

Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
1-800-624-3270 (In-state only)  
(406) 586-4364  
FAX: (406) 522-4131

FILED

JUN 13 2017

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
FLATWILLOW CREEK INCLUDING BOX ELDER CREEK  
BASIN (40B)

\*\*\*\*\*

CLAIMANT: Gene J. Klamert

OBJECTOR: Daniel W. Iverson; United States of America (Bureau of  
Land Management)

COUNTEROBJECTOR: Ned A. Tranel

NOTICE OF INTENT TO APPEAR: Gene J. Klamert; Wilks Ranch  
Montana LTD

CASE 40B-1  
40B 9163-00  
40B 9164-00  
40B 9165-00  
40B 9166-00  
40B 9167-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules (W.R.Adj.R) requires that written objections to a Master's Report be filed within 10 days of the date of the Master's Report. In more complex cases, the Water Master may enlarge the objection to 30 days. Due to the complex nature of this case, the objection period shall be 30 days from the date of service. Rule 23, W.R.Adj.R.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of this Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. *If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.*

**MASTER'S REPORT**  
**PROCEDUARL HISTORY**

The claims consolidated in this case were included in the Preliminary Decree for Flatwillow Creek including Box Elder Creek (Basin 40B) issued on May 5, 2011. The claimant is Gene Klamert, who was represented by Jo Messex Casey. Daniel W. Iverson, represented by James A. Hubble, and the United States of America (Bureau of Land Management), represented by Roselyn Rennie, appeared as objectors. Ned A. Tranel, represented by John W. Tietz III, appeared as a counterobjector. Lastly, Klamert, Janna J. & Michael A. Taylor, represented by John E. Bloomquist, and Wilks Ranch Montana, LTD, represented by Michael J.L. Cusick and Abigail Brown, appeared as Notice of Intent to Appear parties (NOIA). During the case, the Taylors were substituted by Twin Creeks Farm and Ranch, LLC, also represented by Bloomquist.

Initially, this case proceeded on a settlement track. On January 18, 2013, the United States and Klamert filed a stipulation that settled the United States' objections. In the stipulation, Klamert agreed to reduce the places of use for each claim. Except for the Taylors, who agreed with the stipulation, the remaining adverse parties requested that the case be assigned to a hearing track. At the scheduling conference, the United States requested to be excused from further participation but remain on the service list.

During discovery, Tranel withdrew his counterobjections to all of Klamert's claims. Based upon documents obtained during discovery, Wilks filed a motion for summary judgment and requested a hearing on the motion. Wilks' motion for summary judgment was fully briefed and a hearing was held on June 13, 2014, at the Montana Water Court.

Presiding Water Master Peter Fritsch determined that genuine issues of material fact remained and denied Wilks' motion for summary judgment. Wilks objected to the denial of summary judgment, and Associate Judge Douglas Ritter dismissed Wilks' objection, as the Master's ruling was not dispositive. Additional discovery was conducted after the motion for summary judgment. Wilks also filed a motion to intervene on all Klamert claims, which was granted.

After the close of discovery, an evidentiary hearing was held from August 15 through August 19, 2016, in Roundup, Montana, at the Musselshell County District Courthouse with Water Master Benjamin Sudduth presiding. Prior to the hearing, Twin Creeks Farm and Ranch withdrew its NOIA. Klamert, Iverson, and Wilks appeared at the hearing. After the hearing, the remaining parties filed proposed findings of fact and conclusions of law and briefs in support.

Wilks and Iverson primarily contend that Klamert's rights, especially claim 40B 9166-00, were abandoned. Wilks and Iverson assert that the water commissioner and billing records for Flatwillow Creek definitively show that neither Klamert nor his predecessors-in-interest used or called for water for a period of at least seventeen years. Both Wilks and Iverson assert that Klamert's claims should be dismissed.

Klamert challenges the validity of the records promoted by Wilks and Iverson to show a period of nonuse. Klamert presented multiple witnesses who testified that they irrigated or saw irrigation of the Klamert place of use during the alleged period of nonuse.

While the distribution records for Flatwillow Creek do evidence a period of nonuse, the records do not credibly demonstrate nonuse on Klamert's property. The best evidence of actual use on the Klamert property is lay witness testimony, which is corroborated by expert testimony. Ultimately, the objectors failed to establish a period of nonuse.

### **FINDINGS OF FACT**

1. The primary claim challenged by the objectors is claim 41B 9166-00, which is the most senior water right on Flatwillow Creek. This claim claims a priority date of April 25, 1882, and a flow rate of 15.00 cubic feet per second (cfs).
2. All claims were decreed with two issue remarks that indicated that fewer acres were irrigated than claimed. The issue remarks did not identify abandonment as an issue.
3. Flatwillow Creek was described in testimony as "an all or nothing creek." Osborne 803:9-43. The Flatwillow Creek basin is approximately 47 miles long, 6 miles

wide, and its headwaters are in the Big Snowy Mountains. *Id.* The Big Snowy Mountains are a small area for catching and maintaining snowpack. *Id.* The Flatwillow basin can receive a large amount of precipitation, which causes extreme high flows, and the basin is susceptible to drought because it does not have a large, high elevation catchment. *Id.*

4. Klamert's claims and several others on Flatwillow Creek were decreed in the *Fraser* decree. *See Fraser v. Shields et al.*, Cause No. 764 (10th Jud. Dist., Petroleum Co., Sept. 26, 1953) (W-06, 1-14). The *Fraser* decree was a stipulated decree. *Id.* at 1. Under the *Fraser* decree, Klamert's predecessor-in-interest is the Nebraska Feeding Company (NFC).

5. NFC owned Klamert's property until 1983. W-41.<sup>1</sup> After 1983, the property was conveyed as follows:

First Continental Corporation (FCC) (owned by John Greytak)	1983-1989
Aetna Casualty and Surety Company of Illinois	1989-1994
Sunrise Farms, Inc. (f/k/a Golden Eagle Farms, Inc.)	1994-1996
Terry L. & Coral L. Langstraat	1996-1998
Gene Klamert	1998-present

*Id.*; *see also* W-11.

6. In addition to the deeded property owners listed immediately above, the Klamert property was leased to several parties, whose tenures were loosely established by testimony. W-41. Several of the lessees had knowledge of the Klamert property before and after the period in which they leased. The lessees of the Klamert property were approximately as follows:

Larry Grantier	1984-1988	(191:33-42, 198:15-26)
Coleman Murnion	1988-1992	(205:25-44, 279:39-280:8)
Mike Greytak and	1989-1992	(228:19-34)

---

<sup>1</sup> W-41 and W-41A (oversize) were exhibits produced by Wilks. Later, W-41 was reproduced by Klamert and used for demonstrative exhibits W-41B and W-41C (both oversize). Any references to the latter exhibits are Klamert exhibits, not Wilks'.

Sig Pugrud

Mark Weller (custom farmed, no lease)	1988-1993	(669:3-9)
Terry Langstraat and Gene Klamert	1993	(287:2-35)
Todd Anderson	1996-1997	(W-70; 290:27-30, 305:32-35)
Golden Eagle Partnerships	1998-2002	(289-290)
Toby Stahl	2002-2004	(352:6-31)

7. The Klamert property is sprawling. Westenberg 482:28-29; W-14 1, 3, 4; W-25. To understand specific references to fields, headgates, and ditches, it is important to understand the lay of the land. Wilks' expert witness, John Westenberg, produced the most straightforward description of Klamert's property.

8. A marked aerial photo produced during the Water Resources Survey for Petroleum County also provides a good overview of Klamert's place of use and ditches. W-14 1; Westenberg 481:25-46. Three overlays on the WRS aerial marked photo provide additional context and more clearly identify key features. *See* W-14 2-4.

9. The contested place of use lies to the southeast of Highway 244. W-14 1. Between Highway 244 and the "bottomlands," where the places of use are located, is a bluff that is approximately fifteen to twenty feet high. *Id.*; Westenberg 9-10. The bluffs slope down from Highway 244 to the bottomlands.

10. The irrigated place of use can be seen on the WRS photo. From south to north, the place of use is identified in Sections 15-16, 9-10, 2-3, and 34-35. W-14 1-4. Most of the ditches at issue were identified by the WRS and are marked on the photo. W-14 1. However, Exhibit W-14 was spliced and not all aerials were marked consistently by the WRS.

