

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)  
PRELIMINARY DECREE

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CLAIMANT: City of Bozeman

OBJECTORS: City of Bozeman; Lyman Creek LLC; Trout  
Unlimited

NOTICE OF INTENT TO APPEAR: City of Three Forks

**CASE 41H-0049-R-2021**

41H 140882-00

41H 140883-00

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

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the 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 RECOMMENDING SUMMARY JUDGMENT FOR  
LYMAN CREEK LLC, DENYING SUMMARY JUDGMENT FOR CITY OF  
BOZEMAN**

**BACKGROUND**

This case centers on a dispute over the City of Bozeman’s (“Bozeman”) water rights in Lyman Creek. On July 11, 2024, Trout Unlimited (“TU”) filed a Motion for Summary Judgment. Dkt. 105. On July 12, 2024, Lyman Creek, LLC (“Lyman”) filed its Motion for Summary Judgment. Dkt. 107. On August 28, 2024, Bozeman filed its joint response to Lyman and TU’s Motions for Summary Judgment as well as a Cross-Motion for Partial Summary Judgment. Dkt. 113. On September 3, 2024, Lyman filed its response to TU’s Motion for Summary Judgment, Dkt. 120. Lyman and TU claim Bozeman abandoned its surface water rights in favor of groundwater use, while Bozeman asserts its rights are preserved under historical decrees and statutory protections. Bozeman also seeks partial summary judgment affirming its rights and challenges TU’s standing to participate in the case.

**STANDARD OF REVIEW**

Summary judgment is proper only when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620, [citing M. R. Civ. P. 56(c)]. To determine the existence or nonexistence of a genuine issue of material fact, the Court looks to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Lee v. USSA Cas. Ins. Co.*, 2001 MT 59, ¶ 4, 304 Mont. 356, 22P.3d 631. All reasonable inferences that might be drawn from the offered evidence will be drawn in favor of the party opposing the summary judgment motion. *Lee*, ¶ 17. The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *Lee*, ¶ 25. Where the moving party is able to demonstrate that no genuine

issue as to any material fact remains in dispute, the burden then shifts to the party opposing the motion. *Lee*, ¶ 26.

To raise a genuine issue of material fact, the party opposing summary judgment must present material and substantial evidence rather than merely conclusory or speculative statements. *Lee*, ¶ 26. The power of the Court to render summary judgment in favor of the moving party includes the power to render summary judgment for the non-moving party provided the case warrants that result. *Hereford v. Hereford*, 183 Mont. 104, 598 P.2d 600 (1979).

### **ISSUES**

1. *Does the Water Court have jurisdiction to determine the source of these water rights?*
2. *Have Bozeman's Lyman Creek surface water rights been abandoned or not perfected?*
3. *Should Bozeman's Motion to Amend be granted?*
4. *Does Trout Unlimited have standing?*

### **UNDISPUTED FACTS**

The evidence establishes the following undisputed facts regarding Bozeman's historical water usage and transition to groundwater systems:

1. Lyman Creek flows in a southern direction out of the Bridger Mountains to its confluence with Bridger Creek, northeast of Bozeman, Montana.
2. Water right claims 41H 140882-00 and 41H 140883-00 appeared in the Gallatin River (Basin 41H) Preliminary Decree issued on October 11, 2018. The claims are based on statements of claim filed by Bozeman on April 27, 1982.
3. The Preliminary Decree describes claim 41H 140882-00 as a decreed right to use surface water from Lyman Creek for municipal purposes with a priority date of September 1, 1864. The claim has a flow rate of 3.75 cfs and a volume of 2,740 acre-feet.
4. The Preliminary Decree describes claim 41H 140883-00 as a decreed right to use water from Lyman Creek for municipal purposes with a priority date of May 1, 1881. The claim has a flow rate of 2.20 cfs and a volume of 1,606.00 acre-feet.

5. Claims 41H 140882-00 and 41H 140883-00 share a point of diversion. The Preliminary Decree abstracts describe the point of diversion for the claims as follows:

Source Name:	LYMAN CREEK					
Source Type:	SURFACE WATER					
Point of Diversion and Means of Diversion:						
<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SW	28	1S	6E	GALLATIN
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	HEADGATE					
Period of Use:	JANUARY 1 TO DECEMBER 31					

6. The water rights reflected by claims 41H 140882-00 and 41H 140883-00 were the subject of a decree in *Creek v. Bozeman Water Works Co.*, Case 1707 (April 21, 1896) (“1707 Decree”). Defendant Bozeman Water Works Co. was a successor to L.B. Lyman. Bozeman is the successor to Bozeman Water Works Co. (“BWWC”). The 1707 Decree requires Bozeman to pass 8.6 miners' inches (approximately 0.215 cubic feet per second) downstream during periods of high flow exceeding 5.95 cfs.

