?  A. When Mr. Moy and others came to the meeting in Sheridan in January of ‘02, Mr. Moy did raise the -- just asked Mike Whitaker his assessment of the percentage of acres that had changed over from flood to sprinkler.  Q. And they were raising that issue in 2001 as well; correct?  A. Well, it looks like he asked that at the meeting, yes.”</p> <p><b>Tr. 4208:19-20 (Fassett):</b></p> <p>Mr. Fassett’s cited testimony does not support Montana’s assertion:</p> <p>[Mr. Kaste] Q. Same questions with regard to Mr. Kerbel or Mr. Dalby, either of them request any water from the state of Wyoming?  [Mr. Fassett] A. Not that I’m aware of. Mr. Kerbel may have had discussions with Mr. Whitaker.” Tr. 4208:16-20 (Fassett).</p>
<p><b>Page 23, No. 75:</b></p> <p>“Over the years Montana repeatedly inquired about the regulation of Wyoming water rights. Ex. M205 at 4918; Tr. 1796:10-1797:16 (Whitaker); Tr. 4181:17-21 (Fassett); Tr. 4196:9-24</p>	<p><b>Ex. M205 at 4918; Tr. 4181:17-21 (Fassett); Tr. 4196:9-24 (Fassett):</b></p> <p>Exhibit M205 at 4918 does not reference regulation of Wyoming water rights at all. Instead, it references a discussion of the Middle Fork Reservoir project in Wyoming’s Powder River Basin, a project which was</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>(Fassett). The reason for these inquiries was to determine whether Wyoming was complying with Article V(A) of the Compact. Tr. 2564:14-2565:6 (Moy).”</p>	<p>never constructed. Additionally, Mr. Fassett's cited testimony relates to general discussions between the States, and does not refer to specific inquiries by Montana.</p> <p><b>Tr. 2564:14-2565:6 (Moy):</b></p> <p>Montana then attempts to fold its assertion that it made inquiries about water right regulation in Wyoming into the position that it made such inquiries to determine whether Wyoming was complying with Article V(A) of the Compact. However, Mr. Moy's cited testimony does not reference inquiries about regulation of Wyoming water rights.</p> <p>[Mr. Weschler] “Q. When you're attempting to develop this methodology, was one of the reasons that you were doing that in order to make sure Montana got enough water under the compact?</p> <p>[Mr. Moy] A. We wanted -- I mean, if you look at the history of the compact, the issue was, before 1940, I think, there was a feeling in both states that the -- the Tongue River was fully appropriated. That Montana clearly wanted to receive its water. And its entitlement.</p> <p>Q. Did you inform Wyoming that one of the reasons you wanted to develop a methodology was to make sure that Montana received its share of water under the compact?</p> <p>A. That was the reason we did it, yes.</p> <p>Q. Did you also inform Wyoming that one of the reasons was to protect the pre-Compact rights?</p> <p>A. Yes.”</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p><b>Page 23, No. 76:</b></p> <p>“The discussion about increased water use in Wyoming continued into early 2002, when Montana initiated a meeting between the States to discuss water use in Wyoming. Ex. M133.”</p>	<p><b>Ex. M133:</b></p> <p>Wyoming was unable to find anything in Exhibit M133 which suggests that Montana initiated the referenced meeting. To the contrary, the YRCC 2001 annual report appears to indicate that Mr. Tyrrell requested the specific meeting:</p> <p>“Mr. Tyrrell concurred and requested that Mr. Kerbel and Ms. Sue Lowry, and possibly others, continue discussions and provide findings and recommendations to the Commission by the end of January 2002.” Ex. J51 at IV.</p>
<p><b>Page 23, No. 77:</b></p> <p>“In 2000, 2001, and 2002 Montana received inquiries from water users about whether Montana was receiving its share of water under the Compact. Montana informed Wyoming of these inquiries and alerted Wyoming that Montana was not getting its share of water under the Compact. Ex. M65 at MT 12930; Ex. M137; Ex. M343; Tr. 1456:13- 1457:8 (Hayes); Tr. 1489:6-1490:14 (Hayes); Tr. 4975:17-4976:17 (Lowry).”</p>	<p><b>Ex. M65 at MT 12930:</b></p> <p>Exhibit M65 was not offered or admitted into evidence. Presumably Montana intended to reference Exhibit W65. If so, nothing at page MT 12930 indicates that Montana alerted Wyoming that Montana was not getting its share of water under the Compact.</p> <p>Exhibit M343 is a copy of minutes from Montana's Tongue River Advisory Committee. Wyoming was unable to find any reference to the Compact or Wyoming anywhere in those minutes.</p> <p><b>Tr. 4975:17-4976:17 (Lowry):</b></p> <p>None of the testimony cited by Montana appears to support its assertion that Montana alerted Wyoming that Montana was not getting its share of water under the Compact. In fact, the testimony of Ms. Lowry that Montana cites seems to contradict its assertion:</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>[Mr. Wechsler] Q. ““Are receiving inquiries from irrigators and other water users along the Tongue River about Wyoming's water use, and Montana is interested in understanding more about the upper system in order to answer those inquiries.’ Do you recall that there were irrigators in Montana that were asking about Wyoming's water use?</p> <p>[Ms. Lowry] A. I don't recall that any Montana irrigator had asked me directly. I mean, I had to take Montana on their word that they were getting those kinds of requests. I don't doubt that they were. But nobody talked to me directly.</p> <p>Q. Montana informed you that that was true?</p> <p>A. Yes, but no irrigator talked to me.</p> <p>Q. I understand. And Montana informed you that those irrigators believed that Wyoming was using too much water?</p> <p>A. I don't know that they said that. I think there was some -- Mr. Kerbel, particularly, just because he lived closer, I think he would drive down I-90 and see sprinkler systems and that sort of thing. He had some specific fields or specific areas that I recall him asking Mike Whitaker about. But I don't think they were overtly coming to the conclusion that somehow Wyoming was doing something inappropriate. I think they were truly there trying to understand the system better and ask us questions.</p> <p>Q. That was in the early 2000s that Mr. Kerbel was asking those questions?</p> <p>A. That's my recollection, yes.” Tr. 4975:13-4976:17 (Lowry).</p>
<p><b>Page 24, No. 79:</b></p> <p>“This exchange of letters prompted Mr. Stults to communicate to Wyoming that</p>	<p><b>Ex. M141:</b></p> <p>Exhibit M141 is a letter from Mr. Stults to Norma Bixby, it was not a communication to</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>action was required to satisfy Montana's pre-Compact water rights. Ex. M141; Tr. 880:1-881:4 (Stults)."</p>	<p>Wyoming, nor does it reference a communication to Wyoming.</p> <p><b>Tr. 880:1-881:4 (Stults):</b></p> <p>Similarly, the testimony cited by Montana does not reference a communication to Wyoming that action was required to satisfy Montana's pre-Compact water rights.</p> <p>[Special Master] "Q. And then if you can turn to M141.</p> <p>[Mr. Stults] A. I have it.</p> <p>Q. So this is the letter you wrote to Representative Bixby in May of 2002. And in the second paragraph, you discussed the fact that 'The Water Resources Division has been pursuing funds to do an initial assessment of the amount of development so we can clearly describe our concerns and our next interactions with representatives of the State of Wyoming.' So why did you need to do an initial assessment at this stage?</p> <p>A. We wanted more specificity with respect to what had been irrigated and when it had begun to be irrigated, what its priority date was and the amount of acreage it involved so that I could get more detailed about it in discussions with Wyoming.</p> <p>Q. And why did you feel as if you needed more specificity at this point?</p> <p>A. This -- we'd already been talking in 2001 about there being a disparity between the amount of water being used in Wyoming and the water being used in Montana and that there was a need for more water to come across the state line to Montana. And there was a -- response was, you know, what do you mean? What lands? And things like that. I felt I would be better grounded and more persuasive if I could go with more</p>

Citation in Montana’s Post-Trial Brief	Reference to Citation Source
	detail about the specific lands and specific diversions.”
<p><b>Page 24, No. 80:</b></p> <p>“The Montana Legislature unanimously approved the proposed joint resolution. Tr. 2617:18-2618:15 (Moy);Tr. 2620:16-19 (Moy).”</p>	<p><b>Tr. 2617:18-2618:15 (Moy);Tr. 2620:16-19 (Moy):</b></p> <p>Mr. Moy’s testimony supports the assertion that Montana’s Legislature passed the joint resolution, but he did not testify that the resolution passed unanimously.</p>
<p><b>Page 24, No. 81:</b></p> <p>“Throughout the 1980s and early 2000s, there were numerous Commission meetings and technical committee meetings between the States. These meetings often occurred in the spring and summertime. Tr. 2657:2-20 (Moy).”</p>	<p><b>Tr. 2657:2-20 (Moy):</b></p> <p>Montana cites the following testimony from Mr. Moy for the proposition that meetings often occurred in the spring and summertime. He did not say that.</p> <p>[Mr. Kaste] “Q. All right. Now, I have to ask you questions. Let me ask you if you had a piece of paper evidencing these communications that you’ve described in your testimony. I have to ask you, do you remember any specific dates, particularly in the years 1987 through ‘89 or 2000 through 2003, where you had communications with the folks in Wyoming during irrigation season?</p> <p>[Mr. Moy] A. No.</p> <p>Q. It would be pretty remarkable if you did without a piece of paper to remind you; right?</p> <p>A. I would guess that the discussions actually occurred when we had meetings, technical meetings or commission meetings.</p> <p>Q. And technical meetings and commission meetings typically occur in November and April?</p> <p>A. Sometime. And sometimes in the summertime. And those early years we had quite a few meetings. I cannot recall all the meetings but we had quite a few meetings</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>ongoing because there was Powder River meetings, there was Tongue River meetings, there was apportionment meetings, and there was several commission meetings. So there was quite a few different meetings ongoing at the same time." Tr. 2656:23-2657:20 (Moy).</p>
<p><b>Page 25, No. 83:</b></p> <p>"Ms. Lowry, the Interstate Streams Commissioner, has acknowledged that in 2000, 2001 and 2002, Montana informed Wyoming that the T&amp;Y was not getting enough water to satisfy its pre-Compact water right. Tr. 4973:22-4974:7 (Lowry); Tr. 5061:5-20 (Lowry)."</p>	<p><b>Tr. 4973:22-4974:7 (Lowry):</b></p> <p>Ms. Lowry did not testify that in "2000, 2001 and 2002," Montana informed Wyoming that the T&amp;Y was not getting enough water to satisfy its pre-Compact water right.</p> <p>[Mr. Wechsler] "Q. Montana never expressed to you that they were concerned about shortages in Montana?</p> <p>[Ms. Lowry] A. Rich had expressed to me that there were years where T &amp; Y wasn't getting their full – the volume available to them was not equal to what their water right was for.</p> <p>Q. So Montana was concerned about the drought in Montana; right?</p> <p>A. I'd say that's fair, sure.</p> <p>Q. And concerned about the impact of the shortages on its pre-1950 water right; right?</p> <p>A. They expressed that they had water rights that were going unfulfilled, yes." Tr. 4973:20-4974:7 (Lowry)</p> <p><b>Tr. 5061:5-20 (Lowry):</b></p> <p>[Mr. Weschler] "Q. Now, Mr. Moy or Mr. Kerbel informed you of the T &amp; Y right; correct?</p> <p>[Ms. Lowry] A. Yes.</p> <p>Q. And also of the Nance right; correct?</p> <p>A. Yes.</p> <p>Q. And you understood that the Nance right was the senior most right on the river;</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>correct?  A. Yes.  Q. You understood that the T &amp; Y was a very large right; correct?  A. Yes.  Q. At the bottom of the Tongue River in Montana?  A. Yes.  Q. And you understood that the T &amp; Y was the second most senior right; correct?  A. Yes.”</p>
<p><b>Page 25, No. 84:</b></p> <p>“Indeed, Wyoming monitored the Tongue River Reservoir and was aware of when it filled in the years at issue. <i>E.g.</i>, Ex. W37 at WY032854; Tr. 2157:19 - 2158:21 (Knapp) (indicating that he monitored the DNRC Tongue River Reservoir website to determine whether and when the Reservoir filled).”</p>	<p><b>Ex. W37 at WY032854; Tr. 2157:19 - 2158:21:</b></p> <p>Mr. Knapp’s diary, Exhibit W37, and his cited testimony both refer to 2006, and do not support Montana’s assertion that Wyoming was aware of when Tongue River Reservoir filled in all the years at issue.</p>
<p><b>Page 26, No. 85:</b></p> <p>“In addition, Wyoming recognized that when releases occurred from the Tongue River Reservoir, Montana direct flow rights did not receive sufficient water. Tr. 1795:2-5 (Whitaker).”</p>	<p><b>Tr. 1795:2-5 (Whitaker):</b></p> <p>[Mr. Wechsler] “Q. You also generally understood that when releases occurred, of a reservoir, that the direct flow rights were probably short?  [Mr. Whitaker] A. They could be.”</p>
<p><b>Page 26, No. 86:</b></p> <p>“In the years 1987, 1988, 1989, 2000, 2001, 2002, and 2003, Montana informed Wyoming whenever it had the opportunity that Montana was not receiving sufficient water to satisfy its pre-Compact rights, Tr. 1086:12-16 (Fritz); Tr. I 088:5-13 (Fritz); Tr.</p>	<p>Montana cites to multiple pieces of testimony to support its assertion that, whenever it had the opportunity, it informed Wyoming that Montana was not receiving sufficient water to satisfy its pre-Compact rights. That testimony is too lengthy to reproduce here, but not even Mr. Moy testified that he</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>2546:18-24 (Moy), Tr. 2548:11-16 (Moy); Tr. 2546:25- 2547:9 (Moy), Tr. 2548:17-2549:8 (Moy); Tr. 2554:17-2555:9 (Moy); Tr. 2664:8-13 (Moy); Tr. 2666:13-20 (Moy); Tr. 2700:22-2701:10 (Moy).”</p>	<p>informed Wyoming of water shortages whenever he had the opportunity.</p>
<p><b>Page 26, No. 87:</b></p> <p>“During the irrigation seasons of 1981, 1987, 1988, 1989, 2000, 2001, 2002, and 2003, when Wyoming was in a position to take action to provide Montana with water, Montana repeatedly informed Wyoming that it was not receiving sufficient water to satisfy its water rights. Ex. M136; Tr. 950:16- 951:14 (Kerbel); Tr. 2548:22- 2549:8 (Moy); Tr. 2700:16-2701:3 (Moy); Tr. 2708:11-2710:10 (Moy) (“Q. Mr. Moy, sitting here today, do you believe that you made calls to Wyoming during the irrigation season? A. Yes.”); Tr. 4197:3-9 (Fassett); Tr. 4207:4-7 (Fassett); Tr. 4208:1-3 (Fassett);Tr. 4259:14-18 (Fassett); Tr. 4264:12-14 (Fassett); Tr. 4322:24-25 (Fassett); Tr. 4323:19-21 (Fassett) (“Q. So there are a lot of communications during the irrigation season, would you agree with that? A. Sure.”).”</p>	<p>Again Montana has cited numerous pieces of testimony to support its assertion that, when it mattered, Montana repeatedly informed Wyoming that it was not receiving sufficient water to satisfy its water rights. And again Montana has misrepresented much of the testimony. The following are a few, more complete excerpts of testimony cited by Montana, with the testimony actually cited by Montana identified bold.</p> <p><b>Tr. 4197:3-9 (Fassett):</b></p> <p>[Mr. Fassett] “We often met in November, December, so they could kind of summarize how the prior irrigation season went and what kind of regulations occurred.</p> <p><b>And it was fairly routine that both states were sort of dry at the same time. And so both states were suffering from drought.</b> And there really wasn't any sort of, in my recollection, that much focused discussion about sort of V, A 'cause it was, well, I already got a whole bunch of people off, and so do you. And it really wasn't the topic of the day back then.” Tr. 4196:24-4197:9 (Fassett).</p> <p><b>Tr. 4207:4-7 (Fassett):</b></p> <p>[Mr. Kaste] “Q. What about an informal request for action? What about Mr. Fritz</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>saying, hey, can you turn loose some water for us; we're really low, and we think you've got some post-'50 water, and we're entitled to it?</p> <p>[Mr. Fassett] A. I don't recall those kind of specific requests at all. It really was much more conversational than how you're describing it in your question. <b>It was, we're having a tough year down there. And I would ask my staff. Or if I had first-hand knowledge, we'd report on the toughness on our side as well.</b> And it never got into the point of how each person should do something else.” Tr. 4206:21-4207:8 (Fassett).</p> <p><b>Tr. 4208:1-3 (Fassett):</b></p> <p>[Mr. Kaste] “Q. Well, even if he [Mr. Moy] wasn't the compact representative, did he -- and you wouldn't expect it to come from a person in his position, did he make a request for water?</p> <p>[Mr. Fassett] A. I'm not recalling he did. Again, I think he attended many of the meetings, as I recall. <b>And he was a strong advocate for the state of Montana, talking about the conditions.</b> I think I'm not completely clear on the structure of Montana state government. But I know he was involved with, actually the work of Mr. Ashenberg and others. So I know he was involved with working on the proposals for the V, C administration issues and things of that nature.</p> <p>But, well, as I said, I don't recall him making a direct request, a call for water from the compact. That -- I would have remembered.</p> <p>Q. 'Cause that would be a big deal?</p> <p>A. It would be a huge deal. I mean, I just</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	lived through similar things elsewhere in the state of Wyoming. So that's not a casual thing." Tr. 4207:21-4208:15 (Fassett).