11. There are three diversions that were historically associated with the Klamert property. Those diversions are in Sections 16 (most southern), 9, and 2 (most northern). The diversions are commonly referred to in testimony by their section location, and are also used to describe the respective irrigated field (e.g., Section 16 fields). The

Section 16 diversion is shown in the bottom-left corner of the WRS aerial. W-14 1. The ditch associated with that diversion flows east and irrigates land in Sections 15 and 16. W-14 1-4.

12. The diversion for the Section 9 ditch is difficult to see on the WRS aerial. In the middle of the line between Section 9 and Section 16 the word “Creek” is written on the map. W-14 1. The Section 9 diversion is in this general area and diverts water to the north. *Id.* The Section 9 ditch is marked on the WRS aerial beginning in the NESE of Section 9. *Id.* Just to the south of where the Section 9 ditch is drawn is a field that appears to be partially irrigated. *Id.* This field is referred to as the “diamond field.” Westenberg 482:37-46. The field actually resembles more of a triangle and is clearly outlined and identified by the overlays. W-14 2-3.

13. The Section 9 ditch generally follows the toe of the slope all the way to the end of the place of use in Section 34. W-14 1. In Section 10, a small field is visible just to the north and west of the number “10.” *Id.* This field is commonly referred to as the “heart” field or “heart-shaped” field. W-14 4. The dashed line just to the north of the heart field is the “headquarters road.” W-14 1-4. The headquarters road provides access to the ranch headquarters which are in the NE corner of Section 10. *Id.*

14. To the north and east of headquarters road is the bulk of the claimed irrigated place of use, which is irrigated by the Section 9 diversion. W-14 3-4. A smaller portion of the claimed place of use, in Sections 2 and 34, was irrigated from the Section 2 diversion. W-14 4. The Section 2 diversion location is difficult to identify in the referenced photos, but the diversion is not far from the most southwestern point of the Section 2 field. *Id.*; W-14 7.

15. The last important benchmark is the Flatwillow Community Hall road, or Hall road. The road junctions with Highway 244 just to the north of the Section 34 number. W-14 1-4. The road cuts diagonally through Section 34 to the south and east, eventually making a turn due south. *Id.* The road accesses the Flatwillow Community Hall which is due east of the most southeastern point of the Section 2 field. W-14 4.

***The Water Commissioners, the Water Commissioner Records, and the Flatwillow Improvement Association***

16. Klamert’s predecessor-in-interest, NFC, was one of the primary entities to request the appointment of a water commissioner to distribute Flatwillow Creek under the *Fraser* decree. W-06 85-89. From 1980 to 2012, a water commissioner was assigned to distribute water under the *Fraser* decree. *Id.*; W-09 1-621.

17. While the water commissioner ensured priority and recorded use of water, a separate entity established by *Fraser* decree water users, the Flatwillow Improvement Association (FIA), billed users.

18. Both the water commissioners and the FIA kept records of water use on Flatwillow Creek under the *Fraser* decree. While the records ideally should mirror each other, each set of records was maintained differently.

***Water Commissioners and Water Commissioner Records***

19. The water commissioner records document *Fraser* decree water use from 1980 through 2010. W-09 1-601 (603-621 are FIA records that were filed at the district court and are not commissioner records). Most of the commissioner records were certified by the district court.

20. According to the certification stamp on the commissioner records, “certified” signifies that the commissioner records are “true and correct copies of the original, as the same appears of record [in the clerk of court’s] office.” W-09 169 (stamp appears through exhibit). The *Fraser* docket notes that the commissioner records were filed at the court but does not indicate that they were reviewed and/or approved by the district court. W-06 15-22.

21. From 1980 to 2012, eleven persons served as the Flatwillow Creek water commissioner. The water commissioners and their terms were as follows:

1980-1981	Guy Mraz Russell Knutson	(W-06 95-101)
1982-1987	Connie Zimmerman	(W-06 103-107; W-09 28-73)
1988-2000	Bill Meserve	(W-06 18-20; W-09 99-308)
2001-2002	Bob Wiltse	(W-06 20; W-09 310-406)

2003-2004	Jay Smith	(W-06 20; W-09 408-490)
2004-2006	George Dengel	(W-06 21; W-09 491-532)
2006-2010	Larry Peterson Christa Peterson	(W-06 21-22; W-09 533-610)
2011	Pam Barnett	(W-06 22)
2012	Jen Duvall	(Not in commissioner records)

22. The docket for the *Fraser* decree does not reflect that the commissioners were sworn-in every year. According to the docket, the commissioner was sworn-in by the district court in 1980-1982, 1988, 1993, 2000, 2002, 2004, 2006-2007, 2009-2010 (“continuation certificate”), and 2011. W-06 15-22. On a source that was under enforcement for 32 years, the oath of office was only administered 13 times.

23. The water commissioners generally recorded the same types of information: dates of use, water users (usually by last name or entity), measurements of flow, conversions to miner’s inches, and travel. *See generally* W-09. However, the records were not consistent among commissioners. The commissioner records do not identify the underlying claim numbers, priority dates, diversions, or *Fraser* decree names. From 2005-2011, only logs of hours worked and travel mileage were filed at the district court. *Id.* at 505-602.

24. Some commissioner records are clear and easy to decipher while others are more cryptic and chaotic. W-09 408-490 (clear records), 99-308 (chaotic records); Cawfield 425:20-38; Westenberg 615:26-29. It is not always clear what year certain records address. W-09 12-26, 333-342, 347-356, 367-384, 368-391, 396-397; Westenberg 611:27-30. To better understand the commissioner records, the objectors relied on the FIA records. Westenberg 615:31-36.

25. The records of the water commissioners were sometimes missing, not always filed at the district courthouse, and often in disarray. Duvall 15:18-33; Iverson 100:1-4; Lowry 139:14-35; Riley 950:11-42; W-10 153. It was also not uncommon for the records to be sent to the district court repeatedly or for the court clerks to not know where the records were. Duvall 14:43-15:33.

26. There were no specific rules regarding how the water commissioner should



keep their records and how often they needed to go measure water. Lund 175:44-176:7. For example, Bill Meserve did not have a reputation as a good record keeper. Lowry 150:2-11; Weller 691:17-25; Hunter 573:11-17.

27. It was possible to take water without informing the water commissioners, and water users did not always report their water use. *Id.*; Peterson 49:38-50:1; Iverson 107:33-35; Lowry 137:22-37; Lund 176:9-12; Pugrud 241, 245:15-19; Westenberg 618:1-9; Hughes 551:24-32; Weller 683:33-41.

28. A person under the *Fraser* decree could irrigate for a whole season without anyone knowing. Lund 177:28-39. Tye Lund left a headgate open for an entire season without informing the water commissioner that he took water or when he closed his gate. 178:14-27. However, failing to call in was not a typical practice, and it was likely improbable that it happened over an extended period of time. Pugrud 245:21-23; Hughes 538:17-18, 552:24-28.

29. The reporting of water use functioned on the honor system. Duvall 11:25-28; Iverson 98:10-21; Lowry 137:31-37; Lund 176:9-12. Water commissioners answered the phone when a water user reported using water, recorded that use in their records, and then were supposed to go out and measure that use of water. Peterson 33:41-44; Lund 174:33-37; Iverson 98:10-14. Water commissioners most often only documented the water that was reported to them. Duvall 26:24-31. Measurement was infrequent. *Id.*

30. It was common for water commissioners to record uses of water without measuring. Duvall 19:43-46; Lund 174:39-45; Iverson 98:16-27. Water commissioners were not required to turn diversions on or off. Duvall 20:6-21; Peterson 38:4-22; Iverson 99:33-36; Lowry 136:10-13; Lund 176:27-30. Generally, the shorter the supply of Flatwillow water, the more often commissioners were encouraged to check water use. Lowry 136:15-22.

31. Water commissioners almost never made daily trips to check diversions and measure water. Duvall 26:3-14; *see generally* W-9 (commissioner hour and mileage logs). Meserve checked diversions about once a week. W-09 105-308. George Dengel never checked diversions more than three times in a month. W-09 491-532. Some

commissioners worked hard, and others barely bothered to get out of their vehicle. Hughes 538:33-35.

32. In 2000, *Fraser* decree water users had concerns about Bill Meserve's accounting and allocation of water. The users sought the assistance of John Hunter from the DNRC and the district court. Hunter 573:11-41. Meserve was the water commissioner for 13 years of the alleged period of nonuse on Klamert's property. W-41.

