Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
NORTHEND SUBBASIN OF THE BITTEROOT RIVER BASIN (76HB)

* * * * * * * * * * * * * * * * * * *

CLAIMANT: Missoula County RSID #901

OBJECTORS: Gary Brownlee; Margret Brownlee; Kathy Caplis-Moe; Brad Christopher; Laurie Chrisopher; Clark Fork Coalition; Christina Kappes; Randall Kappes; Larry R. Kolb; John W. Larson; Lary R. Kolb Inc.; Maclay Ranch LLC; Helena S. Maclay; Gary Richtmyer; Susan Richtmyer; Joshua P. Schroeder; Trout Unlimited

76HB-6002-A-2023
76H 1196-00

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

Missoula County RSID #901 filed a Motion to Amend the place of use of its water right claim, 76H 1196-00 to a service area. (Doc. 1.00). Objections to the Motion to Amend were filed by Trout Unlimited, Clark Fork Coalition, Maclay Ranch LLC, Helena S. Maclay, John W. Larson, Gary and Margaret Brownle, Randall and Christina Kappes, Kathy Caplis-Moe, Susan and Gary Richtmyer, Brad Christopher, Larry R. Kolb and Larry R Kolb Inc., and Joshua P. Schroeder.[1] (Docs. 5.00–19.00). Two Motions for Summary Judgment were filed. Trout Unlimited ("TU") filed a Motion for Summary Judgment (Doc. 31.00). Clark Fork Coalition, Maclay Ranch LLC, Helena S. Maclay, and John W. Larson (collectively "CFC") filed a Joint Motion for Summary Judgment (Doc. 34.00). This order addresses both motions for summary judgment filed in this case.

BACKGROUND

Claim 76H 1196-00 is owned by Missoula County RSID #901. RSID stands for Rural Special Improvement District. The claim is referred to as "Well 1," and is one of

[1] The objectors also included Daniel P. Bourdage, withdrawn per June 25, 2024 Order, and 2K Holdings LLC, dismissed per September 6, 2024 Order.

three wells used to supply water for municipal use to the community of Lolo in Missoula County, Montana.

Missoula County RSID #901's Motion to Amend ("the Motion") was filed on April 21, 2023. The Motion requests to increase the place of use for 76H 1196-00 to a service area encompassing Lolo's "reasonably anticipated future growth." (Doc.1.00 at 1). The Court required Missoula County RSID #901 to publish notice of the Motion. (Doc. 2.00). As a result of the publication of notice, objections were filed as described above. (Docs. 5.00 – 19.00)

On March 25, 2025, TU and CFC filed Motions for Summary Judgment. (Docs. 31.00, 34.00). Both motions assert Missoula County RSID #901 (for convenience, "Lolo") has not met its burden of proof for the service area proposed.

TU asserts Lolo has not met its burden to show the existence of pre-1973 plans to expand use of 76H 1196-00 to the proposed service area and has not shown reasonable diligence in expanding the place of use of the claim. (Doc. 31.00 at 2). CFC similarly asserts Lolo failed to provide any legal or factual support for its service area. (Doc. 33.00 at 10–11). CFC, however, acknowledges that while Montana law recognizes water supply entities may be entitled to service areas, the evidence is insufficient to support Lolo's requested service area. *Id.* at 17. Both TU and CFC request the Court grant summary judgment that Lolo has failed to meet its burden of proof, and thereby, deny the Motion.

UNDISPUTED FACTS

The following facts are undisputed:

1. A Statement of Claim for 76H 1196-00 was filed on March 10, 1980. The claim is for a well, referred to as Well 1, that serves the community of Lolo. *See* Claim file for 76H 1196-00.

2. The purpose of 76H 1196-00 was claimed as "municipal." *Id.*

3. The Statement of Claim identified a July 28, 1969 priority date and a place of use in Sections 22, 23, 26, and 27, Township 12 North, Range 20 West. *Id.* The map filed with the Statement of Claim identified some land included in the place of use as "future development." *Id.*

4. Claim 76H 1196-00 was constructed with a higher pump capacity than was actually used at the time of construction. (Doc. 36.00 at 6)

5. On September 16, 1992, a Temporary Preliminary Decree was issued for Basin 76HB, including claim 76H 1196-00.[2] A Preliminary Decree for Basin 76HB has not been issued.

