DA 19-0076

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 80

TWIN CREEKS FARM & RANCH, LLC,

Claimant, Appellee, and Cross-Appellant,

v.

PETROLIA IRRIGATION DISTRICT,

Objector, Appellant, and Cross-Appellee,

DANIEL W. IVERSON and WILKS RANCH MONTANA, LTD,

Notice of Intent to Appear.

APPEAL FROM: Montana Water Court, Case No. 40B-4
Honorable Douglas Ritter, Associate Water Judge

COUNSEL OF RECORD:

For Objector, Appellant, and Cross-Appellee:

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For Claimant, Appellee, and Cross-Appellant:

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Submitted on Briefs: October 30, 2019

Decided: April 7, 2020

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Petrolia Irrigation District ("PID") and Twin Creeks Farm & Ranch, LLC ("Twin Creeks") appeal the Water Court's rulings in adjudicating two of Twin Creeks's water rights claims. We affirm the Water Court's determination that Twin Creeks abandoned one claim by nonuse because the intent to abandon occurred concurrently with the nonuse. With respect to the second claim at issue, we conclude that the Water Court misapprehended the effect of testimony regarding its historical use and remand for further consideration.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Twin Creeks owns property along Flatwillow Creek in Petroleum County. Flatwillow Creek's headwaters are in the Big Snowy Mountains and it flows to its confluence with the Musselshell River. Twin Creeks's property consists of three different historical ranches, including the Damschen/Hansen[1] property, which is the subject of this appeal. Most of the property's irrigated land was patented to either Marie or Samuel Smith in the early 1900s. At some point, the Smiths sold the property to Ernest Hansen, whose irrigation history is unclear from the record. From 1950 to 1965, Ernest Hansen leased the ranch to Elliot Trump. The Damschen brothers ("Damschen") acquired the property in 1965. In 1982, Damschen filed statements of claim for direct flow irrigation from Flatwillow Creek. PID objected to the claims. Twin Creeks's predecessors, Mike and Janna Taylor, acquired the Damschen property and the associated water right claims in the

[1] The parties refer to the property interchangeably as the Hansen or Damschen property. We will refer to it as the Hansen property for consistency.

mid-1990s. The Preliminary Decree for Basin 40B was issued in 2011. The Taylors objected to Department of Natural Resources and Conservation ("DNRC") issue remarks on the statements of claim. Twin Creeks purchased the property from the Taylors in 2015.

¶3 There were five Twin Creeks claims at issue before the Water Court. The court held a hearing on August 28-30, 2018, in Winnett, Montana. The Water Court issued its Closing Order in December 2018, ordering changes to four of the claims and removing the issue remarks. The statements of claim at issue on appeal are 40B 109102-00 (the "102 claim") and 40B 109104-00 (the "104 claim").

The 102 Claim

¶4 On July 22, 1904, Samuel Smith filed a notice of appropriation for Flatwillow Creek and its tributary for 500 miner's inches to irrigate 45 acres in Section 35, T14N, R29E, located on the Hansen property with a May 18, 1904 priority date. This area was referred to as the "Lost World" at trial and is downstream of the 104 claim's place of use. Smith's desert-land entry documents support irrigation in the early 1900s.[2] Based on that evidence, the Water Court found the notice of appropriation was perfected and used on the 102 claim's place of use.

[2] Under the Desert Land Act of 1877, designed to promote reclamation of the arid and semiarid western states, individuals could acquire land from the federal government by complying with certain requirements. 43 C.F.R. § 2520.0-1 (2020). Desert-land entries had to show evidence of sufficient water to irrigate or that the acquiring party initiated appropriate steps looking to the acquisition of such right. 43 C.F.R. § 2521.2(d).

¶5 Damschen filed a statement of claim in 1982 for 45 acres on the Hansen property based on the 1904 Samuel Smith notice of appropriation. Damschen claimed 3,000 gallons per minute ("gpm"), or 6.68 cubic feet per second ("cfs"), based on pump capacity.

¶6 In 2005, DNRC examined the claims and reduced the flow rate to 1.70 cfs based on the agency's 17.00 gpm per acre standard. DNRC also inserted an issue remark based on the 1971 Water Resources Survey,[3] which identified zero acres irrigated. Twin Creeks's predecessors, the Taylors, objected to the flow rate and to the DNRC issue remark. PID filed an objection, asserting that the 102 claim was abandoned.

¶7 The Water Court found that nonuse of the claim between 1948 and 1971 showed a lack of intent to continue irrigating with the 1904 Samuel Smith water right; it thus found that the May 18, 1904 priority date was abandoned. The court found that Damschen began irrigating the field after the Damschens acquired the property in 1965. Based on the last evidence of nonuse—the 1971 Water Resources Survey—the court assigned a December 31, 1971 priority date for the 102 claim and restored the 3,000 gpm flow rate based on pump capacity. Twin Creeks appeals the 1971 priority date, asserting that the right had not been abandoned and that the 1904 priority date is correct.

The 104 Claim

¶8 On July 23, 1904, Marie Smith filed a Notice of Water Right in support of a desert-land patent application. The notice of appropriation claimed 300 miner's inches to irrigate 210 acres in portions of Sections 20, 28, 29, and 30, T14N, R29E with a July 10, 1903

[3] The State Engineer did not publish the Water Resources Survey for Petroleum County. However, a considerable amount of work as field notes was done in anticipation of publication.

priority date. The place of use for the 104 claim is located within the boundaries of the Hansen property, upstream from the 102 claim's place of use. Damschen filed a statement of claim in 1982 and claimed the 1903 priority date based on Marie Smith's notice of appropriation.

¶9 In 2005, DNRC added an issue remark during the claim examination, noting the 1971 Water Resources Survey that identified 151 irrigated acres in the claimed place of use, not the 210 acres Damschen claimed. In 2011, PID objected to the 104 claim, asserting that only 15 acres were irrigated prior to 1954. Alternatively, PID argued that even if a 210-acre right had been perfected, all but 15 acres had been abandoned. In 2012, the Taylors objected to the DNRC issue remarks on the 104 claim's flow rate and irrigated acreage.

¶10 The Water Court found that PID had failed to overcome the presumption that the elements of the 104 claim were correct as filed—thereby resolving the DNRC issue remark and establishing the full 210 maximum irrigated acres. It also found that PID had failed to establish a long period of nonuse sufficient to support a finding of abandonment. PID appeals these findings.

STANDARDS OF REVIEW

¶11 We review the Water Court's findings of fact to determine whether they are clearly erroneous. *Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644 (citing *Weinheimer Ranch v. Pospisil*, 2013 MT 87, ¶ 19, 369 Mont. 419, 299 P.2d 327). A finding is clearly erroneous if it is not supported

by substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been made. *Skelton Ranch*, ¶ 27.

¶12 "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Skelton Ranch*, ¶ 27 (citing *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993)). The evidence need not amount to a preponderance of the evidence, but it must be more than a scintilla. *Skelton Ranch*, ¶ 27 (citing *State v. Shodair*, 273 Mont. 155, 163, 902 P. 2d 21, 26 (1995)). "This standard is deferential, and not synonymous with the clear error standard. A reviewing court may still find a factual finding is clearly erroneous even though there is evidence to support it." *City of Helena v. Cmty. of Rimini*, 2017 MT 145, ¶ 13, 388 Mont. 1, 397 P.3d 1 (citing *Skelton Ranch*, ¶ 27). We review such evidence in a light most favorable to the prevailing party and leave the trial court to determine the credibility of witnesses and the weight assigned to their testimony. *Only a Mile, LLP v. State*, 2010 MT 99, ¶ 10, 356 Mont. 213, 233 P.3d 320 (citing *In re Water Complaint of Kelly*, 2010 MT 14, ¶ 25, 355 Mont. 86, 224 P.3d 640).