<p><b>Page 27, No. 90:</b></p> <p>"This prompted Mr. Moy to inform Wyoming that Montana was not receiving sufficient water to satisfy its pre-Compact rights. Tr. 2547:22-2548:1 (Moy)."</p> <p>"The water users followed up with Mr. Stults, causing him to discuss the issue with Wyoming. Ex. M137; Ex. M343; Tr. 1489:6-1490:14 (Hayes)."</p>	<p><b>Tr. 2547:22-2548:1 (Moy):</b></p> <p>Mr. Moy testified that he was prompted to prepare for litigation, not communicate with Wyoming.</p> <p>[Mr. Moy] "And early on, Art Hayes came into my office, and I can't remember if it was 2000 or 2001, and they direly needed help because there was hardly any water going across the border. And I think in some cases, the Powder River was almost dry or was dry. So I was -- at that point I was determined to start preparing for litigation." Tr. 2547:22-2548:4 (Moy).</p> <p>Neither of the exhibits, nor the cited testimony of Mr. Hayes, indicates that any follow up by Montana water users caused Mr. Stults to discuss the issue with Wyoming.</p>
<p><b>Page 28, No. 90:</b></p> <p>"Montana informed Wyoming that it was not receiving sufficient water to satisfy its pre-Compact rights each year after the Tongue River Reservoir did not fill. Tr. 693:3-694:4 (Stults); Tr. 2544:22-24 (Moy)"</p>	<p>Neither piece of testimony cited by Montana supports, or even mentions, communications to Wyoming.</p> <p><b>Tr. 693:3-694:4 (Stults):</b></p> <p>[Mr. Stults] "A. We were concerned that -- we wanted to understand when they were diverting and how much they were diverting. And our suspicion was that they were diverting water that should have been available to us or holding back water that should have been available to us.</p> <p>[Mr. Swanson] Q. Did you have a concern</p>

Citation in Montana’s Post-Trial Brief	Reference to Citation Source
	<p>in those years about whether the Tongue River Reservoir was going to fill?</p> <p>A. Yes.</p> <p>Q. Did it fill, do you recall, in 2001 and 2002?</p> <p>MR. KASTE: Foundation. He hasn't established that he has the foundation to answer that question at this point.</p> <p>SPECIAL MASTER: You want to establish the foundation?</p> <p>BY MR. SWANSON:</p> <p>Q. Had you ever received information from the Water Projects Bureau under your supervision about the status of the Tongue River Reservoir?</p> <p>A. Regularly. As well as the drought advisory committee reports.</p> <p>Q. Do you recall if in 2001 and 2002 the Tongue River Reservoir filled?</p> <p>A. The Tongue River Reservoir did not fill in 2001. I know that for certain. And I'm confident it did not fill in 2002. To the best of my knowledge, it did not.”</p> <p><b>Tr. 2544:22-24 (Moy):</b></p> <p>[Mr. Weschler] “Q. Did you also look at the water levels in the Tongue River Reservoir? [Mr. Moy] A. We did.”</p>
<p><b>Page 30, No. 100:</b></p> <p>“On May 12, 2004, the States attended a YRCC technical team meeting. At that meeting, Montana stated that the Tongue River Reservoir was not yet full and that Montana was not receiving sufficient water to satisfy its pre-Compact rights. Ex. W71. After the meeting, the Montana team developed an action plan to continue to investigate the water use in</p>	<p><b>Ex. W71:</b></p> <p>Montana cites Exhibit W71 for the proposition that the States attended a YRCC technical team meeting on May 12, 2004. However, the exhibit makes abundantly clear that the meeting was not a Compact meeting between the states, but a Montana only meeting:</p> <p>“Those in attendance included Candy West,</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>the Tongue River Basin. <i>Id.</i>”</p>	<p>Sarah Bond, Rich Moy, Kevin Smith, Fred Robinson and Art Hayes by phone.” Ex. W71.</p> <p>Furthermore, the exhibit also makes clear that Montana had not yet placed a call on Wyoming:</p> <p>“1) Jack will need to call Pat Tyrell of Wyoming and to notify him that we are preparing to send him a letter to make a call on pre-1950 water rights on the interstate tributaries of the Yellowstone River.” <i>Id.</i></p>
<p><b>Page 30, No. 104:</b></p> <p>“On July 7, 2006, conditions continued to look favorable, and Montana predicted that the Tongue River Reservoir would fill. Ex. M193 at MT01425.”</p>	<p><b>Ex. M193 at MT01425:</b></p> <p>Exhibit M193 simply does not support Montana’s assertion in any way. On page MT-01425, Mr. Dalby indicates that as of July 7, 2006, the reservoir was about 95% full, inflows were 85 cfs, and outflows were 383 cfs. Wyoming can find no reference in the exhibit that Montana predicted the reservoir would fill.</p>
<p><b>Page 33, No. 114:</b></p> <p>“The Compact Engineering Committee identified the protected capacity of the Tongue River Reservoir as 69,440 acre feet. Tr. 2433:5 - 2435:17 (Littlefield); <i>see also</i> Ex. W266.”</p>	<p><b>Tr. 2433:5 - 2435:17 (Littlefield):</b></p> <p>Neither Dr. Littlefield nor the Compact Engineering Committee characterized 69,440 acre feet as the “protected” capacity of the Tongue River Reservoir.</p> <p>[Dr. Littlefield] “A. It [Ex. W266] refers to the reservoir on the Tongue River.</p> <p>[Mr. Draper] Q. What we call the Tongue River Dam and Reservoir?</p> <p>A. Yes, the same thing that appears in the Big Horn County water resources survey.</p> <p>Q. And is capacity and acre-feet given for that reservoir?</p> <p>A. Yes. The capacity is listed here as</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>69,440 feet. And that, again, as I noted in the capacity column, is identified as total capacity.</p> <p>Q. And that is acre-feet; correct?</p> <p>A. Acre-feet. Did I say something else?</p> <p>Q. You said feet?</p> <p>A. Yes, acre-feet. I'm sorry." Tr. 2435:3-17 (Littlefield).</p>
<p><b>Page 36, No. 128:</b></p> <p>"Mr. Aycock testified that based on his expert experience working on projects throughout the west for the Bureau of Reclamation, a reservoir right is fully protected once it fills to capacity. Tr. 1816:23 (Aycock)."</p>	<p><b>Tr. 1816:23 (Aycock):</b></p> <p>Although Montana only cites to one line of testimony, it appears that Mr. Aycock testified that the original capacity of a reservoir is usually accepted as available for storage, not that a reservoir right is fully protected once it fills to capacity.</p> <p>[Mr. Draper] "Q. From your experience, with respect to reservoirs and their water right, what is the importance of the original capacity of a reservoir?</p> <p>[Mr. Aycock] A. Well, my experience with water rights, you know, when you file a water right, it's based on that original construction. So you have a -- you know, your water right, at least whether the reservoir is full, that's the point where it's -- it reaches its full level. Now, the water right might be a different number if it's -- you allow a second fill. But that is the capacity that is usually accepted as available for storage.</p> <p>Q. And is that true of states, including Montana and Wyoming? In your experience.</p> <p>A. Yes." Tr. 1816:9-23 (Aycock).</p>
<p><b>Page 36, No. 132:</b></p> <p>"If the Reservoir does not fill the shortages are shared by the State and the</p>	<p><b>1211:16-17 (Smith):</b></p> <p>Wyoming generally does not take issue with Montana's assertion here. However, the two</p>

<b>Citation in Montana’s Post-Trial Brief</b>	<b>Reference to Citation Source</b>
NCT as set forth in NCT Compact. Tr. 1211:16-17 (Smith).”	lines of Mr. Smith’s testimony cited by Montana do not relate to that assertion.  [Mr. Smith] “A. Yes. I would say so. [Mr. Wechsler] Q. You consider it to be a reasonable operating plan?”
<b>Page 38, No. 139:</b>  “The Reservoir Manual was originally adopted in June of 1995. <i>See</i> Ex. M527, art. III.D.”	<b>Ex. M527, art. III.D.:</b>  Wyoming was unable to find any reference in Article III.D. of Exhibit M527 regarding when the Reservoir Manual was originally adopted.
<b>Page 38, No. 140:</b>  “If the Tongue River Reservoir does not fill, every storage right is cut back by a proportionate amount. Ex. M343; Ex. M500; Ex. M527 at art. II.A.2.c.ii; Tr. 3338:18-23 (Kepper).”	<b>Ex. M500:</b>  Exhibit M500 was not offered or admitted into evidence and has nothing to do with Tongue River Reservoir.
<b>Page 39, No. 145:</b>  “The current operations of the Tongue River Reservoir are consistent with the historic operations. <i>Compare</i> Tr. 1096:24-1098:25 (Smith), <i>with</i> Tr. 1107:14-1108:7 (Smith), <i>with</i> Tr. 1218:2-20 (Smith); <i>see also</i> Ex. M4 at 11-13, 22-24; Ex. M309-A at 2; Ex. 309-B at MT-03300.”	<b>Ex. 309-B at MT-03300:</b>  Exhibit M309-A, consisting of pages bates stamped MT 03293-03297, was admitted into evidence. Exhibit [M]309-B was not offered or admitted into evidence.