33. Hunter was asked to provide technical assistance to Meserve to make sure that he accurately recorded water use. Meserve took Hunter to several of the *Fraser* decree diversions where Meserve took measurements. 574:3-27; K-6. Hunter had no knowledge of whether the visits were exhaustive or comprehensive of all *Fraser* decree diversions. 574:24-27.

34. The "Hunter Report" was created to assist Meserve, and it summarized Hunter's observations from his diversion visits with Meserve. W-12. The report details Hunter's recommendations to make the measurements for the 11 visited diversions more accurate. *Id.* The report makes one or more suggestions for nearly every one of the diversions. *Id.* None of Klamert's diversions were visited or included in the report. *Id.*; Westenberg 522:43-524:29.

35. A large percentage of the flumes were flooded so they did not measure accurately. Hunter 575:12-19. Where a flume was flooded, Meserve would measure the cross-sectional area and throw a stick or cigarette butt in the ditch to measure the velocity of the water. *Id.* Hunter was unaware if his recommendations were ever applied. 575:41-46.

36. New water commissioners received little or no training from the prior commissioner, from the FIA, or from state associated training programs. Duvall 14:25-41, 29:34-37; Peterson 37:42-38:2; W-30 49:15-21, 57:10-13, 63:12-19; Lowry 135:14-26; Lund 175:10-17. Some water commissioners were unaware of the basis for the water rights they administered. Peterson 48:7-14.

37. Calls for water were sometimes made by Flatwillow users but those calls were not reflected in commissioner records. Duvall 26:37-27:14; Peterson 47:6-37; W-09

533-620. The water commissioner records reflect that very few, if any, calls for water were actually made. Lund 177:6-9; Riley 952:5-23; *see generally* W-9.

38. Since 1992, Tye Lund had never known a water commissioner to shut down a junior user to make water available for a senior user. 180:9-16. Lund asked for water several times over the years but was told that the water would not get to him, so he quit asking. 180:18-45. John Hughes explained that he made approximately forty to fifty calls over the years. 529:17-23. The calls are not recorded. However, in one instance the commissioner shut down Iverson at the request of Hughes, but the water was turned back to Iverson because the water could not reach Hughes. 530:15-43; W-9 160.

39. Some water commissioners were aware of Klamert's rights. When Jay Smith quit as a commissioner in 2008, he penned a letter to the FIA that described some of his general observations. W-10 169. Smith explained that "Klamert has been threatening to start irrigating for a few years now...[i]f he ever does start irrigating it is going to radically change the way things are handled, with respect to other water users." *Id.* Smith was the commissioner for the last two years of the alleged period of nonuse.

40. Wilks asserted that the water commissioner records should generally identify the water right with the best priority dates. Westenberg 517:38-42. Water rights with early priority dates appear frequently in commissioner records. 518:1-13. Where Klamert's water rights do not appear, the records indicate that the junior users took water during the years of alleged nonuse. 525:31-37; W-9 105-504. Regarding the billing for water use, Westenberg explained that for most administered streams the bills come straight from the clerk of court and not a water users' association. 518:36-42.

#### *FIA Records*

41. The FIA oversaw the water commissioners. Iverson 61:4-26. The FIA used the commissioner records to generate billing records, bill the *Fraser* decree water users, and pay the commissioners. Duvall 11:35-40; Iverson 55:41-46; Westenberg 518:36-42. The FIA required all *Fraser* decree water users to pay an annual \$15.00 membership fee. W-10 130 (Bylaw 4); Duvall 11:46-12:11; Iverson 62:33-35; Lowry 126:28-30; Pugrud 234:21-24.

42. The FIA records indicate that Klamert and his predecessors often paid the FIA membership fee during the years of alleged nonuse. K-87 17; W-10 21, 22, 28, 32, 35, 39, 45, 50. However, the payment of membership fees does not equate or represent any sort of water use. Iverson 63:6-9; Lowry 128:31-33. A payment to the FIA in excess of the membership fee reflects water use. Lowry 126:32-35.

43. When compared to the water commissioner records, the FIA records are generally more organized and consistent. Starting in 1984 the FIA used a computerized table and the records of the following years are very clear. W-10 7.

44. The FIA records document many of the same elements as the commissioner records—dates of use, water users, and quantity of water used. *See generally* W-10, 1-127. The FIA records also include the rates and costs of water use, total amounts of water use, the payment of membership fees, and the payment of water use. *Id.* From 1980 to 2002, payments of fees and use were almost always documented by handwritten notes. *Id.* at 1-45.

45. The FIA recognized that there was inconsistency in water users reporting their water use to the water commissioners. Instead of informing the district court of the issue, the FIA instituted a seven-day fine to encourage water users to call and report their water use to the water commissioner. W-10 144; Lowry 137:39-46. It is not clear when the FIA instituted the seven-day fine, but it first appears in the FIA annual meeting minutes in 1998. W-10 144. According to the FIA use records, the first seven-day penalty was assessed to Iverson in 1995. *Id.* at 29. The other documented seven-day fines were all in or after 1997. W-9 219, 249, 259, 334, 342; W-10 32, 40, 44, 48, 57.

46. It was not always clear who should receive the bills from the FIA or who should pay the bills. In certain instances, there was confusion whether landowners or lessees should pay the bills, and there were issues with double billing. Iverson 86:1-87:4; Lowry 147:3-13; W-10 164. FIA bills would sometimes go to the landowner and other times go to the lessee. Iverson 86:1-13. However, Iverson opined that the landowner is the party responsible for paying the bills. 87:4.

47. The members of the FIA who testified indicated that the FIA records are

accurate reflections of their own water use. Iverson 62:2-4, 63:16-22; Lowry 126:41-128:13; Lund 159:10-24. Discrepancies did occur, but those discrepancies were minor and uncommon. Lowry 127:30-128:8. The FIA worked to correct any discrepancies found by their members. *Id.*

*Neither Klamert nor His Predecessors-in-Interest Called for Water from 1988-2004*

48. The water commissioner and the FIA records support an important fact: neither Klamert nor his predecessors reported or were billed for water use from 1988 to 2004. W-09 105-504; W-10 18-63. The objectors categorized any evidence of use outside of the commissioner or FIA records as illegal or unauthorized use. Westenberg 638:10-22.

49. Prior to the alleged period of nonuse, the water use on the Klamert property that last appears in the commissioner records was reported by Klamert's predecessor FCC in 1985. W-09 71. The next reported use of water was reported by Klamert himself in 2005, but that use is not identified in the commissioner records. The commissioner for that year, George Dengel, did not file use logs with the district court. W-09 505-519. The only records of Dengel's distribution that year are mileage logs. *Id.*

50. The FIA records similarly demonstrate that the last entry of use by Klamert's predecessors was by FCC, but that use was recorded in 1987, not 1985. W-10 16. After 1987, there are no records that water use was paid until 2005. *Id.* at 74. The FIA records are the most definitive and concise evidence of the objectors' alleged period of nonuse. However, the FIA records are only as credible as the commissioner records are. *Fraser* decree water users did not have a common understanding of the role of the water commissioners or their relationship with the FIA.

51. Since NFC owned and irrigated the property, the Klamert property changed hands multiple times and was leased several of the intervening years. It was not always the case that the current owner or lessee of the Klamert property called water use in. Pugrud 279:36-280:25. When Sig Pugrud leased the property with Greytak, they were running so much land that they did not think to make sure water was called-in or to look

for a water bill. *Id.*

52. Toby Stahl, another lessee, never heard of the FIA or knew that the water commissioner existed. 355:32-45, 364:38-41. Stahl never asked another user to turn off nor asked the water commissioner to turn another user off. 356:4-16. If water was in the creek, Stahl took water because he was aware of seniority of the water rights. 356:18-27. Stahl did not know that he had the ability to shut other Flatwillow users down, rather he believed that he could just turn the water on whenever he needed it. 367:34-43.

53. Other lessees of the Klamert property were also unaware of the commissioner and FIA. When David Grantier was on the Klamert property and assisting his dad with irrigation, Grantier never called the commissioner to report he was turning on or off. 193:12-18, 205:2-14. Grantier was also unfamiliar with the FIA. 204:42-45. Mark Weller was also not familiar with the FIA. 683:25-27, 695:22-26. Weller never called the commissioner and recalled others failing to report use to the commissioner. 683:29-39.