6. In 2018, Lolo filed a Motion to Amend to reinstate the flow rate and volume identified on the Statement of Claim for 76H 1196-00. In proceedings on the 2018 Motion to Amend, Lolo and the Montana Attorney General filed a Stipulation and Agreement. *See* (Doc. 1, Exh. B). Pursuant to the Stipulation and Agreement, Lolo and the Attorney General agreed the claimed flow rate and volume should be based on a growth projection to the year 2070. *Id.* The Water Court granted the 2018 Motion to Amend based on the Stipulation and Agreement. *See* Master's Report, Case 76H 1196-00 (December 20, 2019) & Order Adopting (January 23, 2020).

7. In this case, the Motion seeks to amend the place of use of 76H 1196-00 to a service area defined by what Lolo describes as its projected growth to the year 2070. (Doc. 1.00 at 10, 12, 14, 15).

8. Several exhibits were attached in support of the Motion including:

a. the 1978 Lolo Land Use Plan, which outlined goals and objectives of the community and identified land subject to potential future growth (Doc. 1.00, Exh. C);

b. the 2002 Lolo Regional Plan, which replaced the 1978 Lolo Land Use Plan and identified a development area (Doc. 1.00, Exh. D);

c. the 2004 Water Systems Facilities Plan, which "undertook the task of planning for the future of Lolo RSID 901 water system" and identified recommendations for the water system to meet projected demand (Doc. 1.00, Exh. E at 3);

d. the 2019 Water Right Needs Assessment, which determined "potential future water demand and in turn the future water rights need for the area that

[2] . https://dnrc.mt.gov/Water-Resources/Water-Rights/adjudication-pages/Clark-Fork-Division,-North-End-Subbasin-Bitterroot-River---Basin-76HB

could be served by the Lolo RSID 901 water system to planning year 2070" (Doc. 1.00, Exh. F at 3);

e. the 2021 Water Systems Preliminary Engineering Report (amended in 2022), which provided a summary of future projects and system improvements (Doc. 1.00, Exh. G–H);

9. The place of use is currently described as follows:

ID	QTR SEC	SEC	TWP	RGE	COUNTY
1		26	12N	20W	Missoula
2	N2	34	12N	20W	Missoula
3	SE	27	12N	20W	Missoula
4	NW	35	12N	20W	Missoula
5	SWSW	25	12N	20W	Missoula

10. The proposed service area is as follows:

ID	QTR SEC	SEC	TWP	RGE	COUNTY
1	W2	1	11N	20W	Missoula
2		2	11N	20W	Missoula
3		3	11N	20W	Missoula
4		4	11N	20W	Missoula
5	N2	5	11N	20W	Missoula
6		22	12N	20W	Missoula
7	SW	23	12N	20W	Missoula
8	W2	25	12N	20W	Missoula
9		26	12N	20W	Missoula
10		27	12N	20W	Missoula
11	S2	32	12N	20W	Missoula
12		33	12N	20W	Missoula
13		34	12N	20W	Missoula
14		35	12N	20W	Missoula
15	W2	36	12N	20W	Missoula

(Doc. 1.00 at 15).

11. The service area boundary proposed by Lolo is generally within the land areas contemplated in the 2002 Lolo Regional Plan. (Doc. 1, at 8).

12. Missoula County RSID #901 also owns other rights for municipal purposes, including Provisional Permits for post-1973 wells, 76H 27837-00, added in 1975, and 76H 95036-00, added in 1995. The Provisional Permits utilize the same distribution system as 76H 27837-00 but serve a larger place of use than claimed for 76H 1196-00. (Doc. 1 at 14–15; Doc. 36.00 at 15).

ISSUE

Has Lolo met the burden of proof to expand the place of use of 76H 1196-00 to the proposed service area?