<b>Page 42, No. 155(a)(iii):</b>  “In 1967, the DNRC estimated that the minimum flow necessary to satisfy the stock water rights was 167 cfs. Ex. M284; Ex. M309-A; Tr. 1112:24 - 1116:10 (Smith) (expressing the expert opinion that 167 cfs is an appropriate	<b>Ex. M309-A:</b>  Exhibit M309-A does not indicate that the DNRC estimated the minimum flow necessary to satisfy stock water rights. Instead, it indicates that wintertime flows should not exceed 167 cfs, and that TRWUA simply agreed that 167cfs was adequate to

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>level of winter flows to satisfy the senior stock rights on the Tongue River in Montana); Tr. 1252:2-12 (Smith); Tr. 1467:9-1468:22 (Hayes).”</p>	<p>provide the needs for stock water. Exhibit M284 simply references back to Exhibit M309-A.</p> <p>“It can be seen that the flows during the irrigation season should not have exceeded 420 c.f.s. nor should the winter flows exceed 167 c.f.s, or 10,000 A.F. per month. These last two figures are assumed figures in that the Association members stated verbally that 420 c.f.s. released during the irrigation season would satisfy irrigation needs in the Tongue River area.”</p> <p>“The Association also indicated that a winter flow of 167 c.f.s would be adequate to provide the needs for stockwater, etc., in the river during the winter months. It was explained to the Association members that this winter flow of 167 c.f.s. would only be released when, and if, the inflow into the reservoir at the U.S. Geological Survey gaging stations above the reservoir equals, or exceeds, this amount, but, at no time during the winter months will the releases from the reservoir exceed the inflow into the reservoir for the same period.” Ex. M309-A at 2-3.</p> <p><b>Tr. 1112:24 - 1116:10 (Smith):</b></p> <p>In the nearly 4 pages of Mr. Smith's testimony cited by Montana, which is too lengthy to include here, he discusses multiple motivations that Montana points to for wintertime flows, not just the need to satisfy senior stock rights as Montana states in its brief before answering the following question:</p> <p>[Mr. Wechsler] “Q. Based on all of that evaluation, is 167 CFS consistent with your</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>understanding of the amount of water that must be flowing in the river in the wintertime?</p> <p>[Mr. Smith] A. Yes." Tr. 1116:6-10 (Smith).</p>
<p><b>Page 43, No. 155(b)(ii):</b></p> <p>"Every one of the Montana water users testified to the significant issues caused by winter ice jams. Tr. 1469:9 - 1470:10 (Hayes); 1472:10 - 1473:13 (Hayes); Tr. 3643:18-3646:14 (Hamilton); Tr. 3719:16-24 (Hirsch); Tr. 3802:15-3804:15 (Nance); Tr. 3879:26- 3880:5 (Muggli)."</p>	<p>Wyoming was unable to find reference to testimony regarding issues caused by winter ice jams from the following Montana water users: William Carrel, Raymond Harwood, Maurice Felton and Kyle Shaw.</p>
<p><b>Page 46, No. 160:</b></p> <p>"The Advisory Committee determined that the Tongue River Reservoir should be operated to fill the Reservoir during the spring runoff. Ex. M316 at A4"</p>	<p><b>Ex. M316 at A4:</b></p> <p>Instead of relating a determination by the Advisory Committee as Montana suggests, Exhibit M316 at page A4 simply indicates the Advisory Committee has a goal to "[f]ill the Reservoir during spring runoff." Another of its goals listed on that page is to "[m]aintain adequate carry-over storage in the Reservoir during the fall, winter, and early spring."</p>
<p><b>Page 47, No. 169:</b></p> <p>"The irrigated area above the T&amp;Y Irrigation District at the time of the Compact was 9,908 acres. Ex. M5 at 8; Ex. M6 at 14-16."</p>	<p><b>Ex. M5 at 8:</b></p> <p>Montana fails to state in its assertion that the 9,908 acres identified in the Montana Water Resource Surveys includes both irrigated and irrigable land, even though Mr. Book references the fact in his report:</p> <p>"The acreage irrigated and irrigable from existing facilities from Tongue River diversions was reported to be 9,908 acres in the reach between the stateline and the T&amp;Y</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	Canal.”
<p><b>Page 47, No 170:</b></p> <p>“Each of these 77 pre-Compact water rights has been verified through the Tongue River Adjudication in Montana. Although the adjudication is not final, all of the pre-1950 claims have undergone a rigorous examination process. <i>See id.</i>; Ex. M230 at 4-14; Tr. 488:6 - 492:11 (Davis).”</p>	<p>While Montana cites generally to the examination process in its adjudication procedure, it does not provide a citation to support its assertion that each of the 77 pre-Compact water rights it identifies have been verified through the Tongue River Adjudication in Montana. But the record shows, for example, that a current abstract produced by the Tongue River Adjudication describes one of Mr. Hayes's water rights improperly as having a 1902 priority instead of a 1950 priority. He explained that the discrepancy would be corrected as it is still in the water courts. Tr. 1491:25-1493:11 (Hayes).</p>
<p><b>Page 48, No. 174:</b></p> <p>“Dale E. Book, P.E. tabulated the pre-1950 water right claims on the mainstem of the Tongue River from documents available as part of the ongoing Tongue River adjudication. Based on this examination, the acreage associated with pre-1950 water rights totals 11,600 acres between the stateline and the T&amp;Y canal. The irrigation status of these rights for 2005, 2009, and 2001 was analyzed based on aerial photography. Ex. M6 at 14-15, Table 4-A and 4-B; Ex. M5 at 8, Table 2. Based on this analysis, it was concluded that the pre-1950 acreage is being irrigated. <i>Id.</i> at 16, Table 4-A and 4-B; Ex. M5 at Table 12, App. A.”</p>	<p><b>Ex. M6:</b></p> <p>Of the 11,600 acres Montana claims are associated with of pre-1950 water rights, Mr. Book's report states the following:</p> <p>“It was determined that the irrigated acreage corresponding to pre-1950 water rights was 8,300 acres for 2009, 8,600 acres for 2005, and 9,500 acres for 2011. The following table summarizes the pre-1950 irrigated area for the years analyzed.” Ex. M6 at 15.</p> <p>Additionally, in his tabulation of irrigated lands, Mr. Book included full supply (irrigated), partial supply (partially irrigated) and idle parcels. <i>Id.</i> at 16.</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p><b>Page 48, No. 175:</b></p> <p>“Mr. Book then used this information concerning pre-1950 irrigated acreage to determine the amount of water that is necessary in Montana to satisfy all of Montana's pre-1950 rights.”</p>	<p>Mr. Book described the amount of water he believed was necessary in Montana to satisfy all of Montana's pre-1950 rights in his first report based upon a theoretical maximum water demand by irrigated and irrigable lands as they were mapped in the 1947-1949 Water Resource Surveys. M5 at 9-11. It was not until his second report that he examined acreage associated with pre-1950 water rights. M6 at 15-16. Accordingly, Mr. Book did not base his opinion on his examination of acreage associated with pre-1950 rights.</p>
<p><b>Page 50, No. 183:</b></p> <p>“For example, the first order appointing Mr. Kepper provided that ‘No water user may use any water flowing in the Tongue River except as distributed by the water commissioners.’ Ex. 378A.”</p>	<p><b>Ex. M378A:</b></p> <p>The complete sentence that Montana quotes from Exhibit M378A states:</p> <p>“No water user may use any water flowing in the Tongue River except as distributed by the Water Commissioner(s) when the prorated plan is in effect.” Ex. M378A at MT-09968.</p>
<p><b>Page 50, No. 185:</b></p> <p>“At the beginning of each year, the Montana Water Commissioners would visit every point of diversion on the Tongue River with the individual water users. Tr. 3321:14-24 (Kepper); Tr. 3578:13-20 (Fjell).”</p>	<p><b>Tr. 3321:14-24 (Kepper):</b></p> <p>Montana asserts that Montana Water Commissioners would visit every point of diversion on the Tongue River at the beginning of each year. The cited testimony from Mr. Kepper only relates to when he first became Commissioner, or 2001:</p> <p>[Mr. Wechsler] “Q. Did you become familiar with the points of diversion on the Tongue River in Montana? [Mr. Kepper] A. Every one of them. Q. How? A. I physically visited every one of them. I got with every water user on the river and</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>“The Water Commissioners showed the water users the Miles City decree from the District Court, and informed them that they would be administering all of the direct flow and storage water. Tr. 3332:4-19 (Kepper); Tr. 3711:3-22 (Hirsch).”</p>	<p>went with them to -- with their irrigator to every point of diversion.  Q. Did you do that when you were first appointed water commissioner?  A. Yes.”</p> <p><b>Tr. 3578:13-20 (Fjell):</b></p> <p>Mr. Fjell's testimony cited by Montana only relates to 2002, the only year he was a Commissioner:</p> <p>[Mr. Swanson] “Q. So what year was this?  [Mr. Fjell] A. 2002.  Q. So when you said you went through all the pumps on the river, you and Mr. Kepper did that together; is that right?  A. Together, yes. And I should have said diversion points, not pumps.  Q. Was that at the beginning of the irrigation season?  A. Yes, it was.” Tr. 3578:11-20 (Fjell).</p> <p><b>Tr. 3332:4-19 (Kepper):</b></p> <p>Mr. Kepper testified that he showed the water users the judge's decree that appointed him, not the Miles City Decree as Montana asserts:</p> <p>[Mr. Wechsler] “Q. When you first met with the water users in 2001, what did you tell them?  [Mr. Kepper] A. I basically showed them the judge's decree where I was appointed. And -- excuse me -- and I showed them, you know, that the Tongue River Water Users, they brought out the new rules. And I showed them that. And, basically, I told them they were out of water,</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>basically. That was in '01.</p> <p>Q. Did you tell them you'd be administering the water of the Tongue?</p> <p>A. Yes.</p> <p>Q. Did you tell that to the decreed water users as well?</p> <p>A. Yes.</p> <p>Q. Told it to all of them?</p> <p>A. Right. Every one."</p> <p><b>Tr. 3711:3-22 (Hirsch):</b></p> <p>The cited testimony from Mr. Hirsch does not reference the Miles City Decree at all:</p> <p>[Mr. Hirsch] "A. Oh, sure. Normally, when the year started out, if they were new, they would come in the yard or call ahead and say, can you help me find your diversions, your points of diversion? And we'd probably just hop in the pickup with them and show them.</p> <p>And like others have testified, from there on, you might have a cup of tea with them, or a glass of tea and visit a little bit about how much water you had remaining from your stored rights. And I can't emphasize enough the cordialness of the grower towards the commissioners. It's just a small community. Everybody knows everybody. No friction. I mean, everybody tried, I think, very hard, to comply.</p> <p>[Mr. Swanson] Q. Did they measure your pumps for your irrigation points?</p> <p>A. Yes.</p> <p>Q. Do you remember what method they used?</p> <p>A. We used the ultrasound exclusively, as I recall."</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p data-bbox="170 220 430 262">Page 54, No. 204:</p> <p data-bbox="170 304 755 535">"Almost every year the large majority of the lands irrigated by the T &amp; Y canal are irrigated. If there was sufficient water available every year, all of these lands would be irrigated every year. Tr. 3891:16-3892:19 (Muggli)."</p>	<p data-bbox="779 220 1226 262">Tr. 3891:16-3892:19 (Muggli):</p> <p data-bbox="779 304 1421 504">Mr. Muggli's testimony cited by Montana relates to irrigation equipment and practices of irrigators, not to Montana's assertion about the quantity of lands irrigated under the T &amp; Y canal each year:</p> <p data-bbox="779 546 1421 661">[Mr. Wechsler] "Q. All the users, are they using the exact same kind of irrigation equipment?"</p> <p data-bbox="779 661 1421 1134">[Mr. Muggli] A. Open ditches mostly, with headgates and an extension pipe that takes the water under the ditch bank, lower ditch bank to their lateral or field ditch. And in a few instances, they have now went to direct pipe to the field that's connected to the back of the bank pipe, which in turn, the first thing that is on the canal is the headgate and the control gate. And then it goes into a pipe under the bank. And then they'll hook on to the backside, maybe 20 feet out, with a plastic line or pipe.</p> <p data-bbox="779 1144 1421 1291">And in a couple instances, there's a -- sprinkler pipes are hooked directly onto there because there's a few folks south of town who have started to go to sprinklers.</p> <p data-bbox="779 1302 1421 1375">Q. So there's a few different types of irrigation equipment?</p> <p data-bbox="779 1375 901 1417">A. Yes.</p> <p data-bbox="779 1417 1421 1533">Q. We talked about the overall 75 alfalfa, 25 grain and corn. Is that different for each individual water user?</p> <p data-bbox="779 1533 901 1575">A. Yes.</p> <p data-bbox="779 1575 1421 1648">Q. So do they have their own individual practices for irrigating?</p> <p data-bbox="779 1648 901 1690">A. Yes.</p> <p data-bbox="779 1690 1421 1764">Q. Are there people irrigating every day during the irrigation season on the T &amp; Y?</p> <p data-bbox="779 1764 901 1806">A. Yes."</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p><b>Page 55, No. 208:</b></p> <p>“For most of the irrigation season during the years at issue, the T&amp;Y was diverting the entire amount of water in the Tongue River in Montana. Tr. 3595:12-21 (Fjell) (“I never saw water go over it”).”</p>	<p>Montana cites to the testimony of Mr. Fjell for the assertion that, during the years at issue, T &amp; Y was diverting the entire amount of the water in the Tongue River in Montana. However, Mr. Fjell was a Water Commissioner only in year 2002. Tr. 3576:13-16 (Fjell).</p>
<p><b>Page 55, No. 210:</b></p> <p>“The Water Commissioners were responsible for shepherding storage water to those water users, which meant that it had to be allowed to pass the T&amp;Y. Tr. 3367:2-16 (Kepper).”</p>	<p>At least for 2002, the responsible Water Commissioner, Mr. Fjell, did not even know there were water users below T &amp; Y canal:</p> <p>[Mr. Swanson] “Q. And then your responsibilities went all the way to -- basically, to the confluence of the Yellowstone River; is that correct? [Mr. Fjell] A. Actually, at that time they went to the T &amp; Y. I had no idea there were users below the T &amp; Y. Q. So you didn't deliver any water below the T &amp; Y? A. No.” Tr. 3595:4-11 (Fjell).</p>
<p><b>Page 55, No. 211:</b></p> <p>“Although there are likely return flows from the water rights and reservoir water in Montana, uncontested expert testimony in this case suggests that the Tongue River is a slightly losing stream during dry years. Tr. 398:1-14 (Dalby).”</p>	<p>Contrary to Montana's assertion that Mr. Dalby's opinion about the Tongue River being a slightly losing stream is uncontested, Mr. Book, another Montana expert, determined that the Tongue River was a gaining stream after review of wintertime gage records:</p> <p>“A value for stream gain was included. This was derived from review of the wintertime gage record at Miles City and the reservoir outlet. A constant gain of 15 cfs was included</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	for the entire reach." Ex. M5 at 10.