DISCUSSION

The 102

¶13 Twin Creeks argues on appeal that the Water Court erred when it found the 1904 priority date for the 102 claim abandoned based on nonuse from 1948 to 1971 and Hansen's intent to abandon. It asserts that the court should have viewed intent through the actions of Damschen, not of Hansen, and that Twin Creeks successfully rebutted the presumption of abandonment because it demonstrated continuous use by Damschen and

his successors. In response, PID urges this Court to affirm the Water Court's finding because Twin Creeks failed to present evidence sufficient to rebut the presumption of abandonment due to Hansen's nonuse.

¶14 Abandonment of a water right requires both nonuse and intent to abandon. *79 Ranch v. Pitsch*, 204 Mont. 426, 432, 666 P.2d 215, 218 (1983). To find abandonment, there must be a "concurrence" of nonuse and intent. *See Roland v. Davis*, 2013 MT 148, ¶ 32, 370 Mont. 327, 302 P.3d 91 (citing *Shammel v. Vogl*, 144 Mont. 354, 359, 396 P.2d 103, 106 (1964)) ("Abandonment involves a voluntary act that requires 'a concurrence of act and intent.'"); *79 Ranch*, 204 Mont. at 433, 666 P.2d at 218 ("There must be a concurrence of nonuse and intent to abandon."); *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923) (citing *Featherman v. Hennessy*, 42 Mont. 535, 540, 113 P. 751, 753 (1911)) ("To constitute abandonment there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use.").

¶15 Whether a water right has been abandoned is a question of fact that depends on the conduct, acts, and intent of the parties claiming the use of the water. *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 311 P.3d 813 (citing *Power v. Switzer*, 21 Mont. 523, 529, 55 P. 32, 34 (1898)). Intent to abandon a water right may be inferred from all of the circumstances of the case and need not be proved directly. *Heavirland*, ¶ 31 (citing *Denver by Bd. of Water Comm'rs v. Snake River Water Dist.*, 788 P.2d 772, 776 (Colo. 1990)). A long period of continuous nonuse creates a rebuttable presumption of intent to abandon; the claimant must produce specific evidence excusing the nonuse to

rebut this presumption. *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218. Such evidence must relate to the specific nonuse on the property in question. *Heavirland*, ¶ 32. Determining abandonment requires weighing all of the relevant factual circumstances in the case. *Heavirland*, ¶ 32; § 85-2-227(3), MCA.

¶16 The Water Court heard evidence that the 102 claim's place of use was irrigated into the 1940s but was not irrigated when Hansen began to lease out the property. Witnesses familiar with the Hansen ranch from the 1940s to the 1970s testified at trial. Joe Whisonant, Jacqueline Trump Whisonant, and Bill Solf all spent time on the Hansen property during the 1950s and 1960s. Jacqueline is Elliot Trump's daughter. Jacqueline testified that her family moved to the Hansen property in 1949 when her father leased it from Hansen and lived on the property until 1956. After she moved away, she and her husband, Joe, came back to the property frequently until 1965, when Elliot Trump retired and the Damschen brothers purchased the property.

¶17 Joe, Jacqueline, and Bill testified that the 102 claim's place of use was not irrigated when Elliot Trump leased the Hansen property. They testified that they did not recall any irrigation under the 102 claim until Damschen began irrigating the field in the late 1960s. Terry Sandman is a farmer in the Winnett area who spent time on the property. He testified that the field was irrigated into the 1940s but was not irrigated during the time Trump leased the property from Hansen.

¶18 Lee Yelin, a water rights expert, testified for Twin Creeks regarding his review of available information related to the 102 claim. He examined desert-land entry records and reviewed USDA aerial photos of the place of use. He testified that he did not see active

irrigation in 1948 or 1954 based on the aerial photos. He confirmed active irrigation of 41.30 acres based on the 1979 aerial photo. The parties agree that once Damschen acquired the property the place of use was irrigated; they do not dispute that the property has been continuously irrigated since that time.

¶19 The Water Court found that the testimony, aerial photos, and 1971 Water Resources Survey showed no irrigation on the 102 claim's place of use. It found that the 102 claim was not used for twenty-three years, as Twin Creeks did not provide any credible evidence of irrigation for the 102 claim from 1948 to 1971. This long period of nonuse, the court reasoned, raised the presumption of intent to abandon the 1904 water right. It further found that this nonuse occurred when Hansen owned and leased the ranch and that Hansen's intent to abandon was more significant for the court's abandonment analysis than was Damschen's. The court found that seventeen years of continuous nonuse had elapsed by 1965, when Damschen took possession, raising the presumption of abandonment. The court found that Twin Creeks failed to provide specific evidence explaining or excusing this long period of nonuse and did not rebut the presumption of abandonment. The court thus held that the right had been abandoned.

¶20 Twin Creeks asserts that our decision in *Heavirland* requires the Water Court to consider the entire facts and circumstances of the case to determine evidence of intent to abandon. It asserts that the court erred when it limited the examination of intent to Hansen's and Trump's intent and did not consider Damschen's later intent and actions developing irrigation. We disagree.

¶21 In *Heavirland*, this Court examined the record of the intent and actions of the nonuser when it upheld the Water Court's ruling that the nonuser had not intended to abandon the water right. Reviewing whether the presumption of abandonment was overcome, the Court looked to: specific obstacles associated with irrigating the property; specific testimony regarding the nonuser owner's age and illness contributing to his decision to cease irrigating; the fact that the elderly nonuser installed power to the property in contemplation of one day running a pivot irrigation system; the financial hardships of the farm; and evidence that the nonuser's son actually filed and sold the water right at issue. *Heavirland*, ¶ 34. The supporting testimony from his son, who acquired the property and began irrigating once he installed a pivot irrigation system, informed our review of the nonuser's intent not to abandon concurrent with the nonuse of the water. *Heavirland*, ¶ 34.

¶22 Twin Creeks urges this Court to consider Damschen's intent when he expanded irrigation and continuously irrigated for forty-five years after acquiring the Hansen property. But Damschen's later intent to continue irrigating was not concurrent with the long period of nonuse at issue and the associated presumed intent to abandon the 102 claim.

¶23 Twin Creeks argues that the 102 claim's place of use on the Hansen property was remote and prone to flood damage, hindering irrigation. The Water Court found that the general obstacles on the Hansen property preventing irrigation such as being remote and being prone to flood damage were not specific to the water right or period of time at issue and were not enough to overcome the presumption of abandonment due to nonuse.[4]

[4] Twin Creeks suggests, for the first time on appeal, that Hansen was "getting old and was unable to work the property." Twin Creeks points to no specific evidence of his age or physical ability.

We conclude that the Water Court did not err. It had sufficient evidence to find that the 1904 priority date was abandoned and to assign the December 31, 1971 priority date based on Damschen's use.[5]

The 104

¶24 A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA; W. R. Adj. R. 19. Prima facie proof may be overcome by a preponderance of the evidence that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. W. R. Adj. R. 19; *see Weinheimer Ranch*, ¶ 27. When determining and interpreting water rights, the Water Court may consider all relevant evidence. Section 85-2-227(3), MCA.

¶25 PID asserts that a preponderance of the evidence admitted at trial proved that all but approximately 15 acres of the claimed place of use for the 104 claim were developed after 1965. It contends that the Water Court erred when it determined that PID failed to overcome the presumption that the elements of the 104 claim were correct as filed. Twin Creeks argues that there was sufficient evidence demonstrating substantially more historical irrigation within the place of use and that the Water Court's analysis of the evidence was proper.