54. Klamert never made a call to the water commissioner for water himself, and any call on his behalf would have been by his manager. 376:37-43. Irrigators of the Klamert property just took water and did not know any better. 903:41-904:6. Klamert did not learn that Meserve was a water commissioner until 2004 when he was a member of the FIA board. 904:8-39. Klamert explained that he did not look for FIA bills, but if he received a bill, he would pay it. 903:24-42.

*Summary—Water Commissioner Records and FIA*

55. The water commissioner records and FIA records both demonstrate nonuse on the Klamert property. The FIA records show that neither Klamert nor his predecessors paid for water use from 1988 through 2004. While Klamert and his predecessors do appear in the FIA records as having paid membership fees, those fees do not amount to actual evidence of use. Both sets of records evidence nonuse, but both records are plagued by completeness and credibility concerns.

56. The water commissioner records do reflect that several of the *Fraser* decree water users diligently reported their use. Daniel Iverson is one of the best examples of

diligent water reporting. Tom Lowry, John Hughes, and Tye Lund are others. These water users each attested to the accuracy of the commissioner and FIA records. The problem, however, is that the records are only as accurate as the water use that was reported. It was possible to take water without informing the commissioner, and several lessees of the Klamert property were not aware of the water commissioner or the need to call in use.

57. Water reporting under the *Fraser* decree functioned on the honor system and was reported by phone. Once water was reported, the commissioners were supposed to measure that use. This did not occur consistently. Not only did water users fail to report, the majority of *Fraser* water use was not corroborated by the water commissioners. For example, Meserve's mileage and hour logs indicate that he went out to measure about once a week during irrigation season. Other water commissioners hardly went out.

58. The water commissioner records are likely accurate as to what each commissioner reported in their records. All they had to do was write down whatever was reported over the phone. The more important consideration is whether the commissioner records are complete. The water commissioner records are evidence of Flatwillow use but they are not exclusive, exhaustive, or the only evidence of use on the creek.

59. In addition to completeness, the commissioner records are plagued with credibility concerns. Even though the commissioner records were certified by the district court, the objectors intend to attach more weight to the word "certified" than the stamp on the records provides. The "certified" stamp merely indicates that the records are true and accurate copies of the records at the district court. *See generally* W-09. Water commissioners did not take the oath of office in most of the years that a commissioner was appointed to Flatwillow, which further erodes the consideration that the records are "certified" court records.

60. There was no established standard as to how the commissioners should keep their records and what information was required. The commissioner records vary considerably from one commissioner to another. Calls for water were also not reflected in

the records of the commissioners. Lund's attempts to make calls for water were so futile that he quit trying.

61. Water commissioners were not trained. Water users were so concerned with Meserve's water measuring that the assistance of John Hunter of the DNRC was employed. Meserve unconventionally measured water with a cigarette butt and was the water commissioner during the majority of the alleged period of nonuse.

62. One of the FIA's primary purposes was to support the water commissioner. Bills generated by the FIA were based entirely on the amounts of water reported by the commissioners. The FIA's involvement in billing is unusual. Generally, district courts bill water users directly, not an intermediate entity.

63. The FIA was aware of failures to report water use and the FIA initiated a fine to alleviate those failures. Billing discrepancies did occur and the bills were not always sent to the right persons. There was also a lack of understanding about the relationship between the FIA and the water commissioner.

64. The water commissioner records and FIA records do provide evidence of nonuse, but both suffer from completeness and credibility concerns.

#### ***Lay Witness Testimony of Actual Use on Klamert Property***

65. The parties who resided, worked, or leased the Klamert property testified to knowledge of, and particular instances of, irrigation during the alleged period of nonuse. Neither Tye Lund, Daniel Iverson, nor Tom Lowry, neighbors of Klamert, had a thorough understanding of the property or irrigation upon it.

66. Lund never visited any of Klamert's diversions and had no knowledge of where all the ditches were. 169:38-46. Iverson visited the Klamert property very few times over the years. 66:29-32. Lowry visited the Klamert property as a brand inspector, but he was not familiar with the those that lived on the Klamert property, the ditches, or irrigation practices. 128-132. The lessees that lived and worked the property were far more familiar with the Klamert property.

67. David Grantier became familiar the Klamert property from his father, the



earliest known lessee. 191:31-36. Before 1988, Grantier helped his father irrigate and hay, and Grantier ran horses on the property. *Id.*; 198:15-18. After 1988, Grantier delivered fuel to the property until 1993 or 1994. 191:31-36, 198:28-37, 202:4-9, 203:9-10. In those years, Grantier was on the property nine or ten times. 202:33-41. While delivering fuel Grantier observed water running in the Section 9 ditch where it crosses headquarters road and at Hall road. 198:28-37, 203:32-38, 204:2-6. Grantier observed water in the ditch, but he did not witness actual application of the water. 206:38-43, 207:11-13.

68. Sig Pugrud and Mike Greytak lived on the Klamert property from approximately 1989 to 1992. 228:24-30, 251:15-27. From ranch headquarters, Pugrud witnessed irrigation on the fields to the southwest, west, north. 250:43-251:3, 251:33-45. Pugrud also witnessed irrigation of the Section 2 fields toward Flatwillow Community Hall. 251:5-13. All of the ditches on the Klamert property were intact, as were most of the laterals. 252:2-5.

69. Pugrud recalled that there were ditches in place down towards the Hughes property to the southwest (Section 16 fields). 262:36-44. There were also ditches that were between Flatwillow Creek and Flatwillow Community Hall and laterals associated with those ditches (Section 2 fields). 262:41-44. Pugrud also identified and specifically recalled the Section 9 ditch. 262:15-32; W-58 Exhibit 3. Pugrud was not aware of where the headgate was for the Section 9 ditch. 263:4-11.

70. Pugrud kept very detailed records of the status of each field that they farmed. 259:17-25. Because of work done by contract labor, any work on any of the fields generated an invoice. *Id.* As part of her record keeping, Pugrud kept field status reports. A 1989 field status report states that two of their fields were listed as irrigated hay. 259:27-33, 260:22-30; W-58 Exhibit 2. Other fields that included grain and barley were irrigated as well. 260:36-43.

71. Pugrud also stated that Klamert has irrigated his property since he took over in the early 1990s. 270:44-271:13. Pugrud used, and still uses, Hall road to get to her property east of Klamert's. Right before the ninety-degree turn in the road to the south,

Pugrud regularly observed water running past Hall road from irrigation on the Klamert property. 271:15-19. The water from the Klamert property flows into a county ditch. 270:10-13.

72. Terry Langstraat lived on the Klamert property from 1993 until 1997 or 1998. During that period, Langstraat was not aware that any portion of the property was irrigated. 290:32-292:6. Langstraat and his wife farmed the bottomlands but did not irrigate. *Id.* Langstraat did not recall cleaning or fixing ditches or diversions. 302:41-44. Langstraat believed that his lessees might have irrigated, and he recalled Toby Stahl talking about irrigating the property around 1997. 324:42-325:22. Langstraat could not recall if Stahl actually irrigated. 344:9-16.

73. When Langstraat began living-on and working the Klamert property all of the ditches around the edges of the fields were intact, and Langstraat did not break up any of the main ditches. 335:32-43. The ditches were steep-banked in most areas. 338:35-43. Where the Section 9 ditch crosses under headquarters road, the ditch is a slight depression and is more level across. 338:15-33. It was easy to plow or till across that land and put the depression back in. 338:31-33. Langstraat farmed right across the ditch in that area. 339:35-46.

74. In 1993, Langstraat and Klamert leased the Klamert property with an option to buy, and in 1994 they bought the property. Langstraat 287:21-41; Klamert 872:41-873:3. A few years after the purchase, Langstraat and Klamert decided to split the property. 288:6-10. The property was appraised for Langstraat's and Klamert's loan applications. According to the December 13, 1995 appraisal, the water rights and ditches were still intact on the Klamert property. W-34 9; Langstraat 317:16-20. The appraisal indicated that the water rights were not being used at that time. W-34 3, 5, 9, 60.

75. Toby Stahl testified about his own irrigation of the Klamert property. Stahl's affiliation with the property began in 1994 when he began working for Klamert. 351:12-14. At the time, Klamert and Langstraat were partners and Stahl helped Klamert prepare for an auction. *Id.* Stahl started working for Langstraat, his father-in-law, in 1995. 351:20-23.