DISCUSSION

A. Applicable Standards.

Burden of Proof for Motions to Amend

Lolo seeks to amend its place of use to a service area that encompasses "its reasonably anticipated future growth as opposed to a specified historical place of use." (Doc. 1.00 at 1). The proposed service area includes land Lolo projects it may serve by 2070, based on planning projections. *Id.* at 3–8.

As the party seeking to amend its claim, Lolo has the burden of proof. Rule 19, W.R.Adj.R. A properly filed statement of claim constitutes prima facie proof of its content, which may be overcome by a preponderance of the evidence showing the elements do not reflect beneficial use as it existed prior to July 1, 1973. Section 85-2-227(1), MCA; Rule 19, W.R.Adj.R. Motions to amend are judged against the original claim to determine if there is sufficient evidence to support the requested amendment. *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558.

Summary Judgment Standard

TU and CFC assert there are no genuine issues of material fact and Lolo has failed to meet the burden to prove the proposed service area. (Doc. 31.00 at 2; Doc. 33.00 at 10–11). On the other hand, Lolo asserts TU and CFC have failed to show that Lolo should be limited to its claimed POU. (Doc. 36.00 at 4–5).

Summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). A material fact is one that involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co*., 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. In determining whether a material fact exists, the court must view the evidence in the light most favorable to the non-moving party. *Lorang v. Fortis Ins. Co*., 2008 MT 252, ¶

38, 345 Mont. 12, 192 P.3d 186. All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. *Id.*

Where the moving party is able to demonstrate that no genuine issue as to any material fact exists, the burden shifts to the party opposing the motion to establish an issue of material fact. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 26., 304 Mont. 356, 22 P.3d 631. Ultimately the question of whether the moving party is entitled to summary judgment under the undisputed facts is a question of law. *Thornton v. Flathead County*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395.

Service Area for Municipal Claims

The threshold question to determine a service area place of use for a pre-1973 claim is whether the entity is one actually entitled to a service area. A service area place of use is appropriate where an appropriator distributes water to other, third-party water users within a defined area, under a contractual, corporate, transactional, or statutory structure. *See, e.g., Curry v. Pondera Cnty. Canal & Reservoir Co.*, 2016 MT 77, 383 Mont. 93, 370 P.3d 440; *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912). In general, water rights held for municipal use may have service areas. *In re Town of Manhattan*, 2023 Mont. Water LEXIS 1004,*20.

However, there must be sufficient evidence to establish the boundaries of a municipal service area. *Id.* at *21. For land to be included within the boundaries of a municipal service area, evidence of both of the following is required: (a) the proposed area was contemplated to be served prior to 1973; and (b) the holder of the municipal claim acted with reasonable diligence to serve the proposed area. *Id.* at *13, *21; *See also, Town of Stevensville v. Capp*, 2023 Mont. Water LEXIS 794, *10–11.

B. Application.

The Motions in this case demonstrate disagreement over the burden of proof and the legal standard applied to municipal service areas. The crux of the disagreement stems from the parties' differing interpretations of how service areas apply to municipal claims and what evidence is required to prove a municipal service area. Thus, an overview of municipal service areas will serve as a framework for this analysis.

A service area is a type of place of use. "Service area" may be used to describe a place of use when water is offered for sale to third parties. Typically, a service area includes land that is not owned by the holder of the water right. Although the concept of a service area has existed for the last century, the Water Court's analysis of the service area concept for a municipal claim is a relatively recent development.[3] The basis for the Water Courts application of service area originates in *Bailey v. Tintinger*. In *Bailey*, the Court held that the appropriation of water for sale or distribution was not perfected upon completion of the distribution facilities when the company was ready and willing to deliver water to users upon demand and offered to do so. 45 Mont. at 177–178, 122 P. at 583. *Bailey* held beneficial use of a water right for sale does not require end-use by the irrigator, rather, the beneficial use is sale, rental or distribution of water by the water right holder. *Id.* at 175, 122 P. at 582.