We decline to address this contention because Twin Creeks did not present this argument to the Water Court. We note further that Hansen did not irrigate during the period when he leased the property to Trump, who ranched on the property.

[5] Twin Creeks makes no argument on appeal for an alternate priority date that the record could support, relying exclusively on its position that the 1904 claimed priority date is correct.

¶26 Hansen leased the property to Trump from 1950 to 1965. Joe Whisonant, Jacqueline Trump Whisonant, JoEllen Potter, and Bill Solf were familiar with the property during Trump's lease. Jacqueline and JoEllen were Trump's daughters, and Joe and Bill lived in the area. They all testified they did not see ditches serving the land north or east of the 15 irrigated acres during their time on the property.

¶27 Jacqueline testified that the only Flatwillow-irrigated piece of property was near the Fisher Bridge and it was about 15 acres. She testified that she and her sister would ride horseback across the property and that the landscape east of the Fisher Bridge-irrigated section was prairie, hills, sod, sagebrush, and trees. Her sister JoEllen confirmed this testimony.

¶28 Joe testified that he spent a "tremendous" amount of time on the Hansen property, and the only irrigation out of Flatwillow Creek he observed was at a diversion at Fisher Bridge irrigating approximately 15 acres on the western edge of the claimed place of use. Bill Solf assisted Elliot Trump with ranch operations and worked on essentially the entire Hansen property. He testified that the landscape east of the Fisher Bridge tract was "pretty rough and primitive" and it "couldn't have been irrigated." He testified that he assisted in leveling the parcel that Trump irrigated out of Box Elder Creek.

¶29 Jacqueline and Joe married and moved away from the property in 1956. After they left, they returned to the property "almost every weekend" until they moved to Richey, Montana, in 1960. They ceased visiting every weekend, but still visited frequently. Joe testified that once the Damschen brothers bought the Hansen property in 1965, they

significantly expanded the irrigation eastward. Bill also described assisting Damschen with expanding the irrigated acreage on the now-Damschen place.

¶30 Terry Sandman testified that before Trump leased the property from Hansen, the Fredricksons leased the property from about 1948 to 1950 and raised cattle and put up hay. Sandman further testified that he assumed the hay was irrigated, but he was eight years old at the time and could not be sure. He recalled small irrigation ditches on the property. He stated that the property was not extensively irrigated during Trump's subsequent lease, testifying that the "only fields that I can remember over there that Elliott [Trump] hayed was – It was pretty close to the Fisher Bridge there, right east of the Fisher Bridge." He did not know the exact acreage, but it "[c]ould have been 30, 35 acres." Sandman knew the Damschen brothers well and recalled them taking over the Hansen property in the late 1960s, rebuilding the diversion system, and altering the irrigation system extensively.

¶31 Twin Creeks's expert Lee Yelin testified that he was able to identify 229 irrigated acres from the 1948 USDA aerial photo and 241 irrigated acres from the 1954 aerial photo. He also stated that the irrigated areas match maps submitted with the various desert-land filings. Yelin testified that far more than 15 acres were serviced by ditches in 1948 and 1954.

¶32 Former DNRC Water Resource Specialist Teresa Olson also reviewed Twin Creeks's water rights claims. At Twin Creeks's request, Olson attempted to resolve the DNRC issue remark's note of the discrepancy between the 1971 Water Resources Survey indicating 151 irrigated acres on the 104 claim's place of use and the Damschen statement of claim to 210 irrigated acres. Her May 10, 2013 memorandum described the

results of her review. Olson testified that she reviewed the 2005 examination by a prior DNRC claims examiner identifying 209.8 acres irrigated for the 104 claim, more than the 151 acres identified by the 1971 Water Resources Survey. Olson reviewed the 1948, 1954, 1968, and 1979 aerial photos; affidavits; the Water Resources Survey; General Land Patent Office records; claim files; and USGS topographic maps. After examining the claim, she was unable to resolve the discrepancy between the Water Resources Survey's stated irrigated acres and the Damschen-claimed acres and could not recommend removing the issue remark for the 59 acres at issue.

¶33 When describing the 59-acre parcel in her memo, she stated: "The photos show an undeveloped parcel. It is surrounded almost entirely by irrigated field and is below the conveyance ditch." The Water Court relied on this testimony when it found that "Olson's memorandum and testimony confirms irrigation up to 151 acres in 1948 and 1954 [on the entire place of use], well beyond the 15 acres identified by other witnesses."

¶34 PID disputes the Water Court's characterization of Olson's testimony. It argues that when Olson provided testimony confirming irrigation surrounding the 59-acre parcel in dispute due to the issue remark, she was referring specifically to the 1979 aerial photo of the place of use, not confirming pre-1965 evidence of irrigation. PID asserts that Olson did not "in any way, shape or form" testify that there were at least 151 acres irrigated by Twin Creeks's predecessors in 1948 and 1954. Her testimony instead was entirely consistent with the testimony of PID's witnesses. PID asserts that the Water Court misapprehended the effect of Olson's testimony and committed clear error. Twin Creeks

responds that Olson's memorandum and testimony confirmed that she determined that at least 151 acres of irrigation occurred before 1965. We agree with PID.

¶35 The Water Court found: "[A] preponderance of the evidence indicates that at least 151.00 acres, and possibly more, were irrigated at various points in time prior to 1968." Though it did not explain in detail the evidence on which it relied, the court mentioned only the testimony of Yelin and Olson. Its ruling seems to be influenced by its finding that the two were of the same mind with regard to pre-1965 irrigation. Yelin testified to 229 acres irrigated in 1948 and 241 acres irrigated in 1954—at a time when the Trumps were not extensively irrigating according to PID's witnesses, Sandman, and Twin Creeks's own admission.

¶36 The court found that "Olson's memorandum and testimony confirms irrigation up to 151 acres in 1948 and 1954, well beyond the 15 acres identified by other witnesses." Our review of the record reveals that the Water Court mischaracterized Olson's memorandum and testimony. The 1971 Water Resources Survey stated there were 151 acres irrigated; this was the reason for DNRC's issue remark when the Damschens claimed 210 acres irrigated. At trial, Olson clarified key comments in her memorandum. She stated that her claim examination was not to confirm or deny evidence of irrigation in areas surrounding the specific area she was evaluating but was specifically looking at the 59 acres in question due to the issue remark. She accepted the area outside the 59-acre parcel as being irrigated based on the 1971 Water Resources Survey. Olson clarified at trial that the comment, "[i]t is surrounded almost entirely by irrigated field," was not intended to be a reflection of her interpretations of the 1948 or 1954 photos. She testified

that she did not confirm or deny evidence of irrigation in areas surrounding the specific areas she was evaluating:

> Q: My question is, Teresa, were you trying to lead the Court to believe that in 1948 the areas around the yellow circled areas [59 acres at issue] was all irrigated in 1948?
>
> A: My language in the report is confusing, but reviewing it now, I would say no.
>
> Q: And would that be the same like '54? . . . [W]ere you saying that what you believed there was that the area around that was all being irrigated in 1954?
>
> A: No.
>
> . . .
>
> A: [I] believe in my report I was referencing the water resource survey.

¶37 Olson clarified that her report language was confusing and was not intended to say that 151 irrigated acres existed in 1948 and 1954; based on the 1971 Water Resources Survey, she simply had accepted the acres as irrigated, and that was not at issue when she evaluated the 59-acre parcel identified in the issue remark. When questioned at trial regarding the 1948 and 1954 aerial photos, she stated that she did not think there was irrigation on the entire place of use. Olson's testimony made it clear she was not opining that irrigation existed on the entire place of use in 1948 or 1954. Yelin testified that he agreed with Olson's assessment that the 59-acre parcel was "surrounded by irrigation," but it is not clear if he was referring to the 1971 Water Resources Survey as was Olson or to his contrary interpretations of the 1948 and 1954 aerial photos.