76. Stahl confirmed that he irrigated the Klamert property. 352:10-13. Stahl stated that he irrigated on three different occasions between 1998 and 2003 but he could not recall the specific years. 352:26-31, 363:40-364:2. Stahl irrigated the diamond field and the heart-shaped field. 352:33-353:41; W-61 12 (Exhibit 1).

77. Stahl identified the general area of the headgate he used for the Section 9 ditch. 353:15-21; W-61 12. When running water in the Section 9 ditch, the water flowing through the diversion was eighteen inches deep. 359:23-29. Stahl recalled the Section 16 and Section 2 ditches, but he did not use them. 361:25-34, 366:17-41; W-61 12; K-89.

78. Stahl successfully irrigated the heart-shaped field and recalled leaving water on overnight and flooding the field. 353:33-37. Stahl's father, Kenny Stahl, personally witnessed Stahl divert water onto the diamond field. 564:33-565:14. Kenny Stahl also recalled seeing running water reach the fields on the north side of Hall road and north of headquarters road. 565:21-25, 566:9-21.

79. Stahl's attempts to irrigate fields north of headquarters road resulted in irrigation of the heart-shaped field. 354:9-355:12, 360:3-12. One of the main factors that affected Stahl's ability to move water to the north of headquarters road in the Section 9 ditch was a damaged culvert. 360:22-26. The culvert was damaged by big equipment driving across it, which bent the end of the culvert down. 369:45-370:11.

80. Stahl explained that the Section 9 ditch ran the whole length of bottomlands. 362:23-26; K-89. The ditch was always there and Stahl farmed right beside it. 363:5-10. Closer to the driveway, the ditch looked more like a "natural ditch." 363:17-21. If the culvert under headquarters road had not been damaged, Stahl surmised that they could have got water all the way down the bottomlands. 363:25-33.

81. Klamert confirmed Stahl's—and Langstraat's—observation that the Section 9 ditch by headquarters road was a "gentle ditch" and it would be easy to pull a drill through. 385:39-386:14; 891:23-46; 926:2-7; 931:39-44. It was not uncommon for the portion of that ditch to be farmed through, and the ditch is a gentle depression that rainwater could flow through. 386:10-16.

82. John Hughes, Klamert's upstream neighbor, explained that he had

personally observed the Section 9 ditch with water in it “twenty times.” 532:25-33. To water his cattle, Hughes, Klamert, or Klamert’s predecessors had to dig the diversion dam out six to eight years out of ten because the water would freeze. *Id.* Hughes also personally saw water running in the Section 16 ditch between 1988 and 1992 (years Coleman Murnion leased). 533:2-18. Hughes was also familiar with irrigation that occurred in the fields between headquarters road and Hall road. 534:40-535:2. Hughes had not seen the Section 2 ditch used since the early 1980s. 535:22-30.

83. Hughes stated that there were no long periods of nonuse on the Klamert property. 537:2-13. The efforts to irrigate the Klamert property varied because there were so many different water users. Hughes characterized the use as “sporadic” because of the people that were there. *Id.* Some lessees cared about irrigation, others did not. *Id.* Hughes stated that Toby Stahl, Larry Grantier, Dave Grantier, Mark Weller, and Jim Connolly all irrigated. 540:12-540:4; 549:21-29.

84. Brad Kinsey succinctly and credibly testified to water use north of Hall road in 1997. Kinsey’s family leased cattle pasture just north of the Klamert property and downstream on Flatwillow Creek. 556:16-27. Kinsey remembers seeing water flowing through the Section 9 ditch, crossing Hall road, and irrigating crops on the north side of Hall road in July of 1997. 558:11-559:45. Kinsey was not sure of the type of crops, but the crops were about four feet tall. 558:22-28. Kinsey recalls the year of irrigation because it was the year he graduated high school, and he drove Hall road to visit his family’s grazing pasture once a week. 559:17-27.

85. Mark Weller moved to the Klamert property in 1988, but his knowledge of the property goes back to 1986 when he custom farmed for the Greytaks. 668:15-40. Weller lived on the Klamert property until 1993, and every year that Weller was there he saw water being used. 669:4-5, 681:26-29. The longest possible period of nonuse that Weller could recall was two to three years. 692:30-34. Weller did not specifically recollect any irrigation of the property during the mid-1990s after his last crop in 1993. 698:4-24. With one exception, Weller explained that he did not personally turn water on to irrigate the Klamert property but was aware of those who did. 694:15-18, 701:1-7.

86. Weller testified that the Grantiers and Coleman Murnion irrigated in 1989-1992. 671:25-46. Weller remembered talking to Coleman Murnion about irrigation on the Klamert property, and Weller was confident that Murnion spoke to Merserve at one point about water use. 682-683, 700:10-41. David Grantier was also sure Murnion irrigated because Grantier told Murnion where the diversions were. 205:27-40. Weller recalled that Toby Stahl irrigated. 681:41-682:24.

87. Weller recalled driving a farm road from headquarters road to Hall road and driving farm equipment through three puddles of water in the Section 9 fields. 672:35-673:43. From 1991 to 1993, the bottomlands above and below headquarters road were irrigated toward Hall road. 678:36-379:10.

88. In 1993, Aetna requested that Weller open the Section 9 ditch during a time that no water was in Flatwillow so water would flow into the ditch if an irrigator upstream ceased use. 679:12-21. Water was diverted and the diverted water “made a mess” in the fields north of headquarters road. *Id.* Weller also testified that he saw irrigation of the Section 9 field north of Hall road in the late 1990s or early 2000s. 687:35-40. Weller never saw the Section 2 diversion used. 698:38-699:5.

89. One important fact, minimally referenced, was the presence of a second culvert under headquarters road in addition to the culvert associated with the Section 9 ditch. The second culvert is closer to the ranch headquarters and took water to the Section 9 ditch. Klamert 878:24-32, 915:31-34, 924:26-36. The second culvert is identifiable on every aerial photograph showing headquarters road. Riley 962:23-38 (referencing K-22). The Section 9 culvert was replaced in 2006. 917:23-24. Prior to replacing the Section 9 culvert, Klamert explained that he repaired the culvert with an excavator and pulled the ends of the culvert up. 878:41-45.

#### *Summary*

90. Several of the lay witnesses testified to actual irrigation on the Klamert property during the alleged period of nonuse. The most important recollection is that of Brad Kinsey. Kinsey observed irrigation on the property in an area furthest from its diversion location. Kinsey observed this irrigation in 1997, which slices the alleged

period of nonuse in half.

91. Several other lay witnesses testified to actual irrigation of the Klamert property before and after 1997. The lay witnesses with knowledge of the property—although not uniform in their recollections—credibly demonstrate that water was used between 1988 and 2004. The credibility of the lay witness testimony was bolstered by Klamert’s expert witness, Tom Osborne.

***Expert Witness Testimony of Nonuse and Use on Klamert Property***

92. Three expert witnesses testified. Larry Cawfield and John Westenberg delivered their analysis and opinions regarding failures to use water. Tom Osborne presented a significant amount of evidence demonstrating use on the Klamert property.

*Larry Cawfield—Iverson’s Expert Witness*

93. Cawfield asserted that the period of nonuse on the Klamert property started in 1983 and extended through 1996. 422:37-42; I-02 3. Cawfield based his assertion of nonuse upon an affidavit provided by Klamert. 423:10-16. Cawfield’s conclusions were also based upon the absence of ditches. 429:24-35. Cawfield’s report included several photographs of Klamert’s places of use, diversions, and ditches as they appeared on a November 13, 2013 site visit. I-02 Attachment B; 401:2-10.

94. Cawfield’s recreation of historical use on the Klamert property is limited. Cawfield provides some historical context, but Cawfield primarily identifies the status quo in and around 2013 when the site visit occurred. 456:19-25. It is difficult to determine where many of Cawfield’s photos were taken and significance of what they show.

95. Cawfield asserted and explained the significance of one aerial photograph from 1996. I-2, Attachment D (August 23, 1996 photo). Cawfield identified areas where ditches were farmed over, areas where straw bales were placed out for cattle to calve, and areas of uniform coloration between areas above and below the Section 16 ditch. 421:6-422:16. Cawfield surmised that this tended to indicate that fields were not irrigated or were idle. *Id.*

96. Cawlfeld reviewed other aerial photos, but the other photos did not provide any definitive information of whether irrigation occurred. 422:26-35. Relying on a 2004 aerial photograph, Cawlfeld could only show that two small ditches were plowed in and farmed across. K-90; 442:35-443:12. Cawlfeld could not tell if the rest of the ditches were plowed in or not. 443:1-7, 460:42-461:14.