7. Claims 41H 140882-00 and 41H 140883-00 divert water from Lyman Creek to supply water to Bozeman’s municipal water system. Bozeman historically diverted surface water from Lyman Creek to fill the Lyman Creek Reservoir, a buried storage tank constructed in the early 1900s. Bozeman used a stream intake diversion structure, located in the SW of Sec 28, T1S, R6E, to divert surface water into a reservoir pipeline to fill the reservoir. Dkt. 108, Ex. KK.

8. Lyman Creek was Bozeman’s first municipal water source; Bozeman purchased the Lyman Creek system and associated water rights from BWWC on January 16, 1899. The Lyman system was operated until 1989 by fully opening the surface headgate diversion and delivering the maximum amount of available flow to the reservoir for the purpose of maintaining storage and pressure head necessary for fire protection and water supply to the City of Bozeman. Bozeman’s SOF.<sup>1</sup>

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<sup>1</sup> Bozeman’s Statement of Facts (“SOF”) is referenced and incorporated in its Combined Response and Cross Motions for Orders Granting Partial Summary Judgment and Dismissing Trout Unlimited for Lack of Standing. The SOF were originally in Bozeman’s Motion to Amend.

9. Between 1900 and 1989 Bozeman made various improvements and developments of the Lyman Creek water.

10. In 1949, Bozeman had a report prepared regarding the expansion of Bozeman's other water rights to keep up with population growth. The report recommended reservoir improvements to protect the water quality of Lyman Creek, but not expansion. Dkt. 54 at 15-23.

11. There were several more plans and studies conducted by Bozeman which led to several improvements to the Lyman Creek system through 1973.

12. In 1957, the City acted on recommendations in the Preliminary Studies by constructing the Lyman booster station at Pear Street. Heaston Aff., ¶ 17. The City began using the Lyman booster station to "push" additional Lyman Creek water into the southside pressure zone, which allowed the City to overcome storage limitations and consistently use the entire flow of Lyman Creek during high water. Heaston Aff. Bozeman's SOF.

13. A report called the City of Bozeman Municipal Water Inventory was prepared by Bozeman staff in September of 1983. Regarding the Lyman system, staff noted that the existing capacity of the booster station (170 MI) limited Bozeman's ability to access Lyman Creek water for service outside the northern gravity flow area. Staff also noted Bozeman was in the process of evaluating measures to protect water quality in Lyman Creek. Dkt. 108, Ex. M at 2.

14. The phased improvements constructed between 1989 and 1991, were largely in response to the Safe Drinking Water Act and included a floating reservoir cover, upgraded chlorine treatment, and a reservoir inlet control structure. The last remaining portion of the dual 12" pipe was replaced with 16" pipe, and a new upstream surface diversion was added and connected to the system by a 16" pipe. In 1991, a spring diversion consisting of two subsurface spring collectors was completed. Presently, the spring diversion is Bozeman's primary "Lyman Creek diversion." The spring source is classified as groundwater not under the influence of surface water and thus does not

require filtration. The existing plant treats water from the spring diversion with chlorine and fluoride before it enters the reservoir. Bozeman SOF ¶ 25.

15. On March 21, 1991, Bozeman filed a change application with the Montana Department of Natural Resources and Conservation (“DNRC”) to add three new points of diversion to claims 41H 140882-00 and 41H 140883-00. Dkt. 117, Ex. 2. The application requested to install two subsurface spring boxes twenty feet below the ground in the S2NESE of Section 21, T1S, R6E, Gallatin County, as well as another surface diversion in the NWNENE of Section 28, T1S, R6E. The combined flow rate of the claims would remain at 5.95 cfs and the two spring boxes would be used as the primary points of diversion to fill the Lyman Creek Reservoir. Bozeman stated it intended to use its surface water diversions in Section 28 for backup/emergency purposes only. Bozeman did not seek to change the source of the claims from surface water of Lyman Creek to groundwater.

16. On November 22, 1991, the DNRC authorized Bozeman’s change application. Dkt. 114, Ex. A. The DNRC authorized the installation of the two subsurface spring boxes and the additional surface water diversion. The DNRC authorized making the two spring boxes the primary points of diversion for claims 41H 140882-00 and 41H 140883-00 and retaining the surface water diversions for emergency/backup purposes.

17. In 2009, a third spring collector was added to Bozeman’s primary diversion. Lyman Creek between the spring diversion and Bozeman’s historical surface headgate is known to be a gaining reach. Water entering the Creek in that reach is not available for diversion at the spring. The third collector was added to capture spring water that was getting around the two original collectors and flowing past the lower surface POD. Bozeman SOF ¶ 29.

