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MONTANA WATER COURT
CLARK FORK DIVISION
NORTHEND SUBBASIN OF THE BITTEROOT RIVER
BASIN (76HB)
TEMPORARY PRELIMINARY DECREE

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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

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

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

This Order addresses Lolo's July 19, 2025, Motion to Alter or Amend Judgment following a briefing schedule set by this Court.

Background

On April 21, 2023, Missoula County RSID #901 ("Lolo") filed a Motion to Amend requesting to increase the place of use of claim 76H 1196-00 to a service area. (Doc. 1.00). The requested service area encompasses approximately 7,532 acres (Doc. 32.00 at 10) reflecting potential growth projected to the year 2070. (Doc. 1.00 at 1). Trout Unlimited ("TU") and Clark Fork Coalition and a group of water users (collectively referred to as "CFC") objected to the Motion to Amend. (Docs. 5.00-19.00). TU and CFC filed Motions for Summary Judgment asserting Lolo did not meet its burden of proof for the requested service area. (Docs. 31.00 & 34.00). On June 24, 2025, the Court

granted the Motions for Summary Judgment. (Doc. 39.00). The Court determined that claim 76H 1196-00 met the requirements for entitlement to a service area. *Id.* at 9. However, the Court concluded Lolo did not meet its burden of proof to show the boundaries of the proposed service area were contemplated prior to 1973 and did not meet the burden of proof to show Lolo acted with reasonable diligence to serve the proposed area. *Id.* at 13. Therefore, the Motions for Summary Judgment were granted, and the requested service area was denied. *Id.* at 14.

The June 24, 2025, Order Granting Summary Judgment closed Water Court proceedings on the Motion to Amend. After the Court issued the Order Granting Summary Judgment, claim 76H 1196-00 was included in an Interlocutory Decree issued December 30, 2025. Pending objections, counterobjections, notices of intent to appear, and issue remark resolution in the Interlocutory Decree proceedings, the claim will be subject to a Final Decree.

On July 29, 2025, Lolo filed a Motion to Alter or Amend Judgment. (Doc. 42.00). Lolo ultimately requests the Court set aside the Order Granting Summary Judgment. *Id.* at 8. Lolo claimed newly discovered evidence: a "comprehensive area-wide water and sewer plan 1970, State of Montana, Volume 6" ("the 1970 Plan"). (Doc. 42.00 at 2). TU and CFC filed a Joint Response in Opposition to Lolo's request for reconsideration (Doc. 43.00)[1]; Lolo replied (Doc. 45.00).

Following review of the briefing, the Court set an additional briefing schedule requesting Lolo address two questions, not clearly addressed in the Motion to Alter or Amend Judgment. (Doc. 47.00). First, how does the 1970 Plan show the service area, as proposed in the April 21, 2023 Motion to Amend, was contemplated or planned prior to July 1, 1973? Second, how does the 1970 Plan show reasonable diligence in perfecting the service area requested in the April 21, 2023 Motion to Amend? As the questions are fully briefed, the Motion to Alter and Amend Judgment is addressed.

[1] Larry R. Kolb and Larry R. Kolb Inc. filed a separate Joint Response, Joining Opposition to the Motion (Doc. 44.00) and a separate Joinder in Objectors Joint Response to Supplemental Brief (Doc. 50.00).

Issue

Is Lolo entitled to an altered or amended judgment, setting aside the Court's Order Granting Motions for Summary Judgment, based on the 1970 Plan and application of Rule 59(e) and 60(b)(2), M.R.Civ.P.?

Applicable Law

Rule 59(e), M.R.Civ.P. addresses the timeline for filing a motion to alter or amend judgment. According to Rule 59(e), M.R.Civ.P., a request to alter or amend a judgment must be filed no later than 28 days after the entry of judgment. Rule 60(b), M.R.Civ.P. provides the specific circumstances under which relief may be granted. One of the circumstances in which relief may be granted is, "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(e)." Rule 60(b)(2), M.R.Civ.P.