97. Cawlfeld found the affidavit of Gene Klamert of particular importance. I-2, Attachment C (April 11, 2008 Affidavit of Gene Klamert found in claim file for claim 40B 9166-00). Cawlfeld explained that Klamert described how Greytak broke-up the range land and “almost all of the hay land.” 423:10-16; K-90. Cawlfeld corroborated his observations from the 1996 photo with Klamert’s statements. Cawlfeld found that from 1983 to 1996 the fields were either idle or had ditches plowed in, and water could not be delivered to them. *Id.*

98. Cawlfeld conceded that his interpretation of nonuse from 1983 to 1996 was largely based on Klamert’s affidavit. 433:9-12, 460:27-31. The affidavit does not attest to the main ditches being torn up, does not definitively indicate that irrigation is not functional, and rather states that the system needed rebuilding. 429:37-430:9, 453:3-25.

*John Westenberg—Wilks’ Expert Witness*

99. Westenberg’s testimony primarily introduces and relies upon aerial photography. Westenberg’s analysis of nonuse is supported by the presence and absence of ditches. Westenberg’s testimony does not directly show irrigation or lack thereof. Westenberg reviewed aerial photographs from the following years: 1968, 1980, 1986, 1991, 1996, 2004-2006, 2009, 2011, and 2013. 479:27-29; W-41 (demonstrative exhibit of W-41 marked W-41A).

100. Westenberg reviewed three aerial photographs during the alleged period of nonuse, one of which was the last year of the alleged period. W-41. Westenberg admitted that the number of aerial photographs available for the area of Klamert’s place of use was limited. 607:35-37. The longest gap of aerial photos during the alleged period of nonuse is eight years. 626:8-10.

101. Each year of aerials Westenberg reviewed was a separate Wilks exhibit. *See*

W-15 through W-24. Each of the exhibits include larger overview photos and blow-ups that focus on areas associated with the Section 16, Section 9, and Section 2 ditches.

102. Westenberg observed that the Section 16 ditch was visible in multiple photos and not visible or plowed-over in multiple photos. Westenberg observed that the Section 16 ditch was in-place, intact, and/or evident in 1980, 1986, 1991, 2009, 2011, and 2013. 488-502; W-15 5; W-16 3; W-17 5; W-22 5; W-23 5; W-24 5. Westenberg explained the years that the ditch was not intact or not functional were 2004, 2005, and 2006. 494-499; W-19 5; W-20 5; W-21 5.

103. As to 1996, Westenberg stated that the ditch was plowed-up and not functional, but the close-up aerial photograph was inconclusive. 494:13-18; W-18 5. Of the years during the alleged nonuse, Westenberg concluded that the Section 16 ditch was only inoperable or non-existent in one year: 2004. 497:1-6; W-19 5. Even in that year, Westenberg noticed that the ditch was still apparent. 497:10.

104. For Section 9, Westenberg focused his analysis of the ditch in two areas: one area where the ditch crosses under headquarters road, and one just to the south of where the Section 9 ditch crosses Hall road very near Highway 244. The Section 9 ditch crosses under both headquarters road and Hall road by way of culverts.

105. Where the Section 9 ditch crosses headquarters road, Westenberg focused his analysis just to the north of the road. 489:19-21; W-14 1 (ditch marked by WRS line). Westenberg noted that the ditch north of headquarters road was visible, clear, and evident in 1980, 1986, 1991, 2009, 2011, and 2013. 488-493, 500-502; W-15 6; W-16 4; W-17 6; W-22 6; W-23 6; W-24 2. In 1996, 2004, and 2005, Westenberg noted that there was no ditch or any noticeable connection to the culvert under headquarters road to the north. 494-499; W-18 6; W-19 6; W-20 6. Westenberg stated that in 2006 water appeared to be flowing in the ditch, but Westenberg characterized the water as “vagrant” and “not of any consequence.” 500:6-12; W-21 6.

106. The quality of the 2004 and 2005 photographs are poor, which makes Westenberg’s position less convincing. Further, both photographs appear to show some semblance of a conveyance, but because of the photographic quality it is difficult to



conclusively determine. W-19 6; W-20 6.

107. Westenberg also chronicled the existence of the Section 9 ditch where the ditch approaches Hall road. The area that Westenberg analyzed is just to the south of Hall road in Section 34. 505:13-17; W-13 38-39. The Section 9 ditch was still intact and visible in 1991 and still crossed Hall road. 505:39-42; W-13 40. However, in the 1996 aerial photo, no ditch is visible and fields above and below the ditch are integrated and farmed-over. 506:9-19; W-13 41. The ditch was subsequently not visible in 2004-2006. 506-507; W-13 42-44.

108. Westenberg did not observe a ditch in the 2009 aerial photo; however, he indicated that this was when the system was being rehabilitated. 507:7-11; W-13 45. Upon close inspection, it does appear that some semblance of a ditch is visible and passes under "Section 34" on the map. W-13 45. The ditch was clearly restored in 2011, and the ditch is difficult to see in the 2013 photo but it can be identified. 507:30-32; W-13 46-47.

109. In addition to the headquarters road and Hall Road proximities, Westenberg also explained the importance of a portion of the Section 9 ditch to the north of the headquarters road culvert. Specifically, Westenberg identified an area of the Section 9 ditch that was modified to follow the "toe of the slope." 512:42-513-3; W-26 2-3. The area is clearly identified on the WRS image immediately around "NWNE." 513:32-35; W-26 2. The ditch leaves the toe of the slope, heads toward the "NWNE" label, then goes north. *Id.*

110. Westenberg observed that in 1980, 1986, and 1991, the ditch north of headquarters road by the "NWNE" label did not follow the toe of the slope. 513-514; W-26 3-5. In 1996, 2004-2006, and 2009, the ditch at the same location was not observable. 514, 515:22-25; W-26 6-10. In 2011 and 2013, the ditch is again observable but follows the toe of the slope and does not jog east toward the "NWNE" label. 514:11-515:12. Westenberg also identified this area as a potential chokepoint due to the low grade of the moved ditch. *Id.*

111. Westenberg identified Section 2 as the ditch that was least visible in aerial photography. Westenberg stated the ditch is visible in a 1980 aerial. 489-90; W-15 7. In

the 1980 photo, the origin of the ditch is difficult to clearly see, and the ditch breaks into “two prongs” or laterals to irrigate the Section 2 field. 489:40-490:3; W-15 7.

Westenberg observed that the Section 2 ditch was plowed over, not functional, and/or not visible in 1986, 1996, 2004-2006, 2009, 2011, or 2013. 490-503; W-16 5; W-18 7; W-19 7; W-20 7; W-21 7; W-22 7; W-24 3.

112. In 1991, there appears to be more than a trace of the ditch, but Westenberg believed that it was not being used because there was no evidence of irrigation immediately below the ditch. 493:18-26; W-17 7. The Section 2 ditch was not observed in the June 2013 aerial photograph, but was located at a site visit was conducted in the following November. 508:38-509:14; W-13 61-62.

113. Westenberg admitted on cross-examination that there was some limited water use in 1991. 628-629. Thus, Westenberg’s qualified period of nonuse was between 1991 or 1992 to 1997, and then from 1997 until 2004 or 2005. 629:26-27.

114. Pat Riley, a witness offered by Klamert, agreed that the irrigation system was intact and irrigation occurred in 1991. 963:24-36. Riley also agreed that the system was farmed-up in 1996. *Id.* However, Riley felt that Westenberg’s conclusions regarding 2004 were based on aerials that were unclear and of poor quality. 963:38-42. Riley’s opinions on those photos were similar to Cawfield’s.

*Tom Osborne—Klamert’s Expert Witness*

115. Tom Osborne based his opinions on several types of information: Landsat aerial images, aerial photographs, precipitation data, historical flow information, drought records, other experts’ reports, and affidavits. 804:25-32. Osborne reviewed the commissioner records and FIA records, but neither were a significant source for Osborne’s opinions. 806:14-17. Osborne’s most compelling testimony was based on Landsat images. Osborne, a hydrologist, had previous experience with Landsat in his work. 807:1-23.