<p><b>Page 56, No. 212:</b></p> <p>"The only time the T &amp; Y switches to stored water is when there is insufficient water reaching the canal to satisfy T&amp;Y's direct flow right. Tr. 3910:17-3911:8 (Muggli); Tr. 3920:15-3921:3 (Muggli)."</p>	<p><b>Tr. 3920:15-3921:3 (Muggli):</b></p> <p>According to Mr. Muggli's testimony cited by Montana, T &amp; Y partially switches to stored water based upon the flow at the stateline gage, not the flow reaching the T &amp; Y canal:</p> <p>[Mr. Wechsler] "Q. Is the stored water important to the T &amp; Y? [Mr. Muggli] A. Yes. Q. Why? A. Because if we were short on inflow at state line, then -- and we're -- for instance, if it drops to 100 CFS at state line and we're taking 150 into the canal, 50 CFS, it technically comes out of stored water. Q. Some of it would be direct flow, and some would be stored water? A. That's right. Q. And in dry years, do you rely on your stored water? A. Yes."</p>
<p><b>Page 56, No 213:</b></p> <p>"When there is insufficient water reaching the T&amp;Y canal to satisfy its direct flow right, other users on the Tongue River are informed that there is no longer water available for direct flow rights, and users junior to the T &amp; Y must use stored water to continuing irrigating. This includes all of the irrigators on the Tongue River below the Reservoir, except for Jay Nance, who is the only water user with a right senior to the T&amp;Y. Tr. 3341:8- 3342:16 (Kepper)."</p>	<p><b>Tr. 3341:8- 3342:16 (Kepper):</b></p> <p>Consistent with Mr. Muggli's testimony above, Mr. Kepper's testimony cited by Montana indicates that he determined whether T &amp; Y's right was being satisfied by looking at the stateline flows, not at the amount of water actually reaching the T &amp; Y canal:</p> <p>[Mr. Kepper] "A. Well, when you only have 12 CFS coming in, even the flow -- that barely covers the first flow right, which is 10 CFS. [Mr. Wechsler] Q. Everybody else is having</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>to --</p> <p>A. Everybody else is on stored water. And it doesn't look like there's much of that left.</p> <p>Q. As the water drops below that, you know, after the spring runoff, would you have to inform the water users that they no longer had direct flow?</p> <p>A. Yes.” Tr. 3341:8- 17 (Kepper).</p>
<p><b>Page 56, No. 214:</b></p> <p>“If there is insufficient water reaching the T&amp;Y to satisfy its direct flow right, the T&amp;Y will supplement the remainder of its diversion with storage water.”</p>	<p><b>Tr. 3920:15-3921:3 (Muggli):</b></p> <p>Mr. Muggli’s testimony again cited by Montana illustrates that T&amp;Y partially switches to stored water based upon the flow at the stateline gage, not the flow reaching the T &amp; Y canal:</p> <p>[Mr. Wechsler] “Q. Is the stored water important to the T &amp; Y?</p> <p>[Mr. Muggli] A. Yes.</p> <p>Q. Why?</p> <p>A. Because if we were short on inflow at state line, then -- and we're -- for instance, if it drops to 100 CFS at state line and we're taking 150 into the canal, 50 CFS, it technically comes out of stored water.</p> <p>Q. Some of it would be direct flow, and some would be stored water?</p> <p>A. That's right.</p> <p>Q. And in dry years, do you rely on your stored water?</p> <p>A. Yes.”</p>
<p><b>Page 58, No. 222:</b></p> <p>“Insufficient water was reaching Montana at some point during the irrigation season to satisfy Montana's active pre-1950 water rights in all but three years since 1961. Ex. M5 at II, Table 5; Ex. M6 at 17-19, Tables 5-A &amp; B, Tables 6A, B, &amp; C.”</p>	<p><b>Ex. M5, Ex. M6:</b></p> <p>Here Montana references “active” pre-1950 water rights. However, Mr. Book described the amount of water he believed was necessary in Montana to satisfy all of Montana’s pre-1950 rights in his first report based upon a theoretical maximum water demand by irrigated and irrigable lands as</p>



Citation in Montana’s Post-Trial Brief	Reference to Citation Source
	<p>they were mapped in the 1947-1949 Water Resource Surveys. M5 at 9-11. It was not until his second report that he examined acreage associated with pre-1950 water rights. M6 at 15-16.</p> <p>Of the 11,600 acres Montana claims are associated with of pre-1950 water rights, Mr. Book’s report states the following:</p> <p>“It was determined that the irrigated acreage corresponding to pre-1950 water rights was 8,300 acres for 2009, 8,600 acres for 2005, and 9,500 acres for 2011. The following table summarizes the pre-1950 irrigated area for the years analyzed.” Ex. M6 at 15.</p> <p>Additionally, in his tabulation of irrigated lands, Mr. Book included full supply (irrigated), partial supply (partially irrigated) and idle parcels. <i>Id.</i> at 16. Even with this broad definition of irrigated lands, Mr. Book found actual irrigation to be as little as 84% of his modeled values. <i>Id.</i></p>
<p><b>Page 60, No. 231:</b></p> <p>“In the dry years at issue, when the Wyoming water users had access to water, those users diverted water. Tr. 1699:3-12 (Whitaker); Tr. 1782:21-25 (Whitaker); Tr. 4269:10-13 (Fassett); Tr. 4271:3-8 (Fassett).”</p>	<p>Montana points to the following generalizations to support its specific assertion that Wyoming water users diverted water in the years in questions:</p> <p><b>Tr. 1699:3-12 (Whitaker):</b></p> <p>[Mr. Wechsler] “Q. And so those water rights, essentially when there's water available to them, they might be taking water until they are put into regulation?</p> <p>[Mr. Whitaker] A. Generally, what we do, the individuals on the streams turn on when they're ready to in the spring, when water is</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>available. And they can go ahead and run without anything from us. We don't touch a ditch when they turn on. When we get a call for administration or regulation, that's when we take control of the stream and control of the headgates.”</p> <p><b>Tr. 1782:21-25 (Whitaker):</b></p> <p>[Mr. Wechsler] “Q. Can you think -- can you identify any active water rights during the years 2001, 2002, 2004, and 2006 that were active water rights but chose voluntarily not to take their water? [Mr. Whitaker] A. No.”</p> <p><b>Tr. 4269:10-13 (Fassett):</b></p> <p>[Mr. Swanson] “Q. Was it your experience as state engineer that if water users could get water, they would use it to irrigate in a dry year? [Mr. Fassett] A. You bet.”</p> <p><b>Tr. 4271:3-8 (Fassett):</b></p> <p>[Mr. Swanson] “Q. And anybody who would have been -- would have had water would have been using it; is that your experience? In Wyoming or Montana? I mean, if they had access to water, they would be using it? [Mr. Fassett] A. Yeah, in a dry year, I assume that's the case.”</p>
<p><b>Page 60, No. 232:</b></p> <p>“During the years at issue, to the extent water was available, Wyoming water users diverted as much as their diversions would allow before regulation began. Tr.</p>	<p>Montana again cites to generalized testimony relating to the main stem of the Tongue River as support for specific diversions by all Wyoming water users:</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>1721:19-1722:14 (Whitaker); Tr. 2231:11-2232:5 (Boyd).”</p>	<p><b>Tr. 1721:19-1722:14 (Whitaker):</b></p> <p>[Whitaker] “A. The only thing I did at one point, and I believe it was in 2004, Mr. Boyd reported one day that the stream was getting low at Ranchester. And a couple of the ditches up by Dayton were taking a little over their appropriation trying to run some surplus water. And I advised him to go shut them back to their original appropriation.</p> <p>[Mr. Wechsler] Q. Is that the only example you can think of during those years?</p> <p>A. Yeah. And that was just an internal thing that I chose to do because Ranchester had a water right, and their water wasn't all that great anyway. So I had to keep some water down there for them. Didn't want them to dry the river up there.</p> <p>Q. If I understand you correctly, they were actually trying to take more water than their right entitled them to?</p> <p>A. The ditches up by Dayton that I referenced? Is that correct?</p> <p>Q. Yes. That's what I'm asking about.</p> <p>A. They were into their surplus water, yes.”</p> <p><b>Tr. 2231:11-2232:5 (Boyd):</b></p> <p>[Mr. Wechsler] “Q. And if they are not regulated and water is available and they need it, they will take it; correct?</p> <p>A. Yes.</p> <p>Q. And you have a general sense for the water rights on the Tongue River; right?</p> <p>A. Yes.</p> <p>Q. And most of those water rights are used every year; is that correct?</p> <p>A. Correct.</p> <p>Q. In the spring, water rights generally have enough water; correct?</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>A. In the spring?  Q. During the spring?  A. Yes.  Q. And, in fact, there might be what's called surplus water; right?  A. Correct.  Q. And that means that users are entitled to take twice their normal amount?  A. Correct."</p>
<p><b>Page 61, No. 238:</b></p> <p>"After regulation has begun, Wyoming water users, like those in Montana, will often still control their diversion works. Tr. 1971:1 -1972:10 (LoGuidice)."</p>	<p><b>Tr. 1971:1 -1972: 10 (LoGuidice)</b></p> <p>Mr. LoGuidice did not testify that Wyoming water users "often" still control their diversion works after regulation has begun:</p> <p>[Kaste] "Q. Are the folks that own the headgate, are they supposed to be changing the settings on that headgate once the stream is in regulation?  [Mr. LoGuidice] A. You know, the tags say that the water commissioner is in control of the headgate. So, I mean, no, they, by the wording on the tag, should not be. And I prefer in normal situations they don't. We get into reservoir releases coming down off the mountain. And reservoir water sometimes will hit an individual's headgate at 1:00 in the morning, 2:00 in the morning. I think we heard Mr. Hayes talk last week about his son being out at midnight, 1:00 in the morning irrigating. Well, these guys know if their reservoir water is coming down at 1:00 in the morning, I'll let them know. If you're out there at 1:00, go ahead. I'll be by in the morning. It's part of my job to make sure everything is set right and set it.</p> <p>And if they're out there at 1:00 and they know their reservoir water's there, everybody, after years, with my permission, with my knowledge, I'll let them take a little -</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>- take the water that they are entitled to. I mean, I'll let them know. If an individual orders, say, 1 CFS of water, there's shrink involved, conveyance losses. So, I mean, I will let them know they're not going to take 1. They're probably going to take about .8, .9, .7, depending on where they are on the creek. The conveyance losses increase the further away you get from the source of the water.</p> <p>And then in the morning, it's part of my job. I have to go down and make sure everything is set right. I mean, no, they're -- short answer, they're not supposed to touch them. But if they got my permission to do it, that's fine with me. I don't think anybody is out there to rob me blind."</p>
<p><b>Page 61, No. 239:</b></p> <p>"As in Montana, the Wyoming Water Commissioners do not measure return flows. Tr. 1976:12-16 (LoGuidice); Tr. 2089:7-15 (Knapp)."</p>	<p>Montana completely mischaracterizes the cited testimony, as illustrated by the more complete testimony of Mr. Knapp:</p> <p><b>Tr. 2088:14-2089:20 (Knapp):</b></p> <p>[Mr. Kaste] "Q. And does that basically follow the same process?</p> <p>[Mr. Knapp] A. Well, the same process as this is water that's already in the creek. So when I go, for example, to the Little Goose gauge and I have my reservoir distribution sheet, it tells me I've got a total of 57 CFS of reservoir water in Little Goose but there's actually 87 in the creek. I will sit there, after I've determined that it's 87 CFS, and I will take 57 CFS that is reservoir releases, apply a 10 percent shrink to that. So now I'm 57 minus 5.7. So I'm 51.3 feet. I had 87, so the difference there is what the creek flow is, the natural portion of the stream.</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>Q. So if I understand right, at each of these particular measuring points, as you're working your way down the stream, you can assess what's reservoir and natural flow; right?</p> <p>A. Yes.</p> <p>Q. And if the return flows have occurred and they have increased the natural flow from the last point you can see that; is that fair?</p> <p>A. I can. I can see that I've -- I have more water in the stream. It's not necessarily measured. I have two gauges on Little Goose. So I can see that I've -- between gauges I can see that increased or decreased and have a little definition of what I've received.</p> <p>Q. All right. And do you utilize those return flows to help satisfy the early irrigators farther down the stream?</p> <p>A. Yes. Once it enters the system again, it becomes a portion of the flow."</p>
<p><b>Page 62, No. 242:</b></p> <p>"The Wyoming Hydrographer Reports indicate the following dates for releases of water from reservoirs with post-Compact storage in the Tongue River Basin in Wyoming:</p> <p>c. 2004</p> <p>ii. Cross Creek August 2, 2004 (Ex. J61 at 104)</p> <p>vi. Twin Lake June 21, 2004 (Ex. J61 at 97)"</p>	<p><b>Ex. J61:</b></p> <p>According to the 2004 Hydrographers' Annual Report, water was first released from Cross Creek reservoir on August 16, 2004 (Ex. J61 at 104), and the first order for water out of Twin Lakes reservoir was received on July 21, 2004 (Ex. J61 at 97).</p>
<p><b>Page 64, No. 244:</b></p> <p>"For example, in 2004 there was no regulation on Big Goose Creek until June</p>	<p><b>Tr. 2149:15-22 (Knapp):</b></p> <p>The cited testimony from Mr. Knapp unmistakably relates to 2006, not 2004:</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
27, 2004. Tr. 2149:15-22 (Knapp)."	<p>[Mr. Draper] "Q. And are you aware that you might have gone on to -- into regulation earlier than June 27th in 2006?</p> <p>[Mr. Knapp] A. I'm not aware. This note confirms that it was at least by June 27th.</p> <p>Q. So up until that time, there was no curtailment of diversions on the Big Goose Creek; is that right?</p> <p>A. That's correct."</p>
<p><b>Page 64, No. 245:</b></p> <p>"Wyoming Water Commissioners try to be proactive in their regulation. They use streamflow levels (sometimes referred to as "trigger-flows") to determine or anticipate when junior rights should be regulated. Tr. 1963:23 - 1964:25 (LoGuidice); Tr. 2008:14-24 (LoGuidice); Tr. 2009:15-20 (LoGuidice); Tr. 2153:2-25 (Knapp)."</p>	<p>Nowhere in the cited testimony are streamflow levels referred to as "trigger-flows," except in the questions from Montana counsel. For example:</p> <p>[Mr. Draper] "Q. What you're describing is, in your mind, is that the same as regulating based on something called a trigger flow?</p> <p>[Mr. LoGuidice] A. It's not a trigger flow as much as it's just we recognize at a certain point where you have a stream gauge and you know what your water rights are. You know your creek real well. You know all the appropriations, how much water belongs to the ditches, how much water they are diverting." Tr. 1965:2-10 (LoGuidice).</p>