18. Since installing the subsurface spring boxes, Bozeman has not used or maintained the surface water diversion infrastructure. In the 2005 City of Bozeman Water Facility Plan, Bozeman stated that “In 1990, the Lyman surface Creek surface water diversions were abandoned in favor of subsurface spring collection.” Dkt. 66, Ex. T. Bozeman’s expert, Brian Heaston, reported the surface diversion located in the SW of

Section 28 is not currently connected to the Lyman Creek Reservoir and would require excavation and installment of a pipe. Dkt. 66, Ex. E. Mr. Heaston also reported that the newer surface diversion located in the NWNENE of Section 28 cannot be used while the spring boxes divert water due to elevation differences and Bozeman has never used this surface water diversion since its installation in 1991, even when the spring boxes are offline. *Id.*

19. In recent years, Bozeman has undergone significant growth planning efforts, including plans to improve its municipal water infrastructure within the Lyman Creek drainage. In late 2020, Bozeman applied for an American Rescue Plan Act (“ARPA”) grant to renovate the subsurface spring box diversion system and the Lyman Creek Reservoir. Bozeman presented no plans to maintain, improve, or reconnect the surface water diversions on Lyman Creek and it ultimately did not perform any improvements to the surface water system. Dkt. 108, Ex. KK and LL. Moreover, according to Bozeman’s December 2023 Capital Improvements Program for Fiscal Years 2025-2029, Bozeman anticipates spending \$19,804,000 on the Lyman Creek Reservoir and the transmission line, but nothing to maintain or connect the historical surface water diversions. Dkt. 108, Ex. MM.

20. Currently, the Lyman Creek spring system contributes approximately 15-20% of Bozeman’s annual municipal water supply. Dkt. 108, Ex. LL.

21. Prior to the 1991 transition to spring boxes, the maximum recorded yield from Lyman Creek was 1,453 acre-feet per year. Doc. 66, Ex. E.

22. Bozeman has no significant diversion records prior to 1973 documenting flows exceeding 5.95 CFS from Lyman Creek. Dkt. 66, Ex. Y.

23. Bozeman’s current groundwater collection system yields approximately 1,280 acre-feet annually. Dkt. 66, Ex. O.

## **DISCUSSION**

1. *Does the Water Court have jurisdiction to determine the source of these water rights?*

The Court acknowledges that questions have been raised regarding whether the spring boxes installed by Bozeman are hydrologically or legally connected to Lyman Creek.

The Montana Water Use Act instructs the Water Court to adjudicate water rights as they "would be protected under the law as it existed prior to July 1, 1973." Sections 85-2-102(13) (defining "existing right"); *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 17, 833 P.2d 1120 ("upon passage of the general statewide Water Adjudication Act, the legislature directed the adjudication of all 'existing' water rights and specifically identified those rights as those in existence prior to July 1, 1973"). Rule 19, W.R.Adj.R.

The Montana Water Use Act authorizes DNRC to process and approve applications for post-1973 changes to existing rights. Section 85-2-402, MCA. When a DNRC change is approved prior to issuance of a decree, the Court's post-decree abstracts do not reflect the change authorization because the change authorization describes post-1973 water use. Water Court orders do not negate changes DNRC approved before the Court decreed a claim. However, the statute does not provide a mechanism for the Court to incorporate DNRC-approved changes in the elements described in the post-decree abstract of a claim. To minimize confusion, the Court's practice is to reference change authorizations in information remarks that remain on a claim abstract until a final decree is issued. *In re Fairchild*, 2023 Mont. Water LEXIS 860.

The Water Court's jurisdiction is limited to adjudicating water rights as they pertain to historical and decreed sources as they existed to July 1, 1973. Determinations regarding the classification of spring boxes as either groundwater or surface water diversions fall under the jurisdiction of the DNRC and other regulatory authorities for any post-1973 changes.

The Court expressly declines to address whether the spring boxes constitute a continuation of Bozeman's historical Lyman Creek water rights. Any challenges concerning the nature or classification of these diversions must be pursued through appropriate administrative or regulatory processes.



The Court only has the ability to adjudicate claims 41H 140882-00 and 41H 140883-00 as decreed in the 41H Preliminary Decree as they existed prior to 1973. The point of diversion and source listed on these claims in the Preliminary Decree are identical for each claim and as follows:

Source Name:	LYMAN CREEK					
Source Type:	SURFACE WATER					
Point of Diversion and Means of Diversion:						
<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SW	28	1S	6E	GALLATIN
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	HEADGATE					
Period of Use:	JANUARY 1 TO DECEMBER 31					

2. *Have Bozeman’s Lyman Creek surface water rights been abandoned?*

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. Neither an intention to abandon nor nonuse is sufficient. The union of both is indispensable to constitute abandonment. *Thomas*, 66 Mont. at 167. There is no enforceable statute defining the length of non-use required to establish a presumption of abandonment. Section 85-2-404(2), MCA. References a 10-year period of nonuse but does not become enforceable until the Water Court issues final decrees. Section 3-7-502, MCA, states, “Whenever a question arises concerning which water judge shall preside over the adjudication of a matter concerning a case certified to the court under 85-2-309 or the determination and interpretation of existing water rights, the question shall be settled by the water judges involved.”