116. Landsat satellites have been in operation since 1972. 808:35; K-39 1. Landsat satellites orbit the Earth every 99 minutes, complete 14 orbits a day, and cross every point on Earth every 16 days. K-39 2. The Landsat satellites collect a broad

spectrum of reflectance that can be processed for different purposes on spectral images. K-37 2; K-39 3 (Table 3); Rodriguez 747:42-748:6. Different ranges and combinations of reflectance are helpful for identifying different characteristics of vegetation. K-39 3. Landsat images are not aerial photographs, and Landsat creates more images than aerial photographs. Westenberg 607:39-43.

117. A principle use of Landsat is for water resources and water uses like irrigation and agricultural use. 808:24-25; K-39 3. Landsat is utilized in water use conflicts on the Snake River in Idaho and has been submitted as evidence in a United States Court of Appeals, Ninth Circuit, case about agriculture. 809:14-38.

118. On a Landsat image, irrigated fields have a distinctive reflectance color and pattern. According to the United States Geological Survey, the red color on infrared aerial imagery is almost always associated with live vegetation. K-45 2. The more intense the color of red, the more vigorous and dense the vegetative growth. *Id.* As vegetation growth and density decreases, the color tones shift to light reds and pinks, greens, and tans. *Id.* If the vegetative growth is low enough, the tones on the infrared image may be overcome by the tones of the soil and appear white, blue, or green. *Id.* Dead vegetation will often display as shades of greens or tans. *Id.*

119. Osborne's analyzed Landsat images from 1991 through 2009. 818:42-819:9. Osborne's analysis was intended to address the years of Westenberg's qualified period on nonuse, and the analysis was not a correlation or synchronization of any other evidence in this case. *Id.*

120. Osborne classified the various portions of Klamert's place of use based upon the diversion and identified multiple comparison and reference fields. 821:1-18; K-45 1-3. Osborne also looked for the presence of the ditches, which would reflect a red color in their vicinity if water flowed through them. 822:19-23; K-45 1. However, a ditch may have been indistinguishable if it was irrigating fields adjacent to it. *Id.*

121. For the place of use analysis, Osborne created a "hierarchy" by which Klamert's fields were compared to the primary, secondary, and tertiary comparison fields. 822:25-29; K-45 1-2. The tertiary comparison fields were Hughes' or Iverson's

fields. K-45 1.

122. Osborne produced three Landsat images for each year from 1991 to 2009. K-45 12-68. Overlaying the field designations on the Landsat images, Osborne classified each field as “red,” “grey,” or some mix in-between, such as “grey-red mottle.” 823-826; K-46 2. Osborne also applied his methodology to the ditches to determine whether the ditches were red, visible, or not visible. *Id.* During his hearing testimony, Osborne only demonstrated his analysis for one year: 1997. 823-826; *see also* K-45 A, B, D, E, F (demonstrative exhibits).

123. In each of the years of Landsat aeriels, Osborne then compared the presence of irrigation or vegetative growth (i.e., intensity of red) to the reference fields. K-45 2. Where red was detected on the Klamert field and no red or grey was detected on the reference field, an affirmative comparison was made. 825:17-41; K-45 2; K-46 1-5. An affirmative comparison equals an affirmative presence of vegetative growth—meaning irrigation was detected. Where grey was detected on a Klamert field and red detected on a reference field, a negative comparison was made—meaning irrigation was not detected on the Klamert field. *Id.* Where the observations yielded no discernable difference, Osborne concluded that the comparison was “indeterminable.” *Id.* For example, if a Klamert field was red and the comparison field was red, it was indeterminate. *Id.* However, if both fields were grey, that was a negative comparison. *Id.* The “indeterminate” status of Osborne’s analysis more closely aligns to an affirmative comparison than it does to a negative comparison. 864:17-28.

124. The outcomes of Osborne’s Landsat observations, methodology, and comparisons were summarized in two tables. *See* K-46. The longer of the two spreadsheets provides the details of analysis of each aerial photo. The shorter is a summary of the comparisons. The last four columns of the summary table are important. K-46 2 (short table).

125. For the field irrigated by the Section 2 ditch, Osborne found seven negative comparisons, seven indeterminate comparisons, and five affirmative comparisons. *Id.* For the fields irrigated by the Section 9 ditch, the comparisons were mixed. Osborne found

three to six years of negative comparisons, two to five years of indeterminate comparisons, and eight to thirteen years of affirmative comparisons. For the Section 16 field, there were seven years of negative comparisons, eight years of indeterminate comparisons, and four years of affirmative comparisons. *Id.*

126. Most importantly, except for the Section 9 field north of Hall road, Osborne found that the longest consecutive number of years with negative comparisons for all fields was two. K-46 2; 828-829. For the field north of Hall road, Osborne found a three years of consecutive negative comparisons. *Id.* Of all places of use on the Klamert property, Osborne's Landsat imagery demonstrated that the longest period of nonuse on the property was three years.

127. When the comparisons are limited to the years during Westenberg's qualified period of nonuse, all comparison numbers decrease, but not to the extent that their importance is diminished. For example, the number of affirmative comparisons for the Section 9 fields would decrease from a range of nine to thirteen to five to nine. *Id.* However, none of the figures in the "longest number of consecutive years" column for any field are affected. *Id.*

128. Osborne compared Landsat analysis to Westenberg's aerial photography analysis. 830:6-33. Osborne identified 21 instances where a Landsat image he relied upon fell within two weeks of an aerial photograph relied upon by Westenberg. *Id.* Osborne only found three instances where Osborne and Westenberg disagreed that either there was evidence of irrigation or evidence of a ditch. *Id.* Where Westenberg did not see ditch infrastructure, Osborne most likely did not identify traces of the same ditch infrastructure. *Id.*

129. During rebuttal testimony, Westenberg explained that he did not agree with the comparison fields that Osborne selected for the Section 9 fields. 1007-1019. As support for his opinion, Westenberg primarily relied on the presence of similar soil types. *Id.* However, Westenberg admitted that he had not actually looked at soil classifications or actual soil types. 1018:1-8. In general, the record contains very little to no information regarding soil types on or around Klamert's property.

### *Summary*

130. The testimony of the expert witnesses was largely contradictory. Cawlfeld analyzed the Klamert affidavit and concluded that the period of nonuse was from 1988-1996. Cawlfeld's testimony largely fails to account for historical use, or lack thereof, and merely describes the status quo based upon the 2013 site visit. Cawlfeld disagreed with Westenberg's conclusions on aerial photos after 1996.

131. Westenberg's testimony synthesized more information than any of the experts, but his conclusions are unsubstantiated. Westenberg admitted that all ditches were in place in 1991, and irrigation likely occurred on the Klamert property that year. Westenberg's observations also succumbed to the testimony of Brad Kinsey who witnessed irrigation of the field north of Hall road in 1997.

132. Westenberg's aerial photos provide insight to the general patterns of use on the Klamert property. However, during the alleged period of nonuse, Westenberg only reviewed three years of aerial photographs—1991, 1996, and 2004. Westenberg admitted that there was likely use in 1991, which leaves only two years of aerial photographic evidence to account for over ten years of nonuse. Westenberg identified issues with the ditches, but his analysis leaves the status of the irrigation unknown.

133. Lastly, the analysis and use of Landsat images relied upon by Osborne carries significant weight. Three Landsat images per year were produced from 1991 to 2004. While the images themselves do not affirmatively prove that the Klamert property was irrigated, the cumulative effect of highlighting vegetative growth credibly demonstrates that the Klamert property was irrigated between 1991 and 2004. That is not to say that each field of the Klamert property was consistently or continuously irrigated, but the Landsat images credibly establish use on the Klamert property. The results of the Landsat analysis corroborate lay witness testimony.

***BLM Stipulation***

134. The United States and Klamert filed a stipulation that resolves the United States' objections and issue remarks. *See* Stipulation (January 18, 2013). A small typographical error was discovered after the Stipulation was filed and the United States filed a correction. United States' Notice of Correction (January 25, 2013). The Stipulation only addresses the places of use.