<p><b>Page 65, No. 246:</b></p> <p>"The calling right is not always the most junior right on the stream. All rights junior to the calling right are not regulated, and are free to divert available water. Tr. 1705:22-1706:14 (Whitaker); 1715:7- 1716:17 (Whitaker)."</p>	<p>These assertions from Montana have no basis in the record, or in the context of prior appropriation. The calling right is never the most junior right, and all rights junior to and upstream of the calling right are regulated and not free to take water. Mr. Whitaker's testimony cited by Montana is as follows:</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p><b>Tr. 1705:22-1706:14 (Whitaker):</b></p> <p>[Mr. Wechsler] "Q. Are you familiar with the term 'calling right'?"</p> <p>[Mr. Whitaker] A. Calling right would be the -- I suppose, would be the calling appropriation, yes.</p> <p>Q. When you have a calling right, you essentially place the ditches above it that are necessary into regulation; right?</p> <p>A. Yes.</p> <p>Q. But you wouldn't necessarily be regulating the ditches below the calling right; is that right?</p> <p>A. No, you don't.</p> <p>Q. Because the objective is to get the water down to the calling right?</p> <p>A. That's correct.</p> <p>Q. And so the only reason to have regulation below the calling right is if you have another calling right; right?</p> <p>A. That's true."</p> <p><b>1715:7- 1716:17 (Whitaker):</b></p> <p>[Mr. Wechsler] "Q. Sure. So when you have a calling right, it's at a particular location in the stream; right?"</p> <p>A. They designate, yes, that point. And as I previously stated, the first thing we do when we receive that call is to go out and verify that they are taking all the water that's available and that indeed they're short of this -- their supply for their original appropriation.</p> <p>Q. That calling right typically has a priority date?</p> <p>A. Oh, it does, yes.</p> <p>Q. Like, I'll use just an example of 1887. So you might -- in Wyoming, I've</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>seen the terminology you might say, the creek was on regulation to 1887. Are you familiar with that kind of terminology?</p> <p>A. Yes.</p> <p>Q. And so that means that you're regulating to that particular calling right; right?</p> <p>A. Yes. You sometimes even have to include the day and -- month and day on that.</p> <p>Q. And that's because there might be multiple rights with the same year?</p> <p>A. Right.</p> <p>Q. So what that tells you is that there are rights above that calling right that are in regulation. But I think you agreed with me that it doesn't necessarily mean that the rights below it are in regulation; right?</p> <p>A. No. They wouldn't be.</p> <p>Q. And the calling right is not always the lowest on the stream; correct?</p> <p>A. Not always. But the best water rights are generally located at the lower end of the stream.</p> <p>Q. Sometimes they are at the low point of the stream; sometimes they could be higher; right?</p> <p>A. They could be, yes."</p>
<p><b>Page 65, No 247:</b></p> <p>"The Alliance Ditch is located near the mountain at the top of Big Goose Creek. The water rights below the Alliance Ditch are not typically regulated, and they were not regulated during the years at issue. Instead, the water rights below the Alliance Ditch on Big Goose Creek rely on return flows and other sources. Tr. 1718:7- 1720:21 (Whitaker). There are post-Compact water rights located below the Alliance Ditch that were not regulated during the years at issue. Ex.</p>	<p><b>Tr. 2101:20- 2102:10 (Knapp):</b></p> <p>Mr. Knapp explained in his testimony, only a portion of which is cited by Montana, that in dry years Big Goose Creek is regulated from the town of Sheridan to the base of the mountain:</p> <p>[Mr. Kaste] "Would you show us where the NB Held Ditch is located in relation to Big Goose Creek?</p> <p>[Mr. Knapp] A. Yes, I would.</p> <p>Q. Okay. Please do that.</p> <p>A. It would be on Big Goose Creek</p>

<b>Citation in Montana's Post-Trial Brief</b>	<b>Reference to Citation Source</b>
<p>M5 at 326 (App. G-3); Tr. 2101:20-2102:10 (Knapp); Tr. 2256:2-2257:11 (Boyd).”</p>	<p>approximately here on the electronic display; it's a little dot. The confluence -- yes, that is it.</p> <p>Q. So the NB Held Ditch is downstream of the Alliance Ditch?</p> <p>A. Yes, it is. It's just above Sheridan.</p> <p>Q. Just above Sheridan. So is there regulation that occurs in a typical year related to the NB Held Ditch?</p> <p>A. Yes. In a drought year, we've had to regulate for NB Held.</p> <p>Q. Is Big Goose Creek regulated from basically the town of Sheridan up to the mountains in a typical year?</p> <p>A. In a drought year. It's essentially regulated in most years, in the sense that they are delivering reservoir water. That's enough tailwater -- it becomes dry at the Alliance in that scenario. But there's enough tailwater returning to the system that we do not get calls from the early rights, which are all downstream. They have that right to call us when it's short. But in a heavier water year, we can dry it up to Alliance, and the tailwater takes care of the bottom half of the system.</p> <p>Q. So the lower rights are senior in that --</p> <p>A. The lower rights are senior.</p> <p>Q. But they are satisfied?</p> <p>A. Yes, they are.</p> <p>Q. And not making a call on the upper rights?</p> <p>A. They are not making the call.” Tr. 2101:2- 2102:10 (Knapp).</p>
<p><b>Page 65, No. 248:</b></p> <p>“In fact, it was not until after the commencement of this litigation in 2007 that water users on the mainstem of the Tongue River were required to have a</p>	<p><b>Ex. M493:</b></p> <p>To the extent Montana means to imply that the commencement of this litigation was the cause of Wyoming ordering the installation of measuring devices, that is not true.</p>

<b>Citation in Montana's Post-Trial Brief</b>	<b>Reference to Citation Source</b>
measuring device. Ex. M493; Tr. 1730:8-1731:5 (Whitaker)."	Exhibit M493 cited by Montana is dated May 3, 2006.
<p><b>Page 67, No. 257:</b></p> <p>Prairie Dog Creek, a Tongue River tributary in Wyoming, has water in it year round. During the spring runoff, there are high levels of water. Later in the summer, streamflows reduce to 1-3 cfs. Tr. 1998:4-15 (LoGuidice).</p>	<p><b>Tr. 1998:4-15 (LoGuidice):</b></p> <p>There is no support in the following testimony from Mr. LoGuidice cited by Montana for the proposition that during spring runoff there are high levels of water in Prairie Dog Creek which starts at the base of the mountains:</p> <p>[Mr. Kaste] "Q. Early on in this trial, I talked with Mr. Book about the HKM basin plan. And we looked at a piece of that report that said the flow in Prairie Dog Creek was about 1 CFS. Is that fairly consistent with what you've observed?</p> <p>[Mr. LoGuidice] A. I don't know where he got his 1 from. If he was talking about just -- I mean, I just named off a bunch of tribs. I'm saying if you pile them all together -- maybe I'm high at 3. It's not a lot of water. It's not a dead creek, but darn near is. I don't know if it would flow from top to bottom in a dry year."</p>
<p><b>Page 67, No. 260:</b></p> <p>"Notwithstanding the post-Compact water rights, Wyoming has never regulated any water rights on Prairie Dog Creek, which it treats as ditch or diversion. Tr. 2257:12-14 (Boyd); Tr. 2457:25-2459:14 (Koltiska)."</p>	<p><b>Tr. 2257:12-14 (Boyd):</b></p> <p>Mr. Boyd did not testify with regard to regulation of Prairie Dog Creek, except to say that Mr. Schroeder is responsible for its regulation, not him:</p> <p>[Mr. Wechsler] "Q. You don't actually regulate on Prairie Dog Creek; right?</p> <p>[Mr. Boyd] A. No.</p> <p>Q. Currently, that's the responsibility of Mr. Schroeder?</p> <p>A. Correct."</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p><b>Page 68, No. 261:</b></p> <p>“Prairie Dog Creek water users rely on direct flow until approximately mid-July before switching to storage water. Tr. 2451:20-23 (Koltiska).”</p>	<p><b>Tr. 2451:20-23 (Koltiska):</b></p> <p>Mr. Koltiska's cited testimony does not support, or even relate to, Montana's assertion:</p> <p>[Mr. Koltiska] “A. Yes. [Mr. Swanson] Q. And is that your understanding, that there were several -- or there were at least two enlargements on Kearney Lake Reservoir?”</p>
<p><b>Page 70, No. 276:</b></p> <p>“Kearney Reservoir has both A shares, associated with the pre-Compact storage in Kearney Reservoir, and B shares, associated with post-Compact storage. Tr. 2451:1 - 2452:16 (Koltiska). In his analysis of the return flows associated with the post-Compact Kearney Reservoir storage, Mr. Fritz did not consider these shares. Ex. W2.”</p>	<p><b>Ex. W2:</b></p> <p>Contrary to Montana's assertion, Mr. Fritz explicitly accounted for and considered the post-1950 storage associated with B shares in Kearney Reservoir:</p> <p>“Kearney Lake Reservoir was not included in the analysis. Kearney Lake is in the Powder River drainage, but its water is imported into the Prairie Dog drainage. Because Kearney Lake has a significant amount of post-1950 storage, its imports under post-1950 water rights should have been included in Mr. Book's analysis of impacts on the Tongue River.” Ex. W2 at 65.</p> <p>“For consistency, the spreadsheets from the Book report were used, edited only as necessary to incorporate the post-1950 imports from Kearney Lake.” <i>Id.</i></p>
<p><b>Page 71, No. 278:</b></p> <p>““The purpose of this provision of law is for the protection of junior direct flow rights against depletion of the water supply of the stream by reservoir storage during the irrigation season.’ [Ex.</p>	<p><b>Ex. W290:</b></p> <p>Montana failed to quote the entire referenced sentence from Exhibit W290 without indicating that it was omitting a portion of the sentence. The entire sentence reads as follows:</p>

Citation in Montana’s Post-Trial Brief	Reference to Citation Source
<p>W290].”</p> <p>“This provision protects downstream junior users in Wyoming, Tr. 1791:21 - 1792:8 (Whitaker)[.]”</p>	<p>“The purpose of this provision of law is for the protection of junior direct flow rights against depletion of the water supply of the stream by reservoir storage during the irrigation season when the reservoir might have been filled at a time when there was more water available than all direct flow rights on the stream could use beneficially.” Ex. W290.</p> <p><b>Tr. 1791:21 -1792:8 (Whitaker):</b></p> <p>Mr. Whitaker’s testimony cited by Montana does not limit the provision’s protection to downstream junior users as Montana’s assertion suggests:</p> <p>[Mr. Wechsler] “Q. The next paragraph says, ‘The purpose of this provisional law is for the protection of junior direct flow rights against depletion of the water supply of the stream by reservoir storage during the irrigation season when the reservoir might have been filled at a time when there was more water available in all direct flow rights on the stream could use beneficially’; you see that?</p> <p>[Mr. Whitaker] A. Yes.</p> <p>Q. When you are storing water in the spring, that is water that otherwise might be available to appropriators; right?</p> <p>A. Potentially, yes.”</p>
<p><b>Page 71, No. 280:</b></p> <p>“There is no evidence, however, that a notice was ever issued for any of the reservoirs located in the Tongue River Basin in Wyoming in any of the years at issue. Tr. 2032:16-23 (Kaste); Tr.</p>	<p><b>Tr. 2091:7-10 (Knapp):</b></p> <p>Mr. Knapp testified that the reservoir owners in his district had notice that they could be charged for water they did not store when they had the ability to store the water:</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
2091:7-10 (Knapp)."	<p>[Mr. Kaste] "Q. All right. So we don't have notices to fill for the reservoirs in your district for the years 2004 and 2006?</p> <p>[Mr. Knapp] A. No, you do not.</p> <p>Q. Did the reservoir operators in your district begin storing water on October 1st during 2004 and 2006?</p> <p>A. Yes, they did.</p> <p>Q. Is that what they do every year?</p> <p>A. That's absolutely what they do every year.</p> <p>Q. Do the -- well, do you communicate with those reservoir operators all the time?</p> <p>A. Yes.</p> <p>Q. All right. Do you and they have an understanding about what could happen to them if they don't fill?</p> <p>A. Yes, they do understand that -- what could happen, if they are -- they could potentially lose water if they don't store immediately." Tr. 2091:7-25 (Knapp).</p>
<p><b>Page 73, No. 283:</b></p> <p>"In total, the flushing flows release approximately 535.41 acre-feet of stored water. To offset these flushing flows, the Wyoming Game and Fish Department has a water right in Park Reservoir of 500 acre-feet. [Tr. 2064:3-12 (Knapp)]."</p>	<p><b>Tr. 2064:3-12 (Knapp):</b></p> <p>Montana asserts that the Wyoming Game and Fish Department owns insufficient storage to offset flushing flows out of Park Reservoir. In his testimony cited by Montana, Mr. Knapp testified that he believed there was sufficient storage to offset these flushing flows:</p> <p>[Mr. Knapp] "A. They have three different parcels. They have a minimum pool, which is, again, for the monies, for fish. They have 90 acre-feet of water which is to help offset the damages incurred by having this 4 and a half foot winter release, so their storage water to compensate for that flow that they capture every year.</p> <p>And then they have a flushing release,</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>which I believe is around 500 acre-feet. And that is so that they can run 90 CFS down the stream for three days to desilt the beds of the Big Goose and help the fish.”</p> <p><b>Tr. 2166: 10-17 (Knapp):</b></p> <p>Later in his testimony when asked by Montana counsel—and actually cited by Montana in its Brief on page 72, No. 281a.—Mr. Knapp testified that he believes the Wyoming Game and Fish Department has a storage right in Park Reservoir of near 540 acre-feet:</p> <p>[Mr. Draper] “Q. 540. And they've a 548 acre-feet storage right for that? [Mr. Knapp] A. I would have to read the actual number, but it is near 540 acre-feet, if not exactly. Q. Is that a post-Compact storage right? A. No. Q. That's pre-1950? A. That is.” Tr. 2166: 10-17 (Knapp)</p> <p>During his testimony Mr. Knapp also referred to the statutory authority which requires the flushing flows. Tr. 2165:15 (Knapp). According to that noncodified statute, Wyoming has 530 acre-feet of stored water to be used to augment flushing flows at the rate of 90 cfs for 72 hours. Wyo. Stat. Ann. § 99-99-504(a)(ii).</p>
<p><b>Page 73, No. 285:</b></p> <p>“In other words, after the Wyoming reservoirs were accessible, Park Reservoir called and received water to satisfy its senior storage right. Even though Park Reservoir made this call, it</p>	<p>Montana implies that the relationships between the high mountain reservoirs in Wyoming are subject solely to prior appropriation regulation. Instead they are operated by agreement of the reservoir</p>

<b>Citation in Montana's Post-Trial Brief</b>	<b>Reference to Citation Source</b>
<p>was not charged with the winter bypass flows. [Ex. J61 at 92; Ex. M485; Tr. 2168:19-2171:1 (Knapp)].”</p>	<p>owners. Although these relationships are more fully described elsewhere in the record, a portion of Mr. Knapp’s testimony cited by Montana briefly describes the agreed upon process:</p> <p>[Mr. Knapp] “Well, what happens in these mountain reservoirs is they’re stacked up on the drainage in a series, very close proximity. And, for instance, Cross Creek Reservoir is filled before we can even get there in many situations, which then spills any water in Cross Creek to Big Horn Reservoir. And once Big Horn would fill, then at least the Cross Creek portion would go to Park Reservoir.</p> <p>Unfortunately, the one that does fill first is the Cross Creek Reservoir system. So once we get to that point, we determine that the actual water that was captured in Cross Creek while it was closed belongs to downstream reservoirs.” Tr. 2169:14-2170:1 (Knapp); <i>see also</i> Tr. 2213:8-12 (describing the relationships as one done by agreement of the reservoir owners).</p>
<p><b>Page 74, No. 286:</b></p> <p>“By law, Wyoming allows one-and-a-half fills to its reservoirs when water is available. Tr. 1794:1-7 (Whitaker).”</p>	<p><b>Tr. 1794:1-7 (Whitaker):</b></p> <p>Here Montana misrepresents Wyoming law and Mr. Whitaker’s testimony. Montana cites to no Wyoming statute like the one referenced by Mr. Wechsler in his question below. Additionally, Mr. Whitaker testified that a reservoir could potentially be filled twice if it is in priority and water was available:</p> <p>[Mr. Wechsler] “Now, you -- if I recall correctly, Wyoming has a statute that actually allows potentially up to another half fill to be taken from a reservoir at times; is that right?”</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	[Mr. Whitaker] A. You could potentially refill the whole thing if you had space available and you were in priority and there was water available to do it."