Nine years of non-use is "certainly very potent evidence, if it stood alone, of an intention to abandon." *Smith v. Hope Mining Co.*, 18 Mont. 432, 438, 45 P. 632, 634 (1896). An approximately 23-year period of non-use raised a rebuttable presumption of abandonment in *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 16, 833 P.2d 1120, 1123 (1992). In *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 56, 375 Mont. 327, 328 P.3d 644, a period of non-use ranging from 18 to 29 years was sufficient to raise a presumption of abandonment. In 79

*Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983), a 40-year period raised a presumption of abandonment, and in *Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist.*, 185 Mont. 409, 424, 605 P.2d 1060, 1069 (1980) it was 75 years.

Although Bozeman has provided few records of water use prior to 1973, the facts are disputed regarding whether and how much Lyman Creek water was used historically. It is undisputed, however, that since 1991, Bozeman has ceased maintaining and utilizing its historical surface water diversion infrastructure for municipal use. Specifically, the evidence establishes that:

- a. The historical surface water system was disconnected upon installation of spring collectors in 1991.
- b. Bozeman has neither maintained, repaired, nor utilized the historical surface water diversion system or its temporary replacement for municipal or emergency purposes since 1991.
- c. Bozeman has shown no concrete evidence for plans, funding, or procedures to restore or re-engage its historical surface water diversions.

To be successful in its motion for summary judgment, Lyman must establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Lyman has established that there is no genuine issue of material fact concerning whether claims 41H 140882-00 and 41H 140883-00, as they existed prior to July 1, 1973, were abandoned. Based on the Bozeman's own statements, these surface water point of diversion has not been used since 1991.

Lyman has successfully shifted the burden to Bozeman to raise a genuine issue of material fact. Bozeman has failed to put forth any evidence of use.

In this case, it is undisputed that the surface water points of diversion have not been used since at least 1991. Thirty-three years of nonuse creates a rebuttable presumption of abandonment. "To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope." *79 Ranch*, 204 Mont, at 433, 666 P.2d at 218. Owners of

water rights rarely acknowledge intent to abandon their claims, and intent can therefore be difficult to prove. Accordingly, "intent need not be proved directly but may be inferred from all the circumstances of the case." *Denver by Board of Water Comm'rs v. Snake River Water Dist.*, 788 P.2d 772, 776 (Colo. 1990). "[S]tatements of intent by the owner of the water rights are insufficient by themselves to rebut a presumption of abandonment." *Beaver Park Water, Inc., v. City of Victor*, 649 P.2d 300, 302 (Colo. 1982).

Bozeman's 1997 Water Facility Plan identified no diversion records "have been kept for the Lyman Creek Reservoir spring box supply since these sources were developed and the supply line extended in 1988 and 1990." Dkt. 108, Ex. P. Bozeman's March 9, 2001 Lyman Creek Additional Spring Development Technical Memorandum No. 5 identified that Bozeman's "conversion from surface to ground water required [the two existing stream diversion structures . . . originally used to divert surface water into the reservoir pipeline] be physically disconnected from the pipeline." Dkt. 108, Ex. R.

Since installing the subsurface spring boxes, Bozeman has not used or maintained the surface water diversion infrastructure. In the 2005 City of Bozeman Water Facility Plan, Bozeman stated that "In 1990, the Lyman surface Creek surface water diversions were abandoned in favor of subsurface spring collection." Dkt. 66, Ex. T. Bozeman's expert, Brian Heaston, reported the surface diversion located in the SW of Section 28 is not currently connected to the Lyman Creek Reservoir and would require excavation and installment of a pipe. Dkt. 66, Ex. E. Mr. Heaston also reported that the newer surface diversion located in the NWNENE of Section 28 cannot be used while the spring boxes divert water due to elevation differences and Bozeman has never used this surface water diversion since its installation in 1991, even when the spring boxes are offline. *Id.*

Bozeman has repeatedly stated that the surface water points of diversion are intended for emergency use, but there have been no documented instances when the use was contemplated. There were no criteria for when the surface water diversion would be used. Bozeman's own expert stated that if there were a catastrophic failure of Bozeman's other water sources, it would require someone to "excavate the ground to install a

segment of pipe to connect the point of diversion to the supply pipeline to the reservoir.” The fact is that the headgate diversions are not currently connected and would require significant groundwork to do and the installation of a pipe. Furthermore, Bozeman’s “intent” to use the Lyman Creek surface diversion for emergency purposes is not supported by any funding, infrastructure, planning, or maintenance.