Newly discovered evidence may constitute grounds for relief if the following conditions are met: (A) the alleged newly discovered evidence came to the moving party after trial; (B) it was not a want of due diligence which precluded its earlier discovery; (C) the materiality of the new evidence is so great that it would probably produce a different result; and (D) the new evidence is not merely cumulative, not tending only to impeach or discredit a witness in the case. *Moore v. Frost*, 2021 MT 74, ¶ 12, 403 Mont. 483, 483 P.3d 1090 (citing *In re B.B.*, 2001 MT 285, ¶ 40, 307 Mont. 379, 37 P.3d 715; *Fjelstad v. State ex re. Dept. of Highways*, 267 Mont. 211, 220-21, 883 P.2d 106, 111-12 (1994)). Relief is not available to relitigate previously litigated matters, reconsider arguments, or raise new arguments that could have previously been made. *Nelson v. Driscoll*, 285 Mont. 355, 361, 948 P.2d 256 (1997).

Application

I. Rule 59(e), M.R.Civ.P.

Rule 59(e), M.R.Civ.P. requires that a motion to alter or amend judgment be filed within 28 days after the "entry of judgment." The parties disagree as to whether the 28-day timeframe began when the June 24, 2025 Order Granting Motions for Summary Judgment (Doc. 39.00) was issued or when TU's July 1, 2025 Notice of Entry of Judgment (Doc. 40.00) was filed.

Regardless, the Water Court has determined that until a final decree is issued, no final judgment has been entered. *See e.g.*, *Smith v. Foss*, 177 Mont. 443, 447, 582 P.2d 329, 332 (1978); *In re Adjudication of Existing Rights to the Use of All the Water*, Case 76HF-61, 2002 Mont. Water LEXIS 8, *4-6; *In re McCarty*, 2024 Mont. Water LEXIS 383, *7; *Downs v. United States (Bureau of Indian Affairs)*, 2021 Mont. Water LEXIS 1075, *8.

Lolo's Motion to Amend was filed outside adjudication case proceedings within a decree. The claim had already been through Temporary Preliminary Decree case proceedings.[2] Further, claim 76H 1196-00 is currently subject to proceedings in an Interlocutory Decree, issued December 30, 2025.[3] The claim will be issued in a Final Decree pending Interlocutory Decree proceedings. Based on the Water Court's prior determinations that there is no final judgment on a historical water right until a final decree and the continuing proceedings on the claim, the Court will address Lolo's Motion to Alter or Amend Judgment.

II. Newly Discovered Evidence, Rule 60(b)(2), M.R.Civ.P.

Rule 60(b), M.R.Civ.P. provides specific circumstances under which there may be relief from judgment. One of those circumstances is "newly discovered evidence" as set forth in Rule 60(b)(2), M.R.Civ.P. As outlined by the Montana Supreme Court, relief from judgment based on alleged newly discovered evidence requires Lolo to prove: (A) it discovered the alleged 1970 Plan after the Order Granting Summary Judgment; (B) it did not lack due diligence in failing to discover the 1970 Plan earlier; (C) introduction of the 1970 Plan would probably produce a different result; and (D) the 1970 Plan is not merely cumulative of other evidence. *Moore*, at ¶ 40. The supplemental briefing responding to the Court's questions is pertinent, particularly to conditions (C) and (D) discussed in the analysis below.

[2] A Temporary Preliminary Decree was issued for Basin 76HB on September 16, 1992.
[3]The Interlocutory Decree can be viewed at: https://dnrc.mt.gov/Water-Resources/Water-Rights/adjudication-pages/76H-Interlocutory-Decree.

A. It is questionable whether Lolo meets the first condition for relief.

The first condition requires that Lolo discovered the 1970 Plan after the June 24, 2025 Order Granting Summary Judgment. *Id.* According to the Affidavit of Missoula County Civil Attorney, John W. Hart, the 1970 Plan was discovered between June 18 and 25, 2025. (Doc. 42.00, Exh. P). Missoula County discovered the 1970 Plan in a box of miscellaneous documents at the office of the Missoula County Clerk and Recorder. Counsel for Lolo was made aware of the 1970 Plan on July 3, 2025. (Doc. 42.00, Exh. R).