The service area concept has evolved to include various water supply entities' claims and claims for municipal use. *See United States (BLM) v. Barthelmess Ranch Corp.*, 2016 MT 348, ¶¶ 27–29, 386 Mont. 121, 386 P.3d 952; *see also*, *In re Teton Co-Op Canal Co.*, 2015 Mont. Water LEXIS 9 ("TCCC") (appealed on other issues); *Claimant: Billings*, 2012 Mont. Water LEXIS 9 ("*City of Billings*").

The Court's most expansive decision on service area was in *Curry,* (on appeal from the Montana Water Court *Curry v. Pondera Cty. Canal & Reservoir Co.*, 2014 Mont. Water LEXIS 20). The Supreme Court determined the Company's place of use was a service area that included land irrigable under the system when it was completed.

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[3]The Water Court's application of service area originated in *Mont. Dep't of Nat. Res. & Conservation v. Daly Ditches Irrigation Dist. (In re Existing Rights to the Use of All the Water)*, 2000 Mont. Water Lexis 10 ("*Painted Rocks*"). *Painted Rocks* was a DNRC State Project that made water available for sale to water users. *3. The DNRC amended the claims requesting a 'general service area' including the West Bitterroot River and the Bitterroot River from the Painted Rocks dam to the Clark Fork River. *Id.* at *4. The Water Court noted it was required to determine specific elements of water right claims pursuant to § 85-2-234, MCA, including identifying "the place of use and a description of the land, if any to which the water right is appurtenant," pursuant to 85-2-234(e), MCA, and concluding a general township and range designation met the requirement. *Id.* at *15, *18.

The next instance of the Water Court's analysis of service area is in 2005. *In re Adjudication of the Existing Rights to the Use of All the Water*, 2005 Mont. Water LEXIS 5; (adopted by the Court in *In re Adjudication of the Existing Rights to the Use of All the Wate*r, 2005 Water LEXIS 4) ("*Big Creek Lakes*"). In *Big Creek Lakes*, the water right at issue listed the maximum acres element as 5,040 acres. A remark was added to the water right noting the place of use was a general service area and the maximum number of acres irrigated within the service area each year could not exceed 3,200 acres. *Id.* at *34.

Curry has come to stand for the proposition that a service area can include the amount of land the entire infrastructure can serve rather than the amount of actual acreage irrigated by shareholders in 1973. ¶14, ¶¶40–44.

Service areas have also been applied to claims for municipal use. Section 85-2-227(4), MCA, inspired by the common law principal of the "growing communities'" doctrine, is one way in which service area law applies to municipal claims. *City of Helena v. Community of Rimini*, 2017 MT 145, ¶ 36, 388 Mont. 1, 397 P.3d 1. Pursuant to Section 85-2-227(4), Montana provides municipal claims protection from abandonment if certain criteria are met. *City of Helena*, was the first case that found a presumption of municipal nonabandonment pursuant to Section 85-2-227(4), MCA. *Id.* at ¶ 26. Although Helena had not used the full extent of its claim, the fact it had a conveyance structure of sufficient size to convey the full measure of the claim was sufficient to meet the presumption. *Id.* at ¶¶ 26–28.

City of Fort Peck, followed. *United States Dep't of Army Corp of Eng'rs*, 2018 Mont. Water LEXIS 8; (*Water Court Case 40E–49B*). In *City of Fort Peck*, the Court determined Fort Peck had abandoned part of its claim despite Fort Peck meeting criteria set forth in Section 85-2-227(4), MCA. *Id.* at *19–23. Since Fort Peck was not "growing" and not using the extent of its claimed volume, the Water Court found, and the Montana Supreme Court affirmed, that projecting growth 40 years from the time of the case was sufficient to calculate Fort Peck's reasonably anticipated future need. *Id.* at *29.