### Growing Communities Doctrine

The requirement that a water right be used diligently represents a problem for municipalities, which are often unable to fully use their rights within the time frames applied in abandonment cases. Uncertainty created by the threat of loss makes it difficult for cities to plan for and meet future water demands.

The growing communities doctrine has effectively been codified by Montana’s Legislature. Section 85-2-227(4), MCA creates protections for cities that have not fully used their rights:

(4) In a determination of abandonment made under subsection (3), the legislature finds that a water right that is claimed for municipal use by a city, town, or other public or private entity that operates a public water supply system, as defined in 75-6-102, is presumed to not be abandoned if the city, town, or other private or public entity has used any part of the water right or municipal water supply and there is admissible evidence that the city, town, or other public or private entity also has:

(a) obtained a filtration waiver under the federal Safe Drinking Water Act, 42 U.S.C. 300(f), et seq.;

(b) acquired, constructed, or regularly maintained diversion or conveyance structures for the future municipal use of the water right;

(c) conducted a formal study, prepared by a registered professional engineer or qualified consulting firm, that includes a specific assessment that using the water right for municipal supply is feasible and that the amount of the water right is reasonable for foreseeable future needs; or

(d) maintained facilities connected to the municipal water supply system to apply the water right to:

(i) an emergency municipal water supply;

(ii) a supplemental municipal water supply; or

(iii) any other use approved by the department under Title 85, chapter 2, part 4.

Under this statute, a city or town may create a presumption that its water rights have not been abandoned if it has used any portion of its water right and met any one of the four criteria in subsections 4(a) through 4(d). *City of Helena v. Community of Rimini*, 2017 MT 145, ¶ 23, 388 Mont. 1, 397 P.3d 1.

[The] purpose of the doctrine, as it was developed in Colorado, was to "assure an adequate [water] supply to the public which it serves" and, according to that state's highest court, "it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time."

*Id.* at ¶ 37 (Citing *Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836, 841 (1939)).

Bozeman asserts that it has met criteria under b, c, and d; however, the Court disagrees with this assessment. Bozeman has not acquired, constructed, or regularly maintained the surface water diversion or conveyance structures for the future municipal use of the water right. It has buried the diversion and does not have a pipeline connection to convey the surface water to the reservoir. Bozeman has conducted several studies regarding its water rights, however none until 2001 included a specific assessment that using the surface water of Lyman Creek for municipal supply is feasible nor do the studies address the Lyman Creek surface measurements or requirements for reasonable or foreseeable future needs.

The referenced 2001 report examined the feasibility of combining all three PODs (Dkt. 108, Ex R), to overcome barriers to using all of the diversions at one time, among other things. A draft supplement to the application explained the diversions were not designed to be used at the same time because of the pressure differences caused by elevation. Dkt. 113.

Bozeman argues that it is comparable to *City of Helena* because it has reserved its Lyman Creek surface water for emergencies. 2017 MT 145, 388 Mont. 1, 397 P.3d 1. However, *City of Helena*, is distinguishable where within twenty years of purchasing the underlying water rights, it upgraded the capacity of the system for future municipal use and maintained an old diversionary structure for emergency fire use according to the

city's own fire records. Bozeman has no actual emergency plan or record for use of the disconnected, unmaintained diversions.

Instead, Bozeman abandoned its previous surface water system and installed a new groundwater system rather than spending money to upgrade the water treatment facilities and testing of the surface supply. *See City of Helena* ¶ 26 (where the Court determined Helena's installation of a large pipeline "was planning for future growth; otherwise [Helena] could have saved taxpayer money by constructing a smaller diversion pipeline").

The undisputed facts indicate that Bozeman has abandoned its Lyman Creek surface rights. That portion of these claims should be dismissed.

#### Limitation of Volume Based on Abandonment

Given the Court is unable to make changes to the volume as it stands under the Change Authorization version of the abstract, this matter will be referred to DNRC to determine how the abandonment of the surface water POD on Lyman Creek will affect the claims' total volume. The Post Decree Abstracts will have the volume and point of diversion removed from the claims with this remark added under those elements:

THIS PORTION OF THE WATER RIGHT HAS BEEN ABANDONDED. THE WATER RIGHT WAS SUBJECT TO A CHANGE APPLICATION APPROVED BY THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION. THE MONTANA WATER COURT DID NOT INCLUDE THE CHANGES APPROVED BY THE DEPARTMENT IN THE DECREE OF THIS WATER RIGHT.