TU and CFC assert that since the 1970 Plan was in Missoula County's possession at the time of the Motion to Amend and throughout proceedings, the 1970 Plan does not qualify as newly discovered evidence. (Doc. 43.00 at 4-6). The 1970 Plan has presumably been in Missoula County's possession since 1970. *Id.* TU and CFC are correct that the Montana Supreme Court has been skeptical of claims of newly discovered evidence when the evidence has been in the possession of the moving party. *Carbon Cnty v. Schwend*, 212 Mont. 474, 479, 688 P.2d 1251, 1254 (1984); *Groves v. Clark*, 1999 MT 117, ¶ 34, 294 Mont. 417, 982 P.2d 446; *Rand v. Kipp*, 27 Mont. 138, 142, 69 P. 714 (1902).

While questionable that Lolo meets the first condition, it is not determinative of Lolo's entitlement to relief because other conditions are not met.

B. It is questionable whether Lolo meets the second condition for relief.

The second condition requires Lolo to confirm it did not lack due diligence in failing to discover the 1970 Plan prior to the Order Granting Summary Judgment. *Moore*, at ¶ 40. "The moving party has the burden to show due diligence in unearthing the newly discovered evidence before relief from judgment […] is proper." *Bruner v. LaCasse*, 241 Mont. 102, 104, 785 P.2d 210, 211 (1990).

TU and CFC argue that Lolo's Motion demonstrates Lolo failed to exercise due diligence in reviewing its own records. (Doc. 43.00 at 5). Lolo asserts that when it filed the Motion to Amend, Missoula County and Lolo conducted diligent efforts to find relevant planning documents. It was simply not aware of the box of miscellaneous documents in the Missoula County Clerk and Recorder's office. (Doc. 48.00 at 6).

It is questionable if Lolo meets the due diligence condition. However, whether Lolo meets the first or second condition is not determinative, as the other conditions are not met.

C. Lolo does not meet the third condition for relief.

The third condition requires that introduction of the 1970 Plan may result in a denial of the Motions for Summary Judgment. *Moore*, at ¶ 40. The Court granted Summary Judgment because Lolo did not meet the burden of proof for its Motion to Amend. Lolo failed to show the proposed service area was contemplated or planned prior to July 1, 1973. Lolo failed to show it acted with reasonable diligence to perfect the requested service area prior to July 1, 1973. There was no evidence that prior to July 1, 1973, Lolo contemplated or planned the proposed 7,532-acre service area or acted with reasonable diligence to perfect such a service area.

The Motion to Alter or Amend Judgment asserts the 1970 Plan shows pre-1973 planning efforts and that Lolo "intended to grow its water system – which was comprised of Well-1 and its water right and grow its water service area to accommodate a growing population." (Doc. 42.00 at 6). However, Lolo's assertions in the Motion to Alter or Amend Judgment did not explain how the 1970 Plan raised a genuine issue of material fact that the 7,532-acre service area was contemplated or planned pre-1973 or how the 1970 Plan raised a genuine issue of material fact that Lolo acted to perfect the 7,532-acre service area pre-1973.

Therefore, the Court required additional briefing and asked Lolo to provide responses to two issues necessary for its analysis –how the 1970 Plan showed the service area, as proposed in the April 21, 2023 Motion to Amend, was contemplated or planned prior to July 1, 1973; and how the 1970 Plan showed reasonable diligence in perfecting the service area requested in the April 21, 2023 Motion to Amend. (Doc. 47.00).

i. The 1970 Plan does not show the proposed service area was contemplated prior to July 1, 1973.

Lolo's response to the first question begins by admitting that the 1970 Plan does not actually address the 7,532-acre service area. (Doc. 49.00 at 3). Lolo argues that while the 1970 Plan does not identify the proposed service area, the 1970 Plan provides

pre-1973 evidence that the community was "likely to grow." *Id.* According to Lolo, the 1970 Plan "supports other pre- and post-1973 evidence showing that Lolo contemplated a service area that was larger than the initial place of use for water right 76H 1196-00." *Id.*

Lolo's problems begin here. The Court does not question that Lolo was "likely to grow." It is possible that prior to 1973, Lolo planned to grow to an area larger than the claimed place of use.[4] However, Lolo is attempting to tie an expansive 7,532-acre service area to a pre-1973 claim based on a "likelihood of growth." *Id.* at 2. The burden of proof required Lolo to show that the specific area it requested was contemplated or planned pre-1973.