¶38 Upon review of the Water Court's order, it is plain that the court relied on Olson's mischaracterized testimony in conjunction with Yelin's testimony when it found that a preponderance of the evidence showed "at least 151 acres" were irrigated in 1948 and 1954. Without Olson's corroboration, the court was left with only Yelin's testimony—based primarily on his review of aerial photos—that there were 229 acres irrigated in 1948 and 241 acres in 1954.

¶39 Other than Yelin's opinion, Twin Creeks did not offer evidence showing irrigation for the entire 210 acres for the 104 place of use that can be tied to the 1903 Marie Smith notice of appropriation. The only evidence regarding historical irrigation came from the desert-land entries. The only other evidence presented regarding historical use prior to the 1950s is Sandman's non-specific testimony that irrigation occurred at times in the late 1940s before it was leased to Trump. But he—like all other witnesses who had been on the property during the relevant time period—agreed that Trump did not extensively irrigate on the 104's place of use when he leased the property from 1950 to 1965. And he—like all other witnesses who had been on the property during the relevant time period—agreed that when the Damschens arrived in the late 1960s, they increased the irrigation to the entire place of use. Yelin's testimony that there was extensive irrigation on 229 acres in the 1950s during Trump's lease finds no support in the record beyond his own interpretation of the 1954 aerial photo. Yelin acknowledged that Trump was on the property in 1954 but challenged the testimony of every other witness that Trump did not irrigate. Twin Creeks even admits that the Trumps did not irrigate extensively.

¶40 The Dissent points to Olson's testimony discussing the 1971 Water Resources Survey field notes. The surveyor utilized the 1954 aerial photo to confirm 52 acres irrigated on the 104's place of use, and then used the 1968 aerial photo to confirm the remaining 99 acres irrigated (totaling 151 acres). Although Olson testified that she and the previous claims examiner did not examine the claim's historic use through the 1948, 1954, and 1968 aerial photos, the surveyor did review those photos; the Dissent thus posits that this "discredits the accounts of PID's witnesses in [PID's] attempt to meet the preponderance standard and rebut the presumption of validity afforded to the 104 claim." Dissent, ¶ 66. The Water Court clearly stated, however, that Olson's testimony confirmed irrigation up to 151 acres in 1948 and 1954. That indicates that the Water Court relied on Olson's memorandum language (and Yelin's photo interpretations finding 229 to 241 irrigated acres)—not on either the field notes regarding the 104 claim (because the field notes do not discuss the 1948 aerial photo) or on Olson's testimony about those field notes. This is exactly the reason for our ruling. The Water Court's mistaken finding that Olson "confirmed" the extensive irrigation in 1948 and 1954 *does* influence whether PID met its burden to rebut the presumption of validity afforded to the 104 claim. Importantly, even the Water Resources Surveyor confirmed only 52 irrigated acres from the 1954 photo—corroborating the time frame that PID's witnesses observed far less than the claimed irrigation on the property.

¶41 In sum, the aerial photos and witness testimony described above comprise the evidence of record for the 1940s and 1950s. Olson's misapprehended evidence does not corroborate Yelin's determination that there was irrigation on the entire place of use in the

1950s. Even if Yelin's opinion, viewed in the light most favorable to Twin Creeks, is evidence of irrigation on the entire place of use, the Water Court's finding nonetheless is clearly erroneous if it misapprehended the effect of the evidence. *Skelton Ranch*, ¶ 27. The Water Court relied on its mischaracterization of Olson's testimony, in conjunction with Yelin's opinion, to find by a preponderance of the evidence that there was irrigation on the entire place of use pre-1968. PID showed by a preponderance of all the other evidence that the claim did not accurately reflect the historical beneficial use of the 104 claim on the entire place of use. Considering all the evidence of record, we conclude that Yelin's testimony, standing alone, is not such that "a reasonable mind might accept as adequate," *Skelton Ranch*, ¶ 27, to support the Water Court's determination. Accordingly, we reverse and remand for further proceedings in light of Olson's complete testimony and the entire record.

¶42 The parties do not dispute that Trump did not irrigate extensively. The Dissent's theory of the evidence does not resolve PID's abandonment argument, which the Water Court still would need to reconsider in light of the alleged long period of continuous nonuse—similar to its consideration of the issue with respect to the 102 claim. Reconsidering Olson's testimony necessarily would require the Water Court to reconsider the facts underlying PID's abandonment claim. The Water Court found that Olson's testimony confirmed up to 151 irrigated acres in 1948 and 1954, but we have held that it did not. The Water Court "may determine *all or part* of an existing water right to be abandoned[.]" Section 85-2-227(3), MCA (emphasis added); *see also* § 3-7-501(4), MCA (declaring the Water Court's jurisdiction to adjudicate "total or partial abandonment of

existing water rights occurring at any time before the entry of the final decree."). Partial use of a water right may result in a finding that the right has been partially abandoned, even if the water right holder has taken other actions that support its claim to the right. *Switzer*, 21 Mont. at 530, 55 P. at 35 (holding that plaintiff retained only four inches of water for domestic purposes out of its larger prior water right used for mining and domestic purposes); *Holmstrom Land Co. v. Meagher Cty. Newlan Creek Water Dist.*, 185 Mont. 409, 424, 605 P.2d 1060, 1069 (1979) (holding that only 80 miner's inches of an originally 337 miner's-inch water right was retained because, for seventy-five years, the irrigated land could accommodate and put to beneficial use only 80 miner's inches). Determining the number of acres irrigated in 1948 and 1954 is a finding key to the abandonment claim. It affects PID's burden to show that Twin Creeks's predecessors failed to continuously irrigate on all 195 acres throughout the alleged period of nonuse.

¶43 On remand, the Water Court will need to determine: (1) the acreage historically irrigated before 1968 that was not abandoned that can be tied to the 1903 claimed priority date; and (2) the priority date for the expanded irrigated acreage established in the record.

CONCLUSION

¶44 We affirm the Water Court's finding that the 102 claim was abandoned. We reverse its finding that PID did not overcome the presumption that the 104 claim was correct as filed. The case is remanded for further consideration in light of this Opinion.

/S/ BETH BAKER

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE
/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, concurring and dissenting.

¶45 I respectfully concur in part and dissent in part from the Court's opinion. I concur with the Court's affirmation of the Water Court's ruling on the abandonment of the 102 claim. As to the 104 claim, I write separately to note that I would follow this Court's standard of review and decline to overturn the Water Court's factual findings, as those findings were based on substantial credible evidence, accurately apprehended by the Water Court.

¶46 As the Court acknowledges, we review evidence "in a light most favorable to the prevailing party and leave the trial court to determine the credibility of witnesses and the weight assigned to their testimony." Opinion, ¶ 12. "Wherever the testimony is directly conflicting, *we presume the trial judge to be correct*. Only he [or she] had the opportunity to observe the demeanor, candor and spontaneity of the witnesses." *Hellickson v. Barrett Mobile Home Transp., Inc.*, 161 Mont. 455, 460, 507 P.2d 523, 526 (1973) (emphasis added). Much of the evidence presented at trial, which the Water Court considered in making its findings and conclusions, consisted of witness testimony. The credibility of such witnesses is of prime importance to this appeal. "The credibility and weight given the witnesses, however, is not for this Court to determine. This is a primary

function of a trial judge sitting without a jury; it is of *special consequence* where the evidence is conflicting." *Cameron v. Cameron*, 179 Mont. 219, 228, 587 P.2d 939, 945 (1978) (quoting *Hellickson*, 161 Mont. at 459, 507 P.2d at 525) (emphasis added).