Service areas for municipal claims have also been established outside of Section 85-2-227(4), MCA.[4] In *Manhattan*, the Court granted Manhattan's modified request for a service area. *24. The Court denied Manhattan's initial motion determining it included subdivisions that were anticipated to be added but not necessarily tied to the existing water right. *Id.* at *7–8. The Court stated, "proving the boundaries of the proposed service area requires more than a map of anticipated future zoning." *Id.* at *8. The

[4] In *In re Belgrade,* 2021 Mont. Water LEXIS 582 (June 18, 2021 Water Court Case 41H-0008-R-2020), a Water Master approved a settlement agreement where the parties agreed to an expanded service area based on pre-1973 planning. Although the Water Master cited to the growing communities' doctrine, the Water Master also cited to pre-1973 planning documentation. The Master's Report was adopted by the Water Court.

modified motion, however, was granted because Manhattan removed the questioned subdivisions from the service area. *Id.* at *19.

In *Town of Stevensville*, Stevensville's motion to amend requesting a service area was denied. *13. The Water Court determined the evidence was insufficient to establish that Stevensville was entitled to a service area based on historical use, *Curry* or the Growing Communities' Doctrine. *Id.*

To clarify the disagreement between the parties in the instant case regarding how a service area applies to municipal claims and what evidence is required for a service area, the law may be summarized as follows. The concept of service area that originated in *Bailey* and was expanded in case law such as *Curry* applies to claims for municipal use. Municipal claims may be entitled to service areas outside application of Section 85-2-227(4), MCA. As set forth in *Manhattan* and *Stevensville*, a municipal claim is generally entitled to a service area as the right is appropriated for sale and distribution for use by third parties. The boundaries of the service area, however, require further analysis. *Manhattan* at *21. For an existing municipal claim, the boundaries of a service area are established based on pre-1973 planning and actions taken to show reasonable diligence in pursuing such planning. *Id.*; *Stevensville* at *10. Therefore, the Court applies the following analysis.

1. 76H 1196-00 is entitled to a service area.

Montana law recognizes that water right claims appropriated for distribution, supply, or sale to third party users — including claims for municipal use — are entitled to a service area.

Claim 76H 1196-00 was appropriated by Missoula County RSID #901 in 1969 for municipal use. *See,* Statement of Claim. The claim is used to supply water to municipal water users in the community of Lolo. (Doc. 1.00 at 14). Lolo owns and controls little land where water is used and has little control over the demand for use. *Id.* There is no question that 76H 1196-00 is entitled to a service area place of use. Therefore, the Court's analysis is primarily focused on whether there is evidence to support the boundaries of the proposed service area.

2. Has Lolo provided sufficient evidence to prove the boundaries of its proposed service area?

Although Lolo meets the initial threshold for entitlement to a municipal service area, Lolo is required to provide evidence to support the boundaries of the proposed service area for claim 76H 1196-00. *Manhattan*, at *21. For a municipal claim, there must be evidence the service area was contemplated prior to July 1, 1973, and developed with reasonable diligence. *Id.*; *See also, Stevensville*, at *10.

a. Contemplation prior to July 1, 1973.

There are not undisputed facts establishing the proposed service area for 76H 1196-00 was contemplated prior to July 1, 1973. Because the Montana Constitution protects "existing rights," the Court has recognized a service area place of use when consistent with "the use of water that would be protected under the law as it existed prior to July 1, 1973." *Manhattan*, at *20; (citing Mont. Const., Art. IX, Section 3(1); Section 85-2-102(13), MCA). It follows that there must be evidence that prior to July 1, 1973, the land within the proposed service area was contemplated as being served. *Id.* at *21.

76H 1196-00 is a claim for an existing right. *See* Statement of Claim. According to CFC, the area within the originally claimed place of use covers approximately 1,360 acres. (Doc. 37.00 at 7). TU identified that the proposed service area includes approximately 7,520 acres. (Doc. 32.00 at 10). Lolo describes the boundaries of the proposed service area as "the boundaries of its reasonably anticipated future growth" up to the year 2070 based on planning projections. (Doc. 1.00 at 1).

Lolo asserts that "to succeed with a request for a service area greater than the original *actual* place of actual use, a water service provider — like Lolo — needs to demonstrate that its proposed service area could have been served by the system built at the time of the appropriation, or that it acted diligently to prosecute plans for future development of that service area." (Doc. 36.00 at 5). Lolo's statement is not necessarily incorrect, but it is incomplete. A service area for a municipal claim requires a showing of a "credible plan of reasonable diligence in place before July 1, 1973." *Manhattan*, at *13. Moreover, Lolo's analysis skips over the requirement that the evidence must be tied back to pre-July 1, 1973 planning.