#### *3. Should Bozeman's Motion to Amend be granted?*

Bozeman has moved to amend its claims to consolidate its asserted water rights under the 1707 Decree and to generate implied claims based on anticipated future municipal needs. Upon review of the evidence and arguments presented, the Court denies Bozeman's motion. These requests are incompatible with the Court's prior findings of abandonment regarding Bozeman's surface water rights on Lyman Creek. The following findings and analysis support this determination:

#### Amendment to Consolidate Rights

Bozeman's proposed amendments to consolidate and expand its claims are inconsistent with the established abandonment of its historical surface water points of diversion. The evidence demonstrates that Bozeman ceased using and maintaining its surface diversion infrastructure in 1991, transitioning entirely to groundwater collection via spring boxes. This marked the beginning of the Bozeman's abandonment of its surface water rights.

Under Montana law, amendments may not be used to revive abandoned rights. As correctly argued by Lyman, a water right that has been abandoned cannot serve as the basis for an amended or consolidated claim. Bozeman has failed to provide evidence of continuous use or an intent to resume use of its surface water rights. Bozeman's decades-long non-use of its surface water diversions precludes any amendment to expand or consolidate these rights.

#### Implied Claims for Future Needs

Bozeman also seeks to establish implied claims under the growing communities doctrine to address potential future municipal water demands. However, the evidence does not support the existence of any other water rights associated with Lyman Creek beyond the historically documented uses.

The court must guard against abuses of such unjust expansions, requiring any claimant to prove three elements. *See In re Adjudication of the Existing Rts. to the Use of All the Water*, 2004 Mont. Water LEXIS 2, 4–7. The claimant must “(1) show evidence of two or more water rights in the original claim form or the material submitted with the claim form; (2) show evidence of historic use corroborating the implied claim; and (3) avoid causing a change to historic water use or increase the historic burden to other water users.” *Open A Ranch Inc. v. Clark Canyon Water Supply Co.*, 2020 Mont. Water LEXIS 356, 54-55; *In re Foss*, 2013 Mont. Water LEXIS 17, 31.

Implied claims under Montana law must be rooted in historical use that predates July 1, 1973. They cannot arise from rights that have been abandoned. Bozeman's failure to utilize its historical surface water system or maintain the infrastructure for decades negates its argument that it relied on Lyman Creek for its municipal water needs.

Moreover, the Court cannot grant implied claims for water sources that have been abandoned. Bozeman's reliance on its groundwater collection system and its lack of investment in maintaining its historical diversion infrastructure further preclude the validity of any implied claims tied to Lyman Creek. Bozeman has failed to establish either a legal or factual basis for asserting implied rights to the water at issue.

Without some substantial evidence that Bozeman used more than its claimed and decreed water right allowed, this court cannot recognize an implied right that may only exist in the future, over 128 years after its first purported use and 52 years after filing its statements of claim. Bozeman has yet to produce any evidence that it diverted more than its decreed rights. Indeed, Bozeman's own statements indicate that they never fully diverted their rights. Bozeman's Motion to Amend should not be granted.

#### 4. *Does Trout Unlimited have standing?*

Bozeman challenges TU's standing to participate in the case, arguing TU has not made any showing of injury to any protected property interest or that one or more of its members would have standing in their own right. TU asserts that it has demonstrated its standing by filing a timely objection to Bozeman's motion, specifying its ownership interests in water rights in the basin, and outlining its history of participation in Gallatin water management issues.

The Montana Supreme Court has concluded that participation as an objector in a case turns on whether an objector has "good cause" to object to a claim. *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 34, 361 Mont. 77, 255 P.3d 179. It based this conclusion on § 85-2-233(1)(a), MCA, which provides that the Water Court must hold a hearing for any objection "with good cause shown." "Good cause shown" means "a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree." Section 85-2-233(1)(b), MCA.

The Montana Supreme Court has also stated that when a person does not have an ownership interest in water, it "will not interpret § 85-2-233, MCA, to deny a party's ability to be heard where that party has met all common law and statutory requirements



for standing to object to a preliminary decree and has shown that its interest in the use of water ‘has been affected by the decree.’” *Mont. Trout Unlimited*, ¶ 33.

Under common law, the question of standing is whether a litigant is entitled to have the court determine the merits of a particular dispute. *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 118 (1997). Standing resolves the issue of whether the litigant is a proper party to seek adjudication of a particular issue, not whether the issue is justiciable. *Helena Parents Comm. v. Lewis and Clark County*, 277 Mont. 367, 371, 922 P.2d 1140, 1142 (1996). The test of standing is that the complaining party must clearly allege past, present or threatened injury to a property or civil right, and the alleged injury must be distinguishable from the injury to the public generally, but it need not be exclusive to the complaining party. *Stewart v. Board of County Comm'rs*, 175 Mont. 197, 201, 573 P.2d 184, 186 (1977); *Aspen Trails Ranch v. Simmons*, 2010 MT 79, ¶ 37, 356 Mont. 41, 230 P.3d 808.