¶47 The scope of this Court's review when considering the findings of a trial court sitting without a jury is clear and well settled in Montana. *Cameron*, 179 Mont. at 227, 587 P.2d at 944. Where the findings of the Water Court are based on substantial—though conflicting—credible evidence, it is this Court's role to heed the judgment of the factfinder. Our standard of review plainly guides this Court to refrain from reversing a finding of the trier of fact simply because we are convinced that we would have decided the case differently, given the same evidence. I disagree with the Court's holding that the Water Court misapprehended the testimonial evidence of Olson. I would decline to disturb the Water Court's findings on the 104 claim on appeal, given our deferential standard of review and our inability to discern the credibility of witnesses' testimony in real time. The record shows that the Water Court carefully and thoughtfully weighed all of the testimony submitted by the parties and fulfilled its obligation to judge the credibility of witnesses. Therefore, I would uphold the Water Court's finding that PID failed to meet its burden of overcoming the presumption that the elements of the 104 claim were incorrect as filed.

¶48 Under Montana law, a properly filed statement of claim of an existing right constitutes prima facie proof of its contents. Section 85-2-227(1), MCA. "The effect of § 85-2-227(1), MCA is to place the burden of proof *on the objector* 'to prove by a preponderance of the evidence that the elements of the original claim do not accurately

reflect the beneficial use of the water right as it existed prior to July 1, 1973.'" *Marks v. 71 Ranch, LP*, 2014 MT 250, ¶ 15, 376 Mont. 340, 334 P.3d 373 (quoting *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558) (emphasis added). "Objections to the validity of a water right as it existed prior to July 1, 1973, are governed by pre-1973 law." *Marks*, ¶ 15 (citing *Axtell v. M.S. Consulting*, 1998 MT 64, ¶ 25, 288 Mont. 150, 955 P.2d 1362).

¶49 Here, Damschen properly filed the 104 statement of claim under §§ 85-2-221, and -227(1), MCA, for irrigation on 210 acres. The 104 claim is based on a notice of appropriation from Flatwillow Creek filed by Marie Smith for 300 miner's inches with a July 10, 1903 priority date. As Damschen's successors-in-interest, Twin Creeks's filed claim 104 thus constitutes prima facie evidence that the information contained in the claim is true. *See Weinheimer Ranch*, ¶ 28; Rule 19, W. R. Adj. R.

¶50 In 2005, during the claim examination process, a DNRC claim examiner added issue remarks[1] to the 104 claim noting that: (1) the 1971 Water Resources Survey (WRS) identified only 151 acres irrigated in the claimed place of use; and (2) the flow rate may require modification if the acres irrigated are reduced. When Twin Creeks acquired the

[1] Under the Water Right Claim Examination Rules, "'Remarks' means statements added to the decree abstract by the [DNRC] or the water court to limit or define a water right, to explain unique aspects of the water right, and to identify potential factual and legal issues. Remarks that limit, define, or explain unique aspects of a claim are 'clarifying' or 'information' remarks. Remarks that identify potential factual and legal issues are 'issue' remarks." Rule 2(a)(57), W. R. C. E. R. *See also* § 85-2-250, MCA ("For the purposes of 85-2-247 through 85-2-249, 'issue remark' means a statement added to an abstract of water right in a water court decree by the [DNRC] or the water court to identify potential factual or legal issues associated with the claim.").

Hansen property from the Taylors in 2015, it assumed the Taylors' objections to the remarks on the claim, asserting that the remarks were incorrect and should be removed. Notably, Twin Creeks did not object to the elements of the 104 claim as filed, as the DNRC did not change the place of use or acres irrigated based on the issue remarks;[2] instead, Twin Creeks objected to the DNRC remarks added to the claim.

¶51 Under § 85-2-233(1)(a), MCA, the Water Court is required to hold a hearing "on any objection to a temporary preliminary decree, a preliminary decree, or a supplemental preliminary decree" filed by a party authorized under the statute to object. Montana law instructs the Water Court on resolution of issue remarks on a claim: "If as a result of the examination or the prior verification conducted by the [DNRC] an issue remark is attached to a claim, the information resulting in the issue remark and the issue remark must be weighed against the claimed water right." Section 85-2-247(2), MCA. Therefore, the prima facie statement of claim is weighed together with the issue remark to resolve and remove the remark prior to issuance of the final decree. Section 85-2-247(1), MCA ("[T]he legislature recognizes that it is in the state's best interest to ensure that valid issues raised as a result of claims examination in the statewide adjudication of pre-July 1, 1973, water rights are resolved before a final decree is issued."). This balancing of interests may result in the Water Court changing the elements of the claim to reflect actual historical use; on the other hand, the Water Court could decide that the issue remarks and evidence presented

[2] Rule 12(d), W. R. C. E. R., provides: "The claimed place of use and acreage irrigated of a water right will not be changed during the [DNRC]'s examination unless: (1) amended by the claimant; or (2) clarified by the [DNRC] to the nearest reasonable and concise legal land description."

do not justify amending the elements of the claim. The Water Use Act does not prescribe a specific statutory burden or standard that the Water Court must meet or follow in resolving issue remarks, beyond weighing the information provided. In contrast, this Court has provided that parties objecting to the specific elements of a properly filed statement of claim must proffer sufficient evidence to rebut the prima facie presumption that the claim is valid as filed. *Marks*, ¶ 15; *Nelson*, ¶ 37; *Teton Coop. Reservoir Co. v. Farmers Coop. Canal Co.*, 2018 MT 66, ¶ 21, 391 Mont. 66, 414 P.3d 1249.

¶52 PID objected to elements of the 104 claim as filed. As objectors to the contents of claim 104, the burden was on PID to show by a preponderance of the evidence that the information in the claim was incorrect. *Marks*, ¶ 16. PID asserted that only 15 acres of the claimed 210 acres—and 0.57 cfs of the 7.50 cfs claimed flow rate—in the 104 claim were entitled to the July 10, 1903 priority date. PID contended that the 195-acre remainder of the claimed acreage was never irrigated until Damschen acquired the property in the mid-1960s. According to PID, because 195 acres of the claimed acreage was not irrigated prior to 1968, 6.93 cfs of the claimed flow rate was likewise never perfected until Damschen put the claimed water to beneficial use. PID requested that the Water Court amend the 104 claim to reflect a July 10, 1903 priority date, 15 acres irrigated in part of Section 29, and a flow rate of 0.57 cfs. To account for the acres irrigated by Damschen and their successors from 1968 onward, PID urged the Water Court to place the remaining 195 acres into an implied claim use right with a January 1, 1968 priority date based on evidence of first use and a 6.93 cfs flow rate. In the alternative, PID asserted that if the

Water Court did find the right perfected by predecessors of Damschen, all but 15 acres of that original right was abandoned through nonuse from 1948 to 1968.