135. To resolve the relevant objections and issue remarks, the Stipulation requestes that the maximum acres and place of use of each captioned claim be corrected as follows:

**Maximum Acres:** 807.50 731.75

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Qtr</u> <u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	64.00	NE	2	12N	26E	PETROLEUM
2	85.00	NW	2	12N	26E	PETROLEUM
3	37.00	E2SW	2	12N	26E	PETROLEUM
4	58.00	SE	3	12N	26E	PETROLEUM
5	33.00	SE	9	12N	26E	PETROLEUM
6	16.00	NE	10	12N	26E	PETROLEUM
7	4.00	NW	10	12N	26E	PETROLEUM
8	57.00	SW	10	12N	26E	PETROLEUM
9	41.00	NW	15	12N	26E	PETROLEUM
10	117.00	NE	16	12N	26E	PETROLEUM
11	31.00	NW	16	12N	26E	PETROLEUM
12	3.00	N2N2SE	16	12N	26E	PETROLEUM
13	8.50	NENESW	16	12N	26E	PETROLEUM
14	4.00	S2SESW	26	13N	26E	PETROLEUM
15	92.00	NE	34	13N	26E	PETROLEUM
16	58.00	SE	34	13N	26E	PETROLEUM
17	12.00	SW	34	13N	26E	PETROLEUM
18	<u>87.00</u>	W2	35	13N	26E	PETROLEUM
Total:	<del>807.50</del>					
1	37.00	NENW	2	12N	26E	PETROLEUM
2	44.00	S2NW	2	12N	26E	PETROLEUM
3	50.50	NE	2	12N	26E	PETROLEUM
4	37.00	W2SW	2	12N	26E	PETROLEUM
5	15.00	E2NESE	3	12N	26E	PETROLEUM
6	35.00	S2SE	3	12N	26E	PETROLEUM
7	26.25	S2SE	9	12N	26E	PETROLEUM
8	4.00	SENW	10	12N	26E	PETROLEUM
9	23.00	SW	10	12N	26E	PETROLEUM

10	19.00	NE	10	12N	26E	PETROLEUM
11	35.50	E2NE	15	12N	26E	PETROLEUM
12	130.00	NE	16	12N	26E	PETROLEUM
13	17.00	E2E2NW	16	12N	26E	PETROLEUM
14	8.50	N2N2SE	16	12N	26E	PETROLEUM
15	5.00	N2NESW	16	12N	26E	PETROLEUM
16	4.00	SESW	26	13N	26E	PETROLEUM
17	100.00	NE	34	13N	26E	PETROLEUM
18	93.00	SE	34	13N	26E	PETROLEUM
19	21.00	E2SW	34	13N	26E	PETROLEUM
20	<u>27.00</u>	NW	35	13N	26E	PETROLEUM
Total:						731.75

Stipulation 3 (aerial maps and proposed abstracts attached).

### PRINCIPLES OF LAW

1. The Montana Water Court has jurisdiction to hear all objections to preliminary decrees. Section 85-2-233, MCA.
2. The Water Court is required to resolve issue remarks. Section 85-2-248(3), MCA.
3. A properly filed statement of claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that demonstrates that the fact to be proved is more probable than not. *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.
4. Inherent in the Water Court's adjudication of existing water rights is an unlimited authority to find a water right totally or partially abandoned at any time prior to the entry of the final decree. Section 3-7-501(4), MCA. The Water Court may base a determination of abandonment on a consideration of all admissible evidence that is relevant, including, without limitation, evidence relating to acts or intent occurring after July 1, 1973. Section 85-2-227(3), MCA; *Heavirland v. State*, 2013 MT 313, ¶ 32, 373 Mont. 300, 311 P.3d 813.
5. Abandonment of a water right is a question of fact. *79 Ranch v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215, 217 (1983) (citing § 89-802, RCM (1947)).



6. A finding of abandonment requires nonuse and intent to abandon. *Heavirland*, ¶ 23 (citing *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923)). A showing of a long, continuous nonuse for a sufficient period raises the rebuttable presumption of an intent to abandon. *Heavirland*, ¶ 19 (citing *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218). If a continuous period of nonuse is shown, the burden of proof shifts to the claimant or nonuser to explain the reasons for the nonuse. *Id.*

7. Montana statute references a ten-year period of nonuse; however, the statute does not become enforceable until the Water Court issues final decrees. Section 85-2-402(2), MCA; *79 Ranch*, 204 Mont. at 434, 666 P.2d at 219. The Montana Supreme Court has recognized that ten years provides an approach for consideration of a period of nonuse consistent with the general trend and the intent of the Montana legislature. *79 Ranch*, 204 Mont. at 434, 666 P.2d at 219.

8. Intermittent periods of water use within an overall longer period of nonuse may be sufficient to rebut the presumption of abandonment. *Shammel v. Vogel*, 144 Mont. 354, 361-62, 396 P.2d 103 (1964); *Thomas*, 66 Mont. at 166-167, 213 P. at 599; *Tucker v. Jones*, 8 Mont. 225, 229-231, 19 P. 571, 572-573 (1888).

9. Abandonment is a voluntary act. *Thomas*, 66 Mont. at 167, 213 P. at 599. Courts will not lightly determine that a right has been abandoned where a right is so valuable in Montana's semi-arid region. *Id.*

10. Other than conclusive presumptions which are declared conclusive by statute, all presumptions are disputable and may be controverted. Rule 301(b)(1) & (2), Mont. R. Evid. A disputable presumption may be overcome by the preponderance of evidence contrary to the presumption. Rule 301(b)(2). Unless overcome, the trier of fact must find the assumed fact in accordance with the presumption. *Id.*

### CONCLUSIONS OF LAW

1. The commissioner records and FIA records show that water from Flatwillow Creek was not delivered to the Klamert property from 1988 to 2004. However, the veracity of the commissioner records is eroded by the incompleteness and lack of credibility. The FIA billing records are no more credible than the water

commissioner records because they rely on the water commissioner records.

2. The objectors cited to no statutory authority or caselaw to demonstrate that water use outside the purview of a water commissioner is not valid water use. The water commissioner records were created within the commissioners' official regularly performed duty, and the water commissioners records do reflect uses of water under the *Fraser* decree. However, the distribution of Flatwillow was incomplete and inconsistent.

3. Each water commissioner maintained their records differently, and water commissioners were not trained. Water commissioners did not regularly or consistently measure water once it was reported. Because distribution of the *Fraser* decree functioned on an honor system, the only uses of water that were recorded were the uses that were reported. The better evidence of water use on the Klamert property is lay witness and expert testimony.

4. Substantial and credible evidence was presented that demonstrates that a continuous period of nonuse on the Klamert property did not occur sufficient to shift the burden of proof to Klamert. Multiple lay witnesses observed irrigation of the Klamert property during the alleged period of nonuse. While specific acts of irrigation were questioned, the Landsat aerial images provide an independent source of evidence that accurately corroborate that there was no continuous period of nonuse as alleged by the objectors.

5. The Stipulation between the United States and Klamert should be accepted and applied by the Court. The Stipulation reduces the maximum acres and places of use to all claims and resolves all issue remarks.

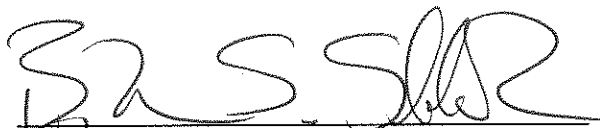
### **RECOMMENDATIONS**

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the issue remarks be removed and the corrections listed in Findings of Fact No. 135 be applied to all captioned claims.

Post decree abstracts of the water right claims addressed in this Order are attached

to confirm that the above corrections have been made in the state's centralized water right record system.

DATED this 13<sup>th</sup> day of June, 2017.



Benjamin S. Sudduth  
Water Master

Jo Messex Casey  
Hendrickson Law Firm PC  
PO Box 2502  
Billings, MT 59103  
(406) 245-6238  
jo@hendricksonlawmt.com

Roselyn Rennie  
Office of the Billings Field Solicitor  
2021 4th Ave. North, Suite 112  
Billings, MT 59101  
(406) 247-7545  
roselyn.rennie@sol.doi.gov

James A. Hubble  
Hubble Law Firm, PLLC  
PO Box 556  
Stanford, MT 59479  
(406) 566-2500  
hrp@hubblelandandlaw.com

Abigail R. Brown  
**Farve & Brown Law, PLLC**  
**1276 N 15<sup>th</sup> Ave, Ste 104**  
**Bozeman, MT 59715**  
**(406) 457-5494**  
**(406) 206-5165**  
**office@farvebrownlaw.com**

John William Tietz III  
Browning Kaleczyc, Berry & Hoven PC  
PO Box 1697  
Helena, MT 59624  
(406) 443-6820  
john@bkbh.com

**NOTE: Service List updated 6-12-17.**