In its Combined Response to TU and CFC's Motions for Summary Judgment, Lolo asserts that the fact that claim 76H 1196-00 was pump tested at a larger capacity and has a higher flow rate and volume than apparently in use is demonstrative of an intent to serve the proposed service area. (Doc. 36.00 at 6). Lolo also admits that it is typical for water systems to be constructed with a larger capacity. *Id.* The capacity of the well, is not demonstrative of pre-1973 contemplation of the proposed service area, projected out to 2017, because it was drilled at a higher capacity especially when that is the common practice.

Additionally, Lolo asserts it would have claimed a broader area if the DNRC had let it. (Doc. 36.00 at 7–8). However, the map filed with the Statement of Claim illustrates "proposed water mains" and land for "future development." *See* Claim file for 76H 1196-00. Again, without more, this fact does not show that the current 7,500 acre proposed service area was contemplated prior to July 1, 1973.

i. Projections in Existing Rights.

In *Stevensville*, the Motion to Amend requested the boundaries of the place of use be based on anticipated future growth. *1. The Court denied the service area as it was based on projections of future growth rather than any pre-1973 plans. *Id.* at *10–11. "Curry does not stand for the proposition that water rights may be indefinitely expanded to accommodate future growth. Nor does it stand for the proposition that expansion of a service area [sic] can occur based on projections of future growth formulated decades after a water right has been perfected." *Id.*.

Similarly, in *Manhattan*, the Water Court stated, "Basing service area boundaries on anticipated future zoning, without more, crosses over the line to the realm of speculation and conjecture, which Montana water law does not recognize as part of the beneficial use of water." *22; citing *Toohey v. Campbell*, 24 Mont. 13, 17, 60 P. 396, 397 (1900); *Miles v. Butte Elec. & Power Co.*, 32 Mont. 56, 79 P. 549 (1905).

The planning documents provided by Lolo do not provide any evidence of pre-1973 plans to serve the proposed area. Constructing a well with excess capacity, especially when such is the common practice, is insufficient to show pre-1973 plans to serve the 7,500-acre place of use requested. The 1978 Land Use Plan outlines the goals

and objectives of the community at that time—including land use. (Doc. 1.00, Exh. C at 8–9). The plan includes a broad "planning area" (*Id.* at 5), but within that "planning area" only some portions are suggested for potential development (*Id*. at 13). Moreover, the 1978 Land Use Plan does not contemplate development or water use within the large "planning area" nor does it provide support for pre-1973 contemplation of the proposed service area. The other more recent planning documents also do not provide any link to pre-1973 contemplation. *See generally*, Doc. 1.00, Exhs. D–H.

No undisputed facts have been established to take the boundaries of the requested service area out of the "realm of speculation and conjecture" and tie the place of use to pre-1973 planning. *Manhattan* at *21.

ii. Abandonment Not Raised.

The "reasonably anticipated future need" language Lolo uses to describe its proposed service area is taken from the application of the growing communities' doctrine in *City of Helena*, and *Fort Peck. City of Helena v. Community of Rimini*, 2017 MT 145, 388 Mont. 1, 397 P.3d 1; *United States Dep't of Army Corp of Eng'rs*, 2018 Mont. Water LEXIS 8; (*Water Court Case 40E–49B*). However, abandonment is not at issue here. Discussing the growing communities' doctrine, this Court stated, "In neither *City of Helena* nor *Fort Peck* did the Supreme Court recognize the doctrine for anything more than what the legislature authorized for cases with abandonment allegations." *Manhattan*, 2022 WL 5266480 "first order" at 10.

The growing communities' doctrine and allegations of abandonment that trigger Section 85-2-227(4), MCA, do not apply in this case. Both Helena and Fort Peck were defending all or a portion of their claims. Here, Lolo is not defending its claim. Rather, Lolo is seeking to increase the place of use beyond what was claimed through an amendment. Therefore, Lolo has the burden of proof.