¶53 Given the parties' separate objections regarding the 104 claim, and the interest-balancing and burden of proof distinctly applicable to those objections, the Water Court was tasked with: (1) weighing the prima facie statement of claim against the DNRC issue remarks to resolve the issues raised and remove the remarks; and (2) determining whether PID met its burden of proof to overcome the prima facie presumption that the elements in the 104 claim were correct as filed. Both Twin Creeks and PID put on evidence to support their respective assertions regarding the place of use and acres irrigated under the 104 claim. PID's evidence was presented in support of its contention that the majority of the 104 claim was never perfected prior to 1968, and if it ever was, all but 15 acres was abandoned through continuous nonuse from 1948 to 1968. The Water Court disagreed with PID, finding that PID failed to prove by a preponderance of the evidence that the entire claimed place of use was not perfected prior to 1948. In response to PID's alternative abandonment argument, the Water Court found that while it was likely that not all of the claimed acreage was consistently irrigated from 1948 to 1968, evidence of *continuous nonuse* on the entire claimed place of use was not clearly established by PID. All told, PID did not successfully rebut the prima facie presumption that the elements of the 104 claim were correct as filed.

¶54 On appeal, PID asserts that the Water Court erred when it concluded that PID had not met its evidentiary burden. PID opines that the Water Court "dismissed the

unchallenged testimony of six separate eyewitnesses who testified conclusively that no more than 15 of the 210 acres claimed by Twin Creeks were irrigated between 1948 and approximately 1968."

¶55 To start, the evidence relied upon by PID was not "unchallenged" as it asserts. PID's evidence in support of the roughly 20-year period of nonuse on 195 acres included trial testimony from Joe Whisonant, his wife Jacqueline Trump Whisonant, and Bill Solf. The Water Court took judicial notice of the deposition testimony of Jacqueline's sister, JoEllen Potter. All witnesses affirmed PID's assertions that only 15 acres of the claimed 210 acres were irrigated from around 1950, when Hansen leased his property to Jacqueline and JoEllen's father, Elliot Trump, up until Hansen sold the property to his grandchildren, the Damschen brothers, in 1965.

¶56 The trial testimony shows that Joe was born in 1937 and moved with his family to the area in question in 1941 when he was four years old. Joe testified that he and Bill spent a "tremendous" amount of time on the property while Elliot Trump was leasing it, from when he was 13 years old in 1950 up until Hansen sold the property to Damschen in 1965. Jacqueline testified that she was ten years old when her father began leasing from Elliot Trump, and she and her sister rode horseback from one end of the property to the other "many times," usually during calving season or to mend fences for her father. Bill Solf's testimony was largely the same as that of Joe Whisonant. Joe, Jacqueline, and Bill each testified that they never saw ditches from Flatwillow Creek serving the land north or east of a small 15-acre tract next to Fisher Bridge on the property.

¶57 However, Joe and Jacqueline's testimony regarding their familiarity with the property and the specific irrigation work done was somewhat undermined by their other testimony in the record indicating their contact with the property may have been more finite than originally asserted. For instance, Jacqueline testified that she had no personal knowledge of the irrigation done on the Hansen property prior to 1950 when she arrived with her family. By 1956, she and Joe had graduated high school and moved to Billings for college. Joe and Jacqueline were married in 1957, and the couple resided in Billings until Joe graduated from Rocky Mountain College in 1960. After he graduated from college, Joe received a job in Richey, Montana, and was a "busy man" teaching physical education and working as the "head coach in every sport." Joe and Jacqueline remained in Richey for nine years, until Joe took another job in Chinook, Montana. Following this move, the couple lived in Chinook for 21 years. Jacqueline admitted at trial that she and Joe were mainly on the property between 1950 and 1956.

¶58 It should also be noted that, in the early 1950s, Petrolia Lake was constructed on Flatwillow Creek as an onstream reservoir by the Montana State Water Conservation Board. From its construction until 1999, the water supply of Petrolia Lake was owned by the State of Montana, and was managed under a water marketing contract wherein the Petrolia Water Users Association agreed to market the water supply of Petrolia Lake to users who entered into water purchase contracts. In 1999, PID was formed as an irrigation district under Title 85, ch. 7, MCA, and received the Petrolia Lake project via transfer from the DNRC. Joe Whisonant served as Chairman of the Board for PID for several years and

is a water user on the project; and, prior to PID's founding, he was a member of the Petrolia Water Users Association. Bill Solf presently serves on the PID Board of Directors and is also a water user on the project. PID acknowledged at trial that it holds a junior right, 1950, on Flatwillow Creek, and that it is obligated to honor all senior rights, including any Twin Creeks right found to be senior in the Water Court proceedings. The testimony of Joe Whisonant, Jacqueline Trump Whisonant, and Bill Solf is hardly that of disinterested third parties.

¶59 In contrast to the testimony put on by PID, Twin Creeks presented testimony from Terry Sandman, a farmer who has lived in the Winnett area his entire life. He testified that Frederickson, who leased the property from Hansen prior to Elliot Trump, "put up hay" throughout the 104 claim's place of use. Terry assumed the hay was from irrigation because there were small ditches carrying water throughout the property. Those small ditches, while not quite the size of canals, were sufficient to irrigate the land and ensure that Frederickson was able to feed their cattle "very well in the wintertime." Terry testified that significant irrigation was conducted on the property through small conveyance ditches out of Flatwillow Creek except for the time it was leased by Elliot Trump. According to Terry, when Damschen purchased the property in the 1960s, they "changed the whole thing," referring to the previous irrigation system. The testimony of Terry Sandman directly contradicted the testimony of Joe Whisonant, Jacqueline Trump Whisonant, and Bill Solf that there were no ditches from Flatwillow Creek, outside of the diversion for the 15-acre parcel, on the Hansen property prior to 1968.

¶60 The testimony and exhibits of Lee Yelin further contradicted the testimony of PID's witnesses. In preparation for trial, Yelin created multiple maps and exhibits and reviewed the claim file information; the available aerial photographs from 1948, 1954, and 1968; the 1971 WRS information; desert land entry and general land office records; and conducted multiple site visits and interviews. At trial, Yelin described the process of analyzing aerial photographs, including the method used for comparing assorted aerial photographs to determine changes occurring on the land. Yelin also explained how various desert land entry statements and maps aligned with the irrigated acreage in the 104 claim. This testimony bolstered the contents of the prima facie statement of claim by confirming perfection of the 104 claim's underlying notice of appropriation filed by Marie Smith for 300 miner's inches on 210 irrigated acres with a July 10, 1903 priority date. Additionally, Yelin's review of all the available evidence led him to assert that irrigation ditches serviced land extending far beyond the 15-acre parcel, according to the aerial photographs from 1948 and 1954. Yelin testified that the 1954 photograph shows the same pattern of irrigation as the 1948 photograph, as there are field boundaries, ditches, and dark areas below the ditches visible in both. Yelin's analysis of the 104 claim directly contradicted the testimony of PID's witnesses on the extent of irrigation and the existence of conveyance ditches throughout the entire claimed place of use prior to Damschen's purchase of the property. Clearly, given its findings, the Water Court found Yelin to be the more credible witness.

¶61 Despite this conflicting evidence, the Court believes that the Water Court's understanding of the testimony of Teresa Olson tipped the Water Court toward discounting the testimonial evidence presented by PID. According to the Court, the Water Court misapprehended the effect of Olson's testimony, and this misapprehension was the ultimate cause of the court's determination that PID failed to meet its evidentiary burden to overcome the 104 claim's prima facie status. The Court seems to pronounce that the Water Court placed too much emphasis on certain portions of Olson's testimony, and drew incorrect inferences regarding the acres irrigated under the 104 claim. However, regarding PID's objection to Twin Creeks's statement of claim, the Water Court was not charged with balancing evidence to determine which party's assertion ultimately wins out. To the contrary, the burden was on PID to overcome the presumption in favor of the 104 statement of claim. While Olson's clarifications on statements made in her 2013 memorandum perhaps were not an outright confirmation of continuous use on 151 acres, she likewise did not bolster PID's arguments that only 15 acres in the claimed place of use were irrigated between 1948 and 1968. At any rate, a review of Olson's entire testimony leads me to believe that the Water Court did not, in fact, misinterpret Olson's testimony regarding the 104 claim.