Lolo posits that the 1970 Plan must be viewed together with the 1978 Lolo Land Use Plan to support "a service area that was larger than the initial place of use for water right 76H 1196-00." The 1978 Lolo Land Use Plan outlined general goals and objectives of the community and identified land subject to potential future growth. As previously determined in the Order Granting Summary Judgment, however, the 1978 Lolo Land Use Plan does not contemplate development or water use to the extent of the proposed service area. (Doc. 39.00 at 11-12, citing Doc. 1.00, Exh. C). Thus, even if the 1970 Plan is taken with the 1978 Lolo Land Use Plan, it does not support Lolo's requested service area.

Lolo asserts it is analogous to *In re Town of Manhattan*, 2023 Mont. Water LEXIS 1004. In *Manhattan*, the Court denied Manhattan's initial motion. The Court granted a modified motion after three subdivisions with no tie to pre-1973 planning were removed, "eliminating the question of whether Manhattan had sufficient plans in place in 1973 to diligently install the infrastructure necessary to provide service to them." *Id.* at *14. As stated by the Court, "proving the boundaries of the proposed service area requires more than a map of anticipated future zoning." *Id.* at *8.

Lolo is not analogous to *Manhattan*. Here, there is no pre-1973 map that includes anywhere near the requested service area let alone a pre-1973 planning document showing any contemplation of the proposed service area. As stated by TU and CFC, "its

[4] Although possible, the claimed place of use includes additional land identified for "future development."

requested service area far exceeds its municipal boundaries and has no basis in any pre-1973 planning." (Doc. 49.00 at 6). "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." *Manhattan*, at *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)).

There is no evidence that, even with the addition of the 1970 Plan, prior to 1973, Lolo planned to grow into the 7,532-acre service area. The service area it requests reflects potential growth projected in 2019 to the year 2070 (Doc. 1, Exh. F), not potential growth contemplated prior to 1973. In fact, the map with the 1970 Plan (Doc. 42.00, Exh. Q), appears similar to the map filed with the original Statement of Claim for 76H 1196-00, providing more support for the place of use of the claim as originally filed rather than the proposed service area. *See* claim file 76H 1196-00.

ii. The 1970 Plan does not show reasonable diligence in perfecting the proposed service area.

The Court also asked Lolo to clarify how the 1970 Plan shows reasonable diligence in perfecting the service area requested. In response to the second question, Lolo asserts that the 1970 Plan, along with the other evidence provided in its original Motion to Amend, shows reasonable diligence in perfecting the proposed service area "both before and after July 1, 1973." In Lolo's view, the 1970 Plan shows contemplation of growth and, if taken together with the 1978 Land Use Plan, proves diligence in planning and perfecting a larger place of use. Lolo argues that its diligence must be viewed within the context of "practical realities of municipal governance" which "frequently requires decades." (Doc. 48.00 at 5). According to TU and CFC, under Lolo's logic, every municipality that had a study on water and sewer infrastructure and general recommendations regarding potential future growth would be entitled to "similarly massive expansions to their places of use." (Doc. 49.00 at 8).

Lolo cites *In re Belgrade*, 2021 Mont. Water LEXIS 582, and *Manhattan* for the idea that planning for growth alone equals reasonable diligence. (Doc. 48.00 at 5). This is an oversimplification of the case law and a misunderstanding of the burden of proof.[5]

Parallels to *City of Belgrade* fail. As previously explained in the Court's Order Granting Summary Judgment, *Belgrade* involved approval of a settlement agreement where the parties agreed to a service area based on pre-1973 planning. *See* (Doc. 39.00, Fn. 4). *Belgrade* is not comparable to this matter.

Regarding *Manhattan*, as previously explained in this Order and the Court's Order Granting Summary Judgment, *Manhattan* is not analogous. *Id.* at 8-9, 11-12. After a denial of its initial motion, *Manhattan* filed a modified motion which removed areas that it could not tie to pre-1973 planning or diligence. *Manhattan*, 2023 Mont. Water LEXIS 1004.

There is no evidence that the 1970 Plan, even when viewed with other evidence, shows Lolo acted with reasonable diligence to perfect the proposed service area. The 1970 Plan does not create a genuine issue of material fact that Lolo contemplated the proposed service area pre-1973. The 1970 Plan does not raise a genuine issue of material fact that Lolo used reasonable diligence to perfect the proposed service area pre-1973. Since the 1970 Plan would not produce a different result, the third condition for relief from