<p><b>Page 78, No. 307:</b></p> <p>"After these adjustments, the BLM Model conformed substantially to reported water levels. Tr. 2778:13-22 (Larson)."</p>	<p><b>Tr. 2778:13-22 (Larson):</b></p> <p>Montana's assertion here is not clear. Montana appears to be asserting that once Mr. Larson made the referenced adjustments, the BLM model conformed substantially to reported groundwater levels. However, Mr. Larson's cited testimony relates to water pumping levels, not groundwater levels:</p> <p>[Mr. Draper] "Q. And by making those adjustments, were you able to bring the model revisions of pumping into substantial conformance with the reported levels?</p> <p>[Mr. Larson] A. Yes. As I reported on page 8, we were able to get the total production over the period from 1995 to 2011 within about 5 percent within the Wyoming area and within about 1 percent in the Montana area of the model, which was a very reasonable comparison between what the model was computing the production to be versus what it was reported to be."</p>
<p><b>Page 78, No. 308:</b></p> <p>"To evaluate the level of infiltration, Mr. Larson contacted the Wyoming Department of Environmental Quality ("WDEQ") regarding methods for disposal of CBM water in the Powder River Basin in Wyoming. Mr. Larson was informed that approximately 75-80% of the CBM impoundments in the Powder River Basin in Wyoming were full containment impoundments that</p>	<p><b>Tr. 2781:22 -2782:9 (Larson):</b></p> <p>Mr. Larson never contacted the Wyoming Department of Environmental Quality, and never claims that he did in his cited testimony:</p> <p>[Mr. Larson] "And looking at that, I included that the amount of infiltration associated with the impoundments in general, and especially within the Tongue River portion of the model, were probably less than 33</p>

<b>Citation in Montana's Post-Trial Brief</b>	<b>Reference to Citation Source</b>
<p>would have limited infiltration. Tr. 2781:22 -2782:9 (Larson).”</p>	<p>percent. So I did a range of calculations from no infiltration up to 25 percent infiltration for purposes of my calculations, based on the review of that information.</p> <p>And so there are -- there's a scenario associated with no infiltration from impoundments, and there's a scenario with 25 percent infiltration from impoundments. And they're handling the discharge water.”</p> <p>Later in his testimony, not cited by Montana, Mr. Larson admits that he never spoke with anyone at Wyoming DEQ about the CBM impoundments:</p> <p>[Mr. Brown] “Q. And you never spoke with anybody from Wyoming DEQ to confirm whether or not those impoundments were actually lined; right?</p> <p>[Mr. Larson] A. That's correct.” Tr. 2839:15-18 (Larson).</p>
<p><b>Page 79, No. 313:</b></p> <p>“Sealing caused by sodium was widespread in the Tongue River area. Tr. 4130:14-17 (Wheaton).”</p>	<p><b>Tr. 4130:14-17 (Wheaton):</b></p> <p>Mr. Wheaton in his cited testimony referenced the Tongue River member geological formation, not the Tongue River area as asserted by Montana:</p> <p>[Mr. Draper] “Q. Did you find that -- in your work, that this phenomenon of the sealing caused by the presence of sodium to be relatively widespread?</p> <p>[Mr. Wheaton] A. In the Tongue River member, it's common.”</p>
<p><b>Page 79, No. 315:</b></p> <p>“In sum, Mr. Wheaton saw no indication of infiltration of CBM-produced water</p>	<p><b>Tr. 4154:10-23 (Wheaton):</b></p> <p>Montana misrepresents Mr. Wheaton's testimony. He was asked about an</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>into the regional aquifer system. For that reason, he considered the 25% infiltration assumption used by Mr. Larson to be high. Tr. 4154:10-23 (Wheaton)."</p>	<p>assumption of 25% of the water getting back to the regional aquifer system. He testified that the 50% which leaked out of the pond went into the shallow system:</p> <p>[Mr. Draper] "Q. So you have not seen indications that there was any infiltration to the regional aquifer system?</p> <p>[Mr. Wheaton] A. Not in my work, I haven't.</p> <p>Q. Would an assumption of 25 percent, getting back to the regional aquifer system, seem appropriate?</p> <p>A. Based on my work. And that's all I can base that on. I haven't seen a site where any water made it to the original aquifer. So the 50 percent that leaked out of the pond, that's just leaking out of the pond into the shallow system. 25 percent could be a random number. I just haven't seen anything get to the deeper system.</p> <p>Q. Nothing at all?</p> <p>A. Nothing. In my data."</p> <p>For clarification, Mr. Wheaton described the local, shallow system as follows:</p> <p>[Mr. Wheaton] "Locally, we have seams that are -- the clinker is recharged. It can form springs right there at the edge of the clinker or form a shallow flow system that feeds the adjacent springs and creeks." Tr. 4095:9-12 (Wheaton).</p> <p>Mr. Wheaton described the regional aquifer system as follows:</p> <p>[Mr. Wheaton] "Now, the regional system flows, and it recharges from our mapping primarily on the Wyoming side, flows north across the border in the state line into</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>Montana. And it's identified partly by the chemistry. It's typically sodium bicarb. And it's fairly deep under artesian pressure." Tr. 4095:17-22 (Wheaton).</p> <p>Mr. Wheaton's testimony is consistent with Wyoming's position regarding return flows. As Mr. Hinckley explained, "A key component in the modeling of CBM groundwater impacts is the disposition of the produced water. Of particular interest is the fraction of produced water that re-enters the groundwater system, either via infiltration to shallow aquifers or via direct injection into deeper aquifers." Ex. W3 at 28.</p> <p>Additionally, Dr. Schreüder explained how return flows behave and are represented in the BLM model. Tr. 2992:10- 2993:3 (Schreüder). Dr. Schreüder further described the consequences, which are that the return flows tend to migrate horizontally towards the stream and results in gains to that stream from shallow groundwater. Tr. 2993:4-12 (Schreüder).</p>
<p><b>Page 79, No. 317:</b></p> <p>"Wyoming does not contest that this pumping affects the streamflow of the Tongue River in Montana."</p>	<p>Understandably, Montana does not provide a citation for this assertion. As stated by Dr. Schreüder, and restated by Wyoming multiple times:</p> <p>"[I]t is my professional opinion that these results are not reliable and that the groundwater impacts from CBM pumping on Tongue River streamflow are indistinguishable from zero." Ex. W15 at 1.</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p data-bbox="164 222 769 264"><b>Page 83, first paragraph:</b></p> <p data-bbox="164 306 769 348">Montana cites Exhibit M59.</p> <p data-bbox="164 422 769 852">“Wyoming maintained this position for decades, until the Special Master and the Court ruled in this litigation that Wyoming's long-standing interpretation of the Compact was wrong. <i>See</i> Ex. J65; Ex. J69; Ex. M183 at 2; Ex. M157; Ex. W76; 5310:6-5311:3 (Tyrrell); Tr. 689:15-23, 728:2-10 (Stults); Tr. 2631:12-21, 2552:24-2555:17, 2556:18-2557:4 (Moy); Tr. 4991:6-16,4995:23-4996:2 (Lowry).”</p>	<p data-bbox="769 306 1422 390"><b>Exhibit M59 was not offered or admitted into evidence.</b></p> <p data-bbox="769 422 1422 705">Wyoming discusses many of these citations in relation to page 11, No. 33 above. They do not establish that Wyoming maintained the claimed position for decades. Similarly, the additional testimony from Mr. Tyrrell which Montana cites here fails to establish the position as well.</p> <p data-bbox="769 747 1422 789"><b>5310:6-5311:3 (Tyrrell)</b></p> <p data-bbox="769 831 1422 978">This cited testimony from Mr. Tyrrell relates to Montana's 2006 call letter, not to a position that Wyoming supposedly held for decades as Montana suggests:</p> <p data-bbox="769 1020 1422 1262">[Mr. Draper] “Q. And turning to page 2 of that letter, the first full paragraph starts with the sentence, ‘Wyoming is required by the Compact to regulate its post-1950 uses on the Tongue, including uses on the main stem, until Montana's pre-1950 uses are satisfied.’</p> <p data-bbox="769 1262 1422 1304">[Mr. Tyrrell] A. I see that.</p> <p data-bbox="769 1304 1422 1377">Q. Did you agree with that statement at the time?</p> <p data-bbox="769 1377 1422 1535">A. I did not. That was a statement made by Montana. And, again, it harkens back to my original view of the call under this Compact as since correct.</p> <p data-bbox="769 1535 1422 1818">Q. And your original view of the Compact with respect to the lack of protection to pre-1950 rights in Montana, that was not a position that you had invented. That was -- you had adopted the standing Wyoming interpretation, when you became State Engineer; correct?</p> <p data-bbox="769 1818 1422 1860">A. I think that certainly something similar</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>had -- I'd seen in earlier documents. It was this notion that the pre-'50 rights were not regulated amongst and that the post-'50s were dealt with under V, B and C. I saw no other way to treat the post-'50s in the document, in the Compact."</p>
<p><b>Page 84, second paragraph:</b></p> <p>"Nor is such a response to Montana's complaints of shortages to its pre-1950 rights unique to the more recent years. See Tr. 2631:3-11 (Moy); Tr. 4994:8-23, 5025:18-5026:3, 5052:4-24 (Lowry)."</p>	<p>Here Montana appears to assert that Wyoming responded to a Montana call prior to 2004. However, nowhere in Ms. Lowry's cited testimony is there reference to any Montana complaints of shortages to its pre-1950 rights other than years 2004 and 2006:</p> <p><b>Tr. 4994:8-23 (Lowry):</b></p> <p>[Mr. Wechsler] "Q. As I stated earlier, the compact makes no provisions for any state to make a call on a river'; do you see that?  [Ms. Lowry] A. Yes, I do.  Q. That was Wyoming's position as of 2004; right?  A. That's correct.  Q. That there was no provision for a call in the compact?  A. That's correct.  Q. That position was true prior to 2004; correct?  A. The position that Wyoming felt there was no language in the compact that described a call?  Q. Yes.  A. Yes, that was our position."</p> <p>Immediately following this testimony, Ms. Lowry indicates that she did not believe Wyoming articulated such a position prior to 2004:</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>[Mr. Wechsler] "Q. And that was your position in 2001?</p> <p>[Ms. Lowry] A. I don't know that we articulated that position. But I think it's certainly true that there is no language in the compact that says, here's how you do a call.</p> <p>Q. Is that also your position in 2002?</p> <p>A. I think that what I just described is, I don't know that we had an overt position but that as we read the compact, there was no language that said that." Tr. 4994:24-4495:7 (Lowry)</p> <p><b>5025:18-5026:3 (Lowry):</b></p> <p>[Mr. Wechsler] "Q. Here [2006 call response letter; Ex. J69] it indicates at the very last sentence of that paragraph, 'An interstate delivery schedule for pre-1950 rights is not now, and never was, a provision of this compact'; do you see that?</p> <p>[Ms. Lowry] A. I do.</p> <p>Q. And that was the position in 2006; right?</p> <p>A. That's correct.</p> <p>Q. Up above it talks about that being the long-held position of Wyoming. Do you understand that that was a long-held position of Wyoming?</p> <p>A. Yes."</p> <p><b>5052:4-24 (Lowry):</b></p> <p>[Mr. Wechsler] "Now, first of all, we've looked at a number of documents that indicate that as late as 2006, Wyoming's position was that a call was not required under the compact; right?</p> <p>[Ms. Lowry] A. I think we said that a call was not defined in the compact.</p> <p>Q. Was not allowed, I think is part of what the 2004 call letter provided; correct?</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>A. I'm sorry. I don't remember that exact language.</p> <p>Q. I guess the language is -- I'll quote it. If you'd like to look at it, it's Exhibit J65. It indicates, as I stated earlier, 'The compact makes no provision for any state to make a call on a river'; do you see that?</p> <p>A. I do.</p> <p>Q. And that was Wyoming's position as late as 2006; correct?</p> <p>A. I believe that's the '04 letter, but, yes.</p> <p>Q. Did you agree with that position?</p> <p>A. Yes."</p>
<p><b>Page 87, first paragraph:</b></p> <p>"Mr. Tyrrell responded to this testimony, indicating that he was aware of Montana's efforts but, despite several meetings on the subject, 'it didn't really result in anything.' Tr. 5169:19-25, 5187:25-5188:20 (Tyrrell)."</p>	<p>Montana asserts that Mr. Tyrrell was responding to the testimony of Mr. Moy. However, Mr. Tyrrell's cited testimony clearly indicates that he was not responding to Mr. Moy's testimony. Additionally, Mr. Tyrrell indicates he was aware of efforts made by both states, not just Montana:</p> <p><b>Tr. 5169:19-25 (Tyrrell):</b></p> <p>[Mr. Brown] "Q. Had you, by this time, 11/19 of '01, the year that you became Wyoming State Engineer, had you had the exposure to Yellowstone River Compact issues?</p> <p>[Mr. Tyrrell] A. My recollection is that I probably had been made aware of, for example, the Lou Allen, Dan Ashenberg work back in the '80s and the fact that it didn't really result in anything. But the nature of what was looked at back in that time. I was unaware of any regulation we had ever done for the state of Montana." Tr. 5169:16-25 (Tyrrell)</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p><b>5187:25-5188:20 (Tyrrell):</b></p> <p>[Mr. Tyrrell] "A. This e-mail exchange [Ex. W76] occurred -- the top date is June 9th. And it was in preparation for a meeting that we had set up on the 10th. And that meeting was going to be in person. And we were talking about -- I think, Jack had requested that we bring our legal counsel to the meeting. And I was trying to -- at least my first reaction was, let's don't. Let's talk about the technical issues that are in play here. As much as I like my attorneys, at that meeting, I wanted the technical people there. And see what we could -- see if there was something one of us was missing technically.</p> <p>And so my reaction, the top where I say, 'Well, whatever differences we have should not be anything we (as states) didn't discuss in the '80s,' what I was referring to there was the Ashenberg/Lou Allen stuff where we did have quite a few meetings and we were talking about probably very similar stuff: administration, water supply, how do we know what's going on on both sides? And I thought we could do that technically."</p>