Lolo tries to insert an abandonment issue by arguing that if the Court denies its proposed service area, it will not be able to use its full flow rate and volume and, thus, its flow rate and/or volume may be abandoned. (Doc. 36.00 at 10–11). Abandonment of flow rate and volume is not the issue before the Court. The issue before the Court is

whether Lolo has met its burden of proof to expand its place of use to the proposed service area.

Rather than proof of "reasonably anticipated future need," Lolo's burden is to show evidence that prior to July 1, 1973, the land within the proposed service area was contemplated as being served and can be included in an existing right.

Lolo has not shown—by a preponderance of the evidence—that the boundaries of its proposed service area were "existing" or part of a credible plan that can be tied back to pre-July 1, 1973. Therefore, this element is not met.

b. Reasonable Diligence.

To prove the boundaries of a municipal service area for an existing claim, both a showing that the land within the proposed service area was contemplated as being served prior to 1973, and a showing that the holder of the municipal claim acted with reasonable diligence in serving the area is required. *Manhattan*, at *21; *Stevensville*, at *10.

Lolo has not shown that the approximately 7,500 acres were contemplated as being served prior to 1973. Therefore, on summary judgement Lolo cannot meet the reasonable diligence requirement without a showing of pre-1973 planning. There is no evidence that the proposed service area was contemplated or planned prior to July 1, 1973, nor evidence that Lolo acted with reasonable diligence prior to July 1, 1973, to perfect the proposed service area. Therefore, Lolo has not proved the proposed service area boundaries.

3. Summary Judgment Should Be Granted.

TU and CFC separately request this Court grant summary judgment concluding that Lolo failed to meet its burden of proof to establish the proposed service area. In response, Lolo asserts CFC and TU have "completely failed to establish, as a matter of law, that the POU for Lolo's (and other Montana city's) water rights are limited to the actual POU existing as of July 1, 1973." This is a misunderstanding of the burden of proof. Lolo carries the burden to prove that the prima facie status of the place of use, as claimed, has been overcome by the evidence provided in the motion.

TU asserts Lolo has not proved the proposed service area was reasonably contemplated prior to July 1, 1973, and pursued with reasonable diligence. (Doc. 32.00

at 3). Similarly, CFC asserts that Lolo's proposed service area was not contemplated prior to 1973 and that Lolo incorrectly applies the growing communities' doctrine. (Doc. 33.00 at 6–7, 12–13).

While 76H 1196-00 is entitled to a service area place of use, Lolo has not met the burden of proof to overcome the prima facie status of the statement of claim that the service area should include the land proposed in the Motion. There is no evidence that the proposed service area was contemplated or planned prior to July 1, 1973, nor evidence of reasonable diligence prior to July 1, 1973, to perfect the proposed service area.

Lolo attempts to raise a disputed fact with an assertion that it was directed by DNRC to limit the place of use to its actual place of use prior to 1973. A material fact is one that involves the elements of the cause of action or defense at issue to the extent it requires resolution by the trier of fact. *Plum Creek Timber Co*., ¶ 14,. This fact is not material to the analysis of whether the place of use, as amended, should include all of the land within the proposed service area. There are no genuine issues of material fact -- Lolo has not met its burden to overcome the prima facie status of the statement of claim that the service area should include all the land proposed in the Motion.

As Lolo has not met its burden of proof to establish the proposed service area, TU and CFC are entitled to summary judgment.

ORDER

Therefore, it is

ORDERED that TU's Motion for Summary Judgment is GRANTED that Lolo has not overcome the prima facie status of the Statement of Claim for 76H 1196-00 to prove the proposed service area.

ORDERED that CFC's Motion for Summary Judgement is GRANTED that Lolo has not overcome the prima facie status of the Statement of Claim for 76H 1196-00 to prove the proposed service area.

ORDERED that Lolo's burden of proof has not been met and the Motion to Amend is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW.

Electronically Signed By:
Hon. Judge Bina Peters
Tue, Jun 24 2025 12:08:05 PM

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