¶62 Olson's review of the 104 claim focused on the 2005 claim examination issue remark. She reviewed the aerial photographs from 1948, 1954, and 1968 in her attempt to resolve the issue remark and limited her review of the photographs to the 59 acres at issue.

After first carefully laying out its findings regarding the testimony of Yelin, the Water Court then discussed Olson's testimony and made the following finding:

> Olson found the [59 acres in question in the issue remark] were surrounded by irrigated land and were below the ditch system. However, she determined the acres could be subirrigated and not a part of the irrigation system in the photographs. She could not recommend removing the issue remark based on the information she reviewed . . . . At the same time, Olson's memorandum and testimony confirms irrigation up to 151.00 acres in 1948 and 1954, well beyond the 15.00 acres identified by other witnesses.

The Court believes this finding was indicative of the Water Court's misapprehension of Olson's testimony regarding her use of the aerial photographs to determine irrigated acreage. Opinion, ¶ 36. However, Olson's own use of the aerial photographs was not the extent of her testimony regarding the information reviewed for the 104 claim.

¶63 Olson was tasked with determining whether to recommend removal of issue remarks placed on the 104 claim by a previous DNRC claim examiner, Millie Bowman. At trial, Olson believed that Bowman likely conducted her 2005 examination of the 104 claim using only the 1979 USDS aerial photograph and the 1971 WRS, as Bowman probably would have accepted the WRS data at face value and forgone a review of the earlier aerial photographs from 1948, 1954, and 1968. Just as Bowman received the information in the WRS as correct, Olson testified at trial that she accepted the area outside the 59-acre parcel as being irrigated based on the information contained in the WRS; Olson's 2013 memorandum comment that the 59 acres in question "were surrounded by irrigated land" was not based on her interpretation of the 1948, 1954, or 1968 aerial photographs. Olson testified that she did review the 1948, 1954, and 1968 aerial photographs in her

examination, but that review was limited to the 59-acre parcel at issue. Although Olson believed that Bowman did not review the 1948, 1954, and 1968 aerial photographs during Bowman's 2005 claim examination, the surveyor who compiled the 1971 WRS *did* review earlier photographs in determining that 151 of the 210 acres claimed were irrigated.

¶64 Bowman's examination worksheet is included in the claim file for the 104 claim. Her worksheet identifies two data sources for her examination of the 104 claim, the 1971 WRS and the 1979 USDA aerial photograph. Bowman adopted the WRS's examined acreage for each Section throughout the 104 claim's place of use, and identified the source of the WRS's findings: (1) in the N2N2 of Section 29, T14N, R29E, the 1968 aerial photograph confirmed 52 acres irrigated under claim 104; (2) in the S2S2 of Section 20, T14N, R29E, the 1968 aerial photograph confirmed 47 acres irrigated; (3) in the NW of Section 28, T14N, R29E, the 1954 aerial photograph confirmed 44 acres irrigated; and (4) in the NWNESW of Section 28, T14N, R29E, the 1954 aerial photograph confirmed 8 acres irrigated. In total, the surveyor for the 1971 WRS used the 1954 and 1968 aerial photographs to determine that 151 acres of the 210 acres claimed were irrigated under the 104 claim.

¶65 The second data source used by Bowman in her 2005 examination of the 104 claim was the 1979 USDA aerial photograph. Bowman noted the examined acreage in the 1979 photograph showed that the irrigated acres on the 104 claim's place of use had expanded from 151 acres to 209.8 acres: (1) in the N2N2 of Section 29, T14N, R29E, there were 99 acres irrigated; (2) in the S2S2 of Section 20, T14N, R29E, there were 50.8 acres

irrigated; (3) in the NW of Section 28, T14N, R29E, there were 50 acres irrigated; and (4) in the NWNESW of Section 28, T14N, R29E, there were 10 acres irrigated. Olson testified at trial that, reviewing the 1979 photograph in comparison to the 1948 photograph, the 59-acre parcel at issue was "greatly improved as far as irrigation," and "there have been significant improvements of the land between October 19th, 1948 and October 9th, 1979." Bowman's 2005 examination corroborates Olson's testimony regarding the 59-acre parcel which spans part of Section 29 into Section 20. As to irrigated acreage in Section 28—land outside the focus of Olson's review of the aerial photographs—Bowman used information obtained from the 1954, 1968, and 1979 photographs, and noted a mere 8-irrigated-acre increase in parts of Section 28 in the 104 claim's place of use. And, in total, Bowman's 2005 claim examination identified an increase of roughly 59 irrigated acres in the entire place of use from the time the WRS was done in 1971 (using aerial photographs from 1954 and 1968), to the time the USDA aerial photograph was taken in 1979. It is true that the WRS was not conducted until six years after Damschen acquired the property in 1965; however, the WRS verified use on 151 acres of the claimed irrigated acreage using the 1954 and 1968 aerial photographs.

¶66 Although the WRS only used the 1954 aerial photograph to substantiate the 52 acres irrigated in parts of Section 28, this information evidences that far more than 15 acres in Section 29 were irrigated under the 104 claim's place of use prior to 1968, which is in direct conflict with the assertions of PID and its witnesses. This conflict alone means that Olson's testimony was not "entirely consistent with the testimony of PID's witnesses," as

the Court concludes. Opinion, ¶ 34. Contrary to the Court's conclusions, the surveyor's use of the 1954 aerial photograph as a data source in the 1971 WRS to confirm irrigation on 52 acres in the claimed place of use does not mean that 52 acres was the extent of the irrigation shown in the 1954 photograph. Opinion, ¶ 40. The information taken from the WRS, elicited during Olson's testimony before the Water Court, directly contradicts PID's assertions that none of the claimed acres were irrigated, save 15 acres in Section 29, before 1968, and discredits the accounts of PID's witnesses in its attempt to meet the preponderance standard and rebut the presumption of validity afforded to the 104 claim.

¶67 In its findings, the Water Court stated that Olson's testimony and 2013 memorandum confirmed that irrigation beyond the 15 acres identified by PID's witnesses—but not in excess of the 151 acres identified in the WRS—was performed on the 104 claim's place of use. Certainly, "Olson's testimony made it clear she was not opining [in her memorandum] that irrigation existed on the entire place of use in 1948 or 1954," Opinion, ¶ 37, but an unabbreviated recounting of the remainder of her testimony reveals that the Water Court clearly understood the effects of Olson's statements when viewed in their entirety.