<p><b>Page 87, second paragraph:</b></p> <p>"The response of Ms. Lowry, also epitomizing Wyoming's decades-long position, was 'I think we had a basic threshold question there of where is that in the compact?' Tr. 5193:19-21 (Lowry); <i>see also</i> Tr. 5056-58 (Lowry) (noting what she characterizes as the ineffectiveness of Montana's proposed methodology for administering rights</p>	<p><b>Tr. 5193:19-21 (Lowry):</b></p> <p>Here Montana states that it is quoting Ms. Lowry, but it is actually quoting testimony of Mr. Tyrrell. Furthermore, a more complete quote of his testimony shows that he was not relating a decades-long position as Montana suggests, but was instead describing what he felt was a disconnect between the states related to Montana's 2004 demand that there be interstate priority administration for pre-</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>under the Compact, and describing the talks around such administration as 'unfruitful')."</p>	<p>compact rights:</p> <p>[Mr. Tyrrell] "And I think I was of a mind at that time that we had a basic disconnect. We were addressing a letter that at the very beginning asked me to do a interstate priority administration for pre-Compact rights. And I think we had a basic threshold question there of where is that in the compact?" Tr. 5193:16-21 (Tyrrell).</p> <p><b>Tr. 5056-58 (Lowry):</b></p> <p>Montana's second citation is the testimony of Ms. Lowry. However, in that testimony, which related to the 1980s, she did not characterize Montana's proposed methodology for administering rights under the compact as ineffective. Additionally, she described the work of both states as being "unfruitful":</p> <p>[Ms. Lowry] "So -- and my recollection in looking back at some of the minutes were that Mr. Fritz set things, like, let's focus now on the scope of work document and not focus so much on these methodology -- what's the right -- approaches from each state. Because I think they felt the Ashenberg and Allen work had been fairly unfruitful.</p> <p>[Mr. Wechsler] Q. There was disagreement over that methodology between Allen and Moy?</p> <p>A. The approaches taken by Ashenberg and Allen?</p> <p>Q. Yes.</p> <p>A. Yes. That's my understanding from reading the old minutes." Tr. 505:6-18 (Lowry).</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p><b>Page 89, second paragraph:</b></p> <p>“Mr. Fritz' testimony regarding this note, and others like it included within Ex. M136, along with the YRCC report, are evidence of notice to Wyoming that Montana needed it to release water to Montana.”</p>	<p>Wyoming discusses Exhibit M136 above in relation to its discussion of page 14, No. 46.</p>
<p><b>Page 90, last paragraph:</b></p> <p>“In 1987 through 1989, Montana notified Wyoming of shortages to Montana's pre-1950 rights both prior to and upon completion of its investigation in each year. <i>See</i> Tr. 2498:5-2499:1[.]” (other citations omitted).</p>	<p><b>Tr. 2498:5-2499:1:</b></p> <p>This testimony cited by Montana is the testimony of Wyoming irrigator Tom Koltiska and appears to have no relevance to Montana's assertion.</p>
<p><b>Page 91, first paragraph:</b></p> <p>“Mr. Kerbel further testified that he made verbal calls for water on the telephone to Mike Whitaker, Sue Lowry, Bill Knapp and Carmine LoGuidice- all appropriate Wyoming officials during the irrigation seasons of 1987, 1988, and 1989. Tr. 2700:16-2701:10 (Moy).”</p>	<p><b>Tr. 2700:16-2701:10 (Moy):</b></p> <p>Obviously the problem with this assertion and its supporting citation is that Montana alleges Mr. Kerbel testified to making calls and then cites to the testimony of Mr. Moy.</p>
<p><b>Page 92, first paragraph:</b></p> <p>“He further testified that he ‘conveyed to Wyoming in 2001 and 2002 that that (sic) post-1950 irrigation shouldn't be happening when the pre-1950 rights in Montana were not satisfied.’ Tr. 904:14-19 (Stults).”</p>	<p><b>Tr. 904:14-19 (Stults):</b></p> <p>Montana attributes the quoted language in this sentence to Mr. Stults. However, the quoted language was not said by Mr. Stults but by Montana counsel:</p> <p>[Mr. Swanson] “Q. So do you believe you conveyed that to Wyoming in 2001 and 2002 that that post-1950 irrigation shouldn't be happening when the pre-1950 rights in Montana were not satisfied?</p> <p>[Mr. Stults] A. I believe I did communicate</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>"See Exhibit W61 (email dated March 2, 2001 indicating communication between Mr. Kerbel and Wyoming officials regarding water shortages)."</p>	<p>that to them at that time."</p> <p><b>Exhibit W61</b></p> <p>Exhibit W61 is an email dated March 2, 2001 authored by Mr. Kerbel and sent to Mr. Stults. In the email Mr. Kerbel informed Mr. Stults what he had observed at a Wyoming Water Development meeting. Nowhere in the email does Mr. Kerbel state or suggest that he communicated with Wyoming officials about water shortages.</p>
<p><b>Page 95, first sentence:</b></p> <p>"However, conditions deteriorated rapidly as the month progressed, and by the end of July it was apparent that the Reservoir would not fill. Tr. 768:9-23; 775:25-778:10 (Stults); Ex. J68 (affidavits of Mr. Hayes and Mr. Kepper describing lack of water during the irrigation season of 2006)."</p>	<p><b>775:25-778:10 (Stults):</b></p> <p>Montana asserts that it became apparent as the month of July progressed in 2006 that the reservoir would not fill. But part of Mr. Stults's cited testimony, which references the affidavits attached to Exhibit J68, appears to indicate that in 2006 Montana believed its rights were not being met at some point in mid-June:</p> <p>[Mr. Stults] "A. June 17th, 2006, is the last date that the river contained sufficient water to satisfy the 1914 Montana decreed rights in the Tongue River. By July 15th, 2006, the river had dropped to a flow sufficient to satisfy only the first water right on the Tongue River."</p> <p>[Mr. Swanson] Q. And then if you could go to the next affidavit, which is by Mr. Charles Kepper; do you see that document?</p> <p>A. I have it.</p> <p>Q. If you could go to page 2 of his affidavit. Page 2, paragraph 5.</p> <p>A. Okay.</p> <p>Q. And paragraph 5, the second sentence, if you could read from there to the end of the paragraph.</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>A. 'The Tongue River flow dropped below the amount of decreed water being called for on June 17th, 2006. And so I began to enforce the priorities on the river on that day. On June 21st, 2006, the flow at the state line was 233 CFS. That is enough to satisfy only the first six water rights of the 22 in the 1914 decree.'" Tr. 776:13-777:9 (Stults).</p>
<p><b>Page 95, first paragraph:</b></p> <p>"Prior to sending the call letter, Montana officials were in contact with Wyoming officials to discuss the shortage problem. Tr. 769:13-23 (Stults)."</p>	<p><b>Tr. 769:13-23 (Stults):</b></p> <p>Mr. Stults did indicate generally that the states continued to work on the issue. But Montana's assertion seems to imply that Montana made a verbal call prior to the written call in 2006. In the cited testimony, Mr. Stults did not say that he or Montana officials discussed the shortage problem with Wyoming officials or that he made a verbal call prior to sending the call letter in 2006:</p> <p>[ Mr. Swanson] "Do you know if you asked Wyoming verbally in 2006 to release more water to Montana?"</p> <p>[Mr. Stults] A. Well, consistent with what I was saying yesterday, we were continuing to work on the issue and putting quite a bit of effort into it. And the effort was increasing. And the issue that we were dealing with was the fact that Montana felt that there was more development -- or more use of water in Wyoming that was not -- not proper and that that -- the water use should not be taking place and that that water should be crossing the state line."</p>
<p><b>Page 108, footnote 5:</b></p> <p>"Because some natural flows need to pass through the onstream reservoir,</p>	<p><b>Tr. 586:15-587:10 (Davis):</b></p> <p>The cited testimony from Mr. Davis does not mention anything about pass through natural</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p>water rights associated with onstream reservoirs in Montana do not identify a flow rate. <i>See</i> Tr. 586:15-587:10 (Davis).”</p>	<p>flows or water rights associated with onstream reservoirs in Montana:</p> <p>[Mr. Wechsler] “Q. The current capacity of the Tongue River Reservoir is 79,000 or roughly that, thereabouts?</p> <p>[Mr. Davis] A. I believe so, yes.</p> <p>Q. And of that, how much can you market?</p> <p>A. Sixty thousand.</p> <p>Q. If you only stored 60,000 acre-feet in the reservoir, would you be able to market 60,000 acre-feet?</p> <p>A. No.</p> <p>Q. Why is that?</p> <p>A. That would take into account the dead pool. It would take into account -- and in very few years would we be able to actually store and release the exact amount that we -- the amount coming in, the amount stored, and the amount released are not always lined up because of the -- because of sedimentation, because of the dead pool, and operating restrictions.</p> <p>Q. In other words, you have to store more water in the reservoir in order to deliver the contract amount?</p> <p>A. Yes.”</p>
<p><b>Page 113, last sentence:</b></p> <p>“DNRC and the TRWUA learned that if sufficient flows were not permitted through the auxiliary outlets works, it resulted in a lot of slaking and peeling of the concrete 100 to 150 feet up the conduit due to freeze-thaw damage. Tr. 3646:15-3647:2 (Hamilton).”</p>	<p><b>Tr. 3646:15-3647:2 (Hamilton):</b></p> <p>Montana only cites to the testimony of Mr. Hamilton for support of this assertion, but his cited testimony does not describe specific damage to the auxiliary outlet works:</p> <p>[Mr. Draper] “Q. Thinking about your role as a board member of the Tongue River Water Users' Association and ice, does ice raise any concerns with you with regarding the safety of the dam itself?</p> <p>[Mr. Hamilton] A. Yes.</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>Q. What are those?</p> <p>A. We have some issues with the concrete that can -- and also the tunnels in the dam that we have to maintain a certain level in the reservoir to prevent that concrete from freezing and chipping off. So we need to have -- Art knows the correct figures, but somewhere around 45,000 to 50,000 acre-feet in the reservoir to prevent damage.”</p>
<p><b>Page 117, last paragraph:</b></p> <p>“Even the current preliminary decree for the Tongue River Reservoir lists a volume of 134,316 acre-feet for the 79,071 acre-feet reservoir. <i>See</i> Ex. M526, Amended Stipulation, proposed abstract; Tr. 537:19 - 538:19 (Davis) (testifying regarding original capacity listed for Tongue River Reservoir and stating that it is typical for reservoir rights to list a volume greater than the capacity in the reservoir ‘to allow for carryover capacity as well as the ability to fill’).”</p>	<p><b>Ex. M526, Amended Stipulation, proposed abstract:</b></p> <p>Montana specifically refers to the proposed abstract which is attached as Exhibit A to the Amended Stipulation for the proposition that the current preliminary decree lists Tongue River Reservoir’s volume as 134,316 acre-feet. But the abstract, which was agreed to by Montana through the Amended Stipulation in August of 2012, does not indicate a volume. Page one of the abstract states: “Volume: A SPECIFIC VOLUME HAS NOT BEEN DECREED FOR THIS WATER RIGHT.” Ex. M526 at MT-15126.</p> <p>The proposed abstract also does not indicate a volume under its capacity heading:</p> <p>“Capacity: 79,071.00 ACRE-FEET</p> <p>THE DAM EXTENDS INTO THE N2NESE SEC 13 TWP 08S RGE 40E BIG HORN COUNTY.</p> <p>PRIOR TO 1999, THE CAPACITY WAS 69,400ACRE-FEET AT THE SPILLWAY CREST ELEVATION, DAM HEIGHT WAS 89 FEET AND SURF ACE AREA WAS 3,500 ACRES. THE DAM WAS REHABILITATED PURSUANT TO THE</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>NORTHERN CHEYENNE RESERVED WATER RIGHTS SETTLEMENT ACT OF 1992, PUBLIC LAW 102-374 (1992), AND WAS COMPLETED IN 1999, WHICH INCREASED THE STORAGE CAPACITY TO THE CURRENT CAPACITY OF 79,071 ACRE-FEET." Ex. M526 at MT-15127.</p>
<p><b>Page 126, last paragraph:</b></p> <p>"Finally, the testimony at trial established that, in the pre-Compact period, the Reservoir was consistently operated below a storage level of 45,000 acre-feet during the October through March season. Tr. 1154:7-16 (Smith)."</p>	<p><b>Tr. 1154:7-16 (Smith):</b></p> <p>In this cited testimony, Mr. Smith does not mention a storage level of "45,000 acre-feet" or reservoir operations during the pre-compact period:</p> <p>[Mr. Wechsler] "Q. Turn with me, please, to page 4-19; do you have that? [Mr. Smith] A. Yes, I do, sir. Q. Here I'm looking under the heading 'reservoir ice.' And the second sentence reads: Historically the reservoir has been drawn down by irrigation releases through the summer and maintained at a low elevation during the winter months, see Figure 4-5, to avoid use of the spillway in the spring'; do you see that? A. Yes, I do, sir." Tr. 1154:7-17 (Smith).</p>