Bozeman asserts that TU has failed to show that any of its members have standing to participate in their own right in this case, comparing the evidence pleaded in TU’s objection to the motion to amend and motion for summary judgment to that in *Mont. Trout Unlimited*. In *Mont. Trout Unlimited*, TU provided affidavits in which the Water Court found “had demonstrated personal environmental and recreational interests in the Big Hole River basin; that these interests were distinct from those of the public at large; and that these interests could be adversely affected by the temporary preliminary decree.” *Mont. Trout Unlimited*, ¶ 28.

The holding in *Mont. Trout Unlimited*, establishes that “good cause” under § 85-2-233(1), MCA., does not necessitate ownership of a water right when the party can meet the common law requirements for standing as well as the statutory requirements to participate in an adjudication case as an objector. *Id.*, ¶ 33; *see also, Mont. Trout Unlimited v. Mont. Dep't of Nat. Res.*, 2025 MT 1, 420 Mont. 85, 561 P.3d 995, (M. McGrath, concurring) (stating that common law standing requirements and compliance with statutory requirements confers a right to participate in an adjudication hearing). The Supreme Court further stated that broad rights of participation are important in the

adjudication of water in Montana, particularly because the State owns the waters of Montana in public trust as a resource for its people. *Id.*, ¶ 41. Regardless, § 85-2-233(1), MCA., clearly states ownership of a water right is “good cause.” TU owns two water rights and numerous instream flow leases in the Gallatin River Basin that are downstream of claims 41H 140882-00 and 41H 140883-00. Dkt. 92. Therefore, TU has shown good cause.

Furthermore, in its objection to Bozeman’s motion to amend, TU alleged that its water rights and instream flow leases are located on Bridger Creek and the East Gallatin. Dkt. 92. It therefore has also alleged a threatened injury to its property that is distinguishable to the public but not necessarily exclusive to itself.

The Water Court broadly construes the standing requirements set forth in *Mont. Trout Unlimited*. In recent years, TU’s standing has been questioned numerous times. The Water Court has consistently ruled that TU has standing. *See Melin v. Trout Unlimited*, 2025 Mont. Water LEXIS 69; *In re Trout Unlimited*, 2024 Mont. Water LEXIS 609; *360 Holdings LLC v. Trout Unlimited*, 2024 Mont. Water LEXIS 161; *Melin v. Trout Unlimited*, 2023 Mont. Water LEXIS 37. TU is a “nonprofit organization of members and supporters dedicated to conservation, protection, and restoration of wild and native trout” that “routinely defends Montana Fish, Wildlife and Parks’ instream flow reservations and Murphy rights.” Dkt. 92. Its mission, membership, and frequent participation in water issues throughout Montana have established in each of those cases that its members have a particularized environmental and recreational interest in Montana’s water that is distinct from those of the public at large.

Because TU has an ownership interest in water rights in the Gallatin River Basin, those water rights are located downstream of Bozeman’s claims, and it has a particularized interest in the adjudication of water rights in Montana, Bozeman fails to prove TU lacks standing to participate in this case as an objector to the motion to amend.

#### RECOMMENDATIONS

Lyman’s Motion for Summary Judgment should be GRANTED in part.

Trout Unlimited’s Motion for Summary Judgment should be GRANTED in part.

City of Bozeman's Motion for Summary Judgement should be DENIED.

The changes recommended above should be adopted. Post Decree Abstracts of Water Rights Claims are served with the Report to confirm that the recommendations have been made in the state's centralized water right record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

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EBest@mt.gov**

**Note: Service List Updated  
2-28-25**

**POST DECREE  
 ABSTRACT OF WATER RIGHT CLAIM  
 GALLATIN RIVER  
 BASIN 41H**

**Water Right Number:** 41H 140882-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** BOZEMAN, CITY OF  
 %CITY CLERK  
 PO BOX 1230  
 BOZEMAN, MT 59771-1230

**Priority Date:** SEPTEMBER 1, 1864

**Type of Historical Right:** DECREED

**Purpose (Use):** MUNICIPAL

**Flow Rate:** 3.75 CFS

**Volume:**

THIS PORTION OF THE WATER RIGHT HAS BEEN ABANDONDED. THE WATER RIGHT WAS SUBJECT TO A CHANGE APPLICATION APPROVED BY THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION. THE MONTANA WATER COURT DID NOT INCLUDE THE CHANGES APPROVED BY THE DEPARTMENT IN THE DECREE OF THIS WATER RIGHT.