¶68 The Court concludes that the Water Court must have misapprehended the evidence of Olson, because the only other evidence it could have relied upon in making its findings was the testimony of Yelin, who, "based primarily on his review of aerial photos," contradicted the testimony of PID's witnesses. Opinion, ¶ 38. Indeed, at trial Olson was not asked whether she categorically agreed with Yelin's testimony regarding the aerial

photographs, and she did not independently proclaim that her examination of the aerial photographs revealed that at least 151 acres were most definitely irrigated between 1948 and 1968. However, Olson's confirmation that the WRS surveyor relied on the 1954 aerial photograph, her subsequent reliance on the WRS findings, and her insistence that her review of the 2005 examination was of limited scope, lent weight to Yelin's testimony on the 1948 and 1954 photographs and served to confirm the findings of the WRS that 151 acres were irrigated as of 1968. Olson used the 1948, 1954, and 1968 aerial photographs for her review. At trial, Olson confirmed her 2013 memorandum statements that the 59-acre area of focus was "surrounded almost entirely by irrigated field" and was "below the conveyance ditch" as portrayed by the aerial photographs. Her inability to judge whether the 59 acres were subirrigated, or were part of the irrigation system present in the photographs, was a factor in her decision to decline recommending removal of the issue remark on the claim. It is true that Olson did not trumpet verbatim to the Water Court its eventual finding that her "memorandum and testimony confirms irrigation up to 151.00 acres in 1948 and 1954," but Olson was not required to make such a proclamation. The Water Court did not mischaracterize Olson's testimony, but instead drew a logical inference from all the information provided. PID opted against putting on its own expert witness, with experience reading and comparing aerial photographs, to contradict Yelin's interpretations of the aerials outside the 59-acre parcel at issue in claim examination. Yelin's interpretations of the 1948, 1954, and 1968 aerial photographs—excluding the

59-acre parcel examined by Olson—stood uncontroverted by any alternative expert interpretation.[3]

¶69 According to the Court, "The Water Court relied on its mischaracterization of Olson's testimony, in conjunction with Yelin's opinion, to find a preponderance of evidence that there was irrigation on the entire place of use pre-1968." Opinion, ¶ 41. However, the rebuttable presumption provided for in § 85-2-227(1), MCA, does not ask which party to a dispute can amass a greater preponderance of evidence in substantiating or discrediting the elements in a statement of claim. A prima facie statement of claim is, in itself, evidence of the existence of a fact, i.e., the contents contained in the claim. At trial, it was up to PID, and PID alone, to disprove the elements in the statement of claim. Twin Creeks, as owner of the statement of claim, was free to put on evidence to expose any dissimulation or disparities in PID's evidence, and it did. The question is whether PID, not Twin Creeks, presented sufficient evidence at trial proving that only 15 acres, in total, were ever irrigated on the 104 claim's place of use, or, alternatively, that only 15 acres were irrigated between 1948 and 1968. Although it is true that PID's witness statements were consistent with one another, those statements did not establish by a preponderance of the evidence presented that, except for 15 acres in Section 29, the entire claimed place of use was never irrigated or was abandoned through nonuse from 1948 to 1968.

[3] At trial, Yelin stated that he believed the 210 acres claimed under the 104 claim were supported by historical information, including desert land entries, the aerial photographs, and the DNRC. When challenged on this assertion, because the 1971 WRS says only 151 acres were irrigated in the place of use, Yelin responds that the DNRC was incorrect—the 59-acre parcel at issue was irrigated pasture, and he could "prove it on the '54 aerial" because of the presence of ditches going through it.

¶70 Except for the 59-acre parcel at issue in claim examination, Olson's testimony and 2013 memorandum were congruent with the aerial interpretations of Yelin. The testimony of Olson, Yelin, and Sandman, the desert land entry and general land office records, the conflicting interpretations of the 1948, 1954, 1968, and 1979 aerial photographs, the 2005 claim examination, and the 1971 WRS and its data sources together worked to discredit PID's witnesses' testimony. At trial, during PID's cross-examination of Yelin regarding the irrigated acres under the 104 claim, the following exchange occurred:

> Q: And Bill Solf testified that there was no irrigation outside those 15 acres.
>
> A: He did, but I don't agree with him.
>
> Q: And Jackie Whisonant said that.
>
> A: Yes, and I disagree.
>
> Q: And Joe Whisonant.
>
> A: I disagree.
>
> Q: And Chuck Allen.
>
> A: I disagree, and can I tell you why? 'Cause there's ditches there. And those people all said they never saw a ditch anywhere on that property and rode it for years, and I can show you on the photos during the periods of time in which they rode that property that there are ditches. And so I don't find their evidence credible, and, in fact, the story was so much exactly the same it sounded like it was . . . disingenuine (sic).
>
> Q: So it's going to come down to credibility. The judge is either going to believe your aerial interpretations or the folks that were on the ground, correct?
>
> A: Yeah. And I hope he does look at the aerials.

¶71 Clearly, given the conflicting evidence presented by the parties, the Water Court's decision *did* come down to weighing the credibility of the witnesses. I would entrust the Water Court to perform its duty as fact finder and would give due regard to its competency to judge the integrity of witnesses' statements. As this Court is not vested with the responsibility of assessing which evidence should be accorded a greater degree of credibility, and in light of our deferential standard of review, I would not substitute my own judgment for that of the Water Court. I disagree with the Court's holding that the Water Court misapprehended the testimonial evidence of Olson. The record shows that the Water Court carefully and thoughtfully weighed all of the testimony submitted by the parties, properly applied the prima facie rebuttal burden of proof, and fulfilled its obligation to judge the credibility of witnesses. Therefore, I would uphold the Water Court's finding that PID failed to meet its burden of overcoming the presumption that the elements of the 104 claim were incorrect as filed.

¶72 Finally, the Court posits that the above "theory of the evidence does not resolve PID's abandonment argument, which the Water Court still would need to reconsider in light of the alleged long period of continuous nonuse—similar to its consideration of the issue with respect to the 102 claim." Opinion, ¶ 42.

¶73 Abandonment of a water right is a question of fact. *79 Ranch*, 204 Mont. at 431, 666 P.2d at 217; *Featherman*, 42 Mont. at 540, 113 P. at 753. Two concurrent elements are required to effectuate an abandonment finding: (1) continuous nonuse of the water associated with the water right; and (2) the intent to abandon the water right. *79 Ranch*,

204 Mont. at 432, 666 P.2d at 218; *Skelton Ranch*, ¶ 52. In an abandonment analysis, "[t]he *objector* bears the initial burden of showing a long period of continuous non-use of the claimed water right." *Skelton Ranch*, ¶ 53 (emphasis added). In meeting the burden of proof under an abandonment assertion, "the evidence . . . should be clear and definite." *Thomas*, 66 Mont. at 168, 213 P. at 600.

¶74 In this case, PID had the initial burden at trial to prove the first element of abandonment. If PID successfully proved nonuse on 195 acres under claim 104 from 1948 to 1968, then this twenty-year period of nonuse would raise a rebuttable presumption of an intent to abandon, and shift the burden of proof to Twin Creeks, the nonuser, to explain the reasons for nonuse. However, the Water Court determined:

> [T]he evidence of continuous nonuse is not clear. Aerial photographs from 1948, 1954, and 1968 show significant irrigation. So does the aerial photograph used for the 1971 [WRS]. Terry Sandman testified Elliot Trump did less irrigation between 1950 and 1965, but nonetheless irrigated. While not all acres were consistently irrigated, there is no clear evidence establishing a long period of continuous nonuse.

Therefore, no presumption of an intent to abandon 195 acres under the 104 claim arose to shift the evidentiary burden onto Twin Creeks. Contrary to the Court's reasoning, just because PID *alleged* a long period of continuous nonuse does not mean it met its burden of proof for that element under the abandonment analysis. After alleging nonuse for a continuous period, PID then had the burden of proving that Twin Creeks's predecessors-in-interest failed to continuously use water on all 195 acres throughout the entire 20-year period alleged. PID failed to do so by clear evidence, given the testimony of Sandman, Yelin, and Olson.

¶75 The difference between the Water Court's analysis of the 104 claim, compared to its examination of the 102 claim, was the establishment of continuous nonuse by PID in the latter. Unlike the 104 claim, the 1948 and 1954 aerial photographs and the 1971 WRS, did not show active irrigation on the 102 claim's place of use. The Water Court's findings on the lack of continuous nonuse of the 104 claim were supported by substantial evidence. The Water Court correctly applied the law of abandonment.

¶76 For the reasons stated above, I would affirm the Water Court's findings on the 104 claim.

/S/ LAURIE McKINNON