<p><b>Page 136, middle paragraph:</b></p> <p>"In fact, Wyoming relies on a 'trigger flow' method of administration similar to the approach advanced by Montana. Wyoming water commissioner Bill Knapp explained that he monitors diversions and streamflow, and when he sees that the streamflow is near a certain range, he begins the process of regulating off junior water rights. <i>See generally</i> Tr. 2067:5-2070:3 (Knapp)."</p>	<p><b>Tr. 2067:5-2070:3 (Knapp):</b></p> <p>Mr. Knapp testified that he does not regulate junior rights for the benefit of senior rights unless he knows the senior right holder needs the water. Within the testimony cited by Montana, after describing how he does regulate water rights, Mr. Knapp was asked if he regulates using a "trigger flow" method like Montana has advanced:</p> <p>[Mr. Kaste] "Q. Now, is that different from looking at a stream gauge and seeing a</p>



Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>specific number and saying, 'I'm going to go out and start turning headgates on my own'?</p> <p>[Mr. Knapp] A. It's very different. I've had a similar situation where I asked an early right if he wanted his water, and he said, 'No, I'm fine with what I got.' So I don't go get him the water. He said he doesn't need it. So I can't assume that they need their entire right." Tr. 2068:3-12 (Knapp).</p>
<p><b>Page 136, last paragraph:</b></p> <p>"Similarly, Wyoming commissioner David Schroeder confirmed that he relies at least in part on certain flows to trigger regulation. Tr. 2274:6-11 (Schroeder)."</p>	<p><b>Tr. 2274:6-11 (Schroeder):</b></p> <p>In the testimony cited by Montana, Mr. Schroeder very clearly testified that he does not rely on certain flows to trigger regulation:</p> <p>[Mr. Kaste] "Q. Do you use a trigger flow, or do you react to calls?</p> <p>[Mr. Schroeder] A. I'm aware of trigger flows. I watch my creeks very closely. But I do not regulate and have not regulated just because of a certain flow. I will wait for a call."</p>
<p><b>Page 148, first full paragraph:</b></p> <p>"However, the Sheeleys do not use the direct flow rights, and the only source of supply for all of the pivots in the Fivemile area is the Padlock Reservoirs. Tr. 3481:2-14 (Benzel)."</p>	<p><b>Tr. 3481:2-14 (Benzel)</b></p> <p>Mr. Benzel did not testify that the Sheeleys do not use direct flow rights, only that Padlock Ranch does not use direct flow rights:</p> <p>[Mr. Wechsler] "Q. And now you -- we talked about the fact that these pivots in the Fivemile area are all irrigated from those reservoirs; correct?</p> <p>[Mr. Benzel] A. They are.</p> <p>Q. And that's the only source of supply for those pivots?</p> <p>A. That's correct also.</p> <p>Q. Now, there are some water rights that are assigned to those areas; correct?</p> <p>A. There are.</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>Q. Those direct-flow water rights are not actually used; correct?  A. We do not.”</p> <p>Montana notes on page 75 under paragraph number 291 of its Post-Trial Brief that the Sheeleys take all of the direct flow for irrigation during the irrigation season.</p>
<p><b>Page 148, third full paragraph:</b></p> <p>“Mr. Book's analysis shows that the total post-1950 water supply stored in 2004 in the Padlock Reservoirs was approximately 720 af. Ex. M5 at 15; M6 at 27, Table 3; Tr. 3784:20-21 (Nance).”</p>	<p><b>Tr. 3784:20-21 (Nance):</b></p> <p>Obviously Mr. Nance, a Montana irrigator, did not testify with regard to the Padlock Reservoirs in Wyoming.</p>
<p><b>Page 151, first full paragraph:</b></p> <p>“The post-1950 water stored by Wyoming would have been stored by Montana in the Tongue River Reservoir had that water been allowed to flow to the stateline as required by the Compact. Tr. 138:20-139:4 (Book).”</p>	<p><b>Tr. 138:20-139:4 (Book):</b></p> <p>In the testimony Montana cites, Mr. Book did not state that Montana “would” have stored the water had it flowed to Montana:</p> <p>[Mr. Book] “With respect to the pre-Compact water right for the Tongue River Reservoir, the test is was that water right fulfilled or satisfied during the year, and for the four years that I identified that the reservoir had not filled after the improvements on the spillway and the enlargement were completed, in those four years depletions due to post-'50 uses in Wyoming reduce the amount of water available for storage that <i>could</i> have been stored in the reservoir.” (emphasis added).</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
<p><b>Page 154, second paragraph:</b></p> <p>“He did not talk with any of the Prairie Dog water users. Tr. 5517:2-17 (Fritz).”</p>	<p><b>Tr. 5517:2-17 (Fritz):</b></p> <p>In the cited testimony, Mr. Fritz states that he did not talk to either John Koltiska or Tom Koltiska with regard to Kearney Lake reservoir operations. He did not state that he did not talk to any Prairie Dog water users:</p> <p>[Mr. Wechsler] “Q. You go on to talk about a decision that was made with the concurrence of the users on Prairie Dog Creek. Do you see that?  A. Yes.  Q. Other places in your report I noticed you had a citation. There's no citation for that statement; right?  A. There isn't.  Q. And we talked about the fact that you didn't talk to John Koltiska about reservoir operations.  How about Mr. Tom Koltiska?  A. I did not talk to Tom about it either.  Q. And John Koltiska didn't discuss that in his deposition, did he?  A. I don't recall that he did.”</p>
<p><b>Page 159, first full sentence:</b></p> <p>“METRIC data was unavailable for 2001 and 2002. Cf Ex. M5 at 21.”</p>	<p><b>Ex. M5 at 21:</b></p> <p>Exhibit M5 at 21 does not indicate that METRIC data was unavailable for 2001 and 2002. However, page 7 of Exhibit M5 does indicate that Montana retained Dr. Allen to prepare the METRIC data only for 2004 and 2006.</p>
<p><b>Page 163, last full paragraph:</b></p> <p>“Finally, in 2006, streamflows did not reach the key flow rates until June 12 on Little Goose Creek and June 24 on Big Goose Creek. <i>Ibid.</i>; see Tr. 2149:6-22</p>	<p><b>Tr. 2149:6-22 (Knapp):</b></p> <p>In the cited testimony, Mr. Knapp does not mention flow rates, but his diary does reference a call for regulation:</p>

Citation in Montana’s Post-Trial Brief	Reference to Citation Source
(Knapp).”	<p>[Mr. Draper] “Q. If we look on the left-hand side, you see a note at the top that's circled, it says, ‘Call for Big Goose reg’?”</p> <p>A. Yes, I do.</p> <p>Q. Does that enable you to answer my question as to when you went on to regulation on the Big Goose?</p> <p>A. Yes, it does. It would have been June 27th. Unless there is a prior note of this type in my diary, an earlier date.</p> <p>Q. And are you aware that you might have gone on to -- into regulation earlier than June 27th in 2006?</p> <p>A. I'm not aware. This note confirms that it was at least by June 27th.</p> <p>Q. So up until that time, there was no curtailment of diversions on the Big Goose Creek; is that right?</p> <p>A. That's correct.”</p>
<p><b>Page 166, first paragraph:</b></p> <p>“<i>See, e.g., Ex. M136 (In 1981, Wyoming rejected a request from Montana to regulate Wyoming water rights for the benefit of the Tongue River Reservoir and other post-Compact rights);</i>”</p>	<p>Wyoming discusses Exhibit M136 above in relation to its discussion of page 14, No. 46. Wyoming did not reject a request from Montana to regulate Wyoming water rights.</p>
<p><b>Page 168, first paragraph:</b></p> <p>“Further, the BLM Model includes the area in question in this case within the model domain. <i>See Ex. M9, App. B, at B-1.</i>”</p> <p>“Among other things, the Model was prepared to quantify the impact of CBM pumping on the Tongue River. <i>See Ex. M38 at 2-2 (Table 2-1), 4-18; Tr. 2771:17-2772:7.</i>”</p>	<p><b>Ex. M9, App. B, at B-1:</b></p> <p>The BLM Model domain excludes much of the Tongue River basin watershed.</p> <p><b>Ex. M38 at 2-2 (Table 2-1):</b></p> <p>There is no mention of the Tongue River in Table 2-1 of Exhibit M38, nor of any depletions to any stream.</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p><b>Ex. M38 at 4-18:</b></p> <p>Page 4-18 of Exhibit M38 provides a brief discussion of how, mechanically, the model simulates aquifer/stream interactions. These interactions are briefly mentioned with respect to the Powder River, the Belle Fourche River, the Little Powder River and the Cheyenne River. The Tongue River is only mentioned with regard to Model representing perennial streams as constant head nodes.</p>
<p><b>Page 169, last sentence:</b></p> <p>“That modeling assumed that the actual amount of produced water that returned to the groundwater system varied from about 15 to 30% in the primary alternatives considered by the BLM and their modelers. <i>See</i> Ex. M9 at 10; Tr. 2780:10-2783:6 (Larson).”</p>	<p><b>Tr. 2780:10-2783:6 (Larson):</b></p> <p>A portion of Mr. Larson's testimony cited by Montana shows that the BLM modeling assumed the actual amount of produced water that returned to the groundwater system varied from about 15 to 45%:</p> <p>[Mr. Larson] “They had estimated various percentages ranging from about 15, I think, to 45 percent depending on where you were in the basin. I was focused mainly on the Tongue River portion of the model domain.</p> <p>In that area, they had estimated, I think, roughly 33 percent in one of their primary scenarios would be the amount of CBM produced water that would infiltrate.” Tr. 2871:6-16 (Larson).”</p>
<p><b>Page 170, second full paragraph:</b></p> <p>“While Wyoming took issue with Mr. Larson's assumptions regarding infiltration as being too low, on direct examination by Wyoming, Mr. Wheaton testified that MBMG's monitoring program showed drawdown in Montana wells from CBM pumping in Wyoming.</p>	<p><b>Tr. 4117:9-21 (Wheaton):</b></p> <p>Mr. Wheaton testified that Montana's monitoring wells showed drawdown, but that Montana observed no impacts to existing groundwater wells:</p> <p>[Mr. Wheaton] “A. Our monitoring program showed drawdown in our</p>

<b>Citation in Montana’s Post-Trial Brief</b>	<b>Reference to Citation Source</b>
<p>Tr. 4117:9-11 (Wheaton) .”</p>	<p>monitoring wells from CBM pumping in Wyoming that caused drawdown in Montana. [Mr. Brown] Q. Right. And I think my question was, I think you told me that you didn't observe any impacts to existing groundwater wells for groundwater right owners in Montana; is that right?  A. And that's -- I have not observed it. And I would not necessarily have recourse or an option to observe it. So it's not -- I can't say that it didn't happen.  Q. Sure. You just never observed it?  A. Right.”</p> <p>Additionally, contrary to Montana’s implication, Mr. Wheaton did not testify that any groundwater drawdowns observed in Montana’s monitoring wells had any relationship to Mr. Larson’s assumptions regarding infiltration.</p>
<p><b>Page 170, last paragraph:</b></p> <p>“Mr. Wheaton testified that based on his studies of specific CBM ponds in Wyoming, the ponds typically seal after a relatively brief period of infiltration Tr. 4130:14-17 (Wheaton); Ex. W236 at 13.”</p>	<p><b>Tr. 4130:14-17 (Wheaton):</b></p> <p>In the cited testimony, Mr. Wheaton only states that sealing was common in the Tongue River member:</p> <p>[Mr. Draper] “Q. Did you find that -- in your work, that this phenomenon of the sealing caused by the presence of sodium to be relatively widespread?  [Mr. Wheaton] A. In the Tongue River member, it's common.”</p> <p><b>Ex. W236 at 13:</b></p> <p>Page 13 of Exhibit W236 states, in part:</p> <p>“Holding ponds can be unlined, which allows impounded water to infiltrate to shallow aquifers and to evaporate, or lined, which</p>

Citation in Montana's Post-Trial Brief	Reference to Citation Source
	<p>restricts the water to evaporation. Both lined and unlined ponds are used extensively in Wyoming; however, ponds in Montana are currently all lined. Water infiltrating from unlined holding ponds recharges shallow aquifers and, in some settings, may result in increased availability of usable groundwater. In other settings, infiltration from holding ponds may cause deterioration of shallow groundwater quality due to dissolution of soluble salts in shallow strata beneath the ponds. Some monitored unlined ponds in Wyoming have shown salinity spikes in the shallow aquifer below and downgradient from the ponds. These spikes usually take several years to dissipate.</p> <p>The utility of infiltration ponds can be reduced if the interaction of sodium in the coproduced water with the floor of the pond causes the floor to seal, greatly restricting infiltration. Additionally, if an impermeable layer such as shale is present, the infiltrating water may be diverted horizontally to form unwanted saline seeps.”</p>
<p><b>Page 171, last paragraph:</b></p> <p>“When asked whether 25% was a reasonable assumption for the amount of CBM produced water returning to the regional aquifer system, Mr. Wheaton testified that he had never seen any water getting back to the regional aquifer system. Tr. 4154:13-23 (Wheaton).”</p>	<p><b>Tr. 4154:13-23 (Wheaton):</b></p> <p>Wyoming previously addressed Montana's mischaracterization of CBM produced water returning to the regional aquifer system above in response to Montana's similar assertion at page 79, No. 315. Wyoming's position, as confirmed by Mr. Wheaton, is that CBM produced water recharges the shallow aquifer, not the regional aquifer system.</p>