**Point of Diversion and Means of Diversion:**

<u><b>ID</b></u>	<u><b>Govt Lot</b></u>	<u><b>Qtr Sec</b></u>	<u><b>Sec</b></u>	<u><b>Twp</b></u>	<u><b>Rge</b></u>	<u><b>County</b></u>
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THIS PORTION OF THE WATER RIGHT HAS BEEN ABANDONDED. THE WATER RIGHT WAS SUBJECT TO A CHANGE APPLICATION APPROVED BY THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION. THE MONTANA WATER COURT DID NOT INCLUDE THE CHANGES APPROVED BY THE DEPARTMENT IN THE DECREE OF THIS WATER RIGHT.

**Period of Use:** JANUARY 1 TO DECEMBER 31

**\*Place of Use:**

<u><b>ID</b></u>	<u><b>Acres</b></u>	<u><b>Govt Lot</b></u>	<u><b>Qtr Sec</b></u>	<u><b>Sec</b></u>	<u><b>Twp</b></u>	<u><b>Rge</b></u>	<u><b>County</b></u>
1			SE	36	1S	5E	GALLATIN
2				31	1S	6E	GALLATIN
3			SW	32	1S	6E	GALLATIN
4				1	2S	5E	GALLATIN
5			SE	2	2S	5E	GALLATIN
6			NE	2	2S	5E	GALLATIN
7			E2	10	2S	5E	GALLATIN
8				11	2S	5E	GALLATIN
9				12	2S	5E	GALLATIN
10				13	2S	5E	GALLATIN
11			SW	14	2S	5E	GALLATIN
12			N2	14	2S	5E	GALLATIN
13				24	2S	5E	GALLATIN
14			S2	4	2S	6E	GALLATIN
15				5	2S	6E	GALLATIN

16		6	2S	6E	GALLATIN
17		7	2S	6E	GALLATIN
18	SE	8	2S	6E	GALLATIN
19	W2	8	2S	6E	GALLATIN
20	SW	9	2S	6E	GALLATIN
21	N2	16	2S	6E	GALLATIN
22	W2	17	2S	6E	GALLATIN
23		18	2S	6E	GALLATIN
24	W2	19	2S	6E	GALLATIN

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**Remarks:**

AUTHORIZATION TO CHANGE THE POINT OF DIVERSION ISSUED 11/22/1991. NOTICE OF COMPLETION DUE 11/30/1993.

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 140883-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** BOZEMAN, CITY OF  
%CITY CLERK  
PO BOX 1230  
BOZEMAN, MT 59771-1230

**Priority Date:** MAY 1, 1881

**Type of Historical Right:** DECREED

**Purpose (Use):** MUNICIPAL

**Flow Rate:** 2.20 CFS

**Volume:**

THIS PORTION OF THE WATER RIGHT HAS BEEN ABANDONDED. THE WATER RIGHT WAS SUBJECT TO A CHANGE APPLICATION APPROVED BY THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION. THE MONTANA WATER COURT DID NOT INCLUDE THE CHANGES APPROVED BY THE DEPARTMENT IN THE DECREE OF THIS WATER RIGHT.

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
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THIS PORTION OF THE WATER RIGHT HAS BEEN ABANDONDED. THE WATER RIGHT WAS SUBJECT TO A CHANGE APPLICATION APPROVED BY THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION. THE MONTANA WATER COURT DID NOT INCLUDE THE CHANGES APPROVED BY THE DEPARTMENT IN THE DECREE OF THIS WATER RIGHT.

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SE	36	1S	5E	GALLATIN
2				31	1S	6E	GALLATIN
3			SW	32	1S	6E	GALLATIN
4				1	2S	5E	GALLATIN
5			SE	2	2S	5E	GALLATIN
6			NE	2	2S	5E	GALLATIN
7			E2	10	2S	5E	GALLATIN
8				11	2S	5E	GALLATIN
9				12	2S	5E	GALLATIN
10				13	2S	5E	GALLATIN
11			SW	14	2S	5E	GALLATIN
12			N2	14	2S	5E	GALLATIN
13				24	2S	5E	GALLATIN
14			S2	4	2S	6E	GALLATIN
15				5	2S	6E	GALLATIN

16		6	2S	5E	GALLATIN
17		7	2S	6E	GALLATIN
18	SE	8	2S	6E	GALLATIN
19	W2	8	2S	6E	GALLATIN
20	SW	9	2S	6E	GALLATIN
21	N2	16	2S	6E	GALLATIN
22	W2	17	2S	6E	GALLATIN
23		18	2S	6E	GALLATIN
24	W2	19	2S	6E	GALLATIN

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**Remarks:**

AUTHORIZATION TO CHANGE THE POINT OF DIVERSION ISSUED 11/22/1991. NOTICE OF COMPLETION DUE 11/30/1993. SEE 41H 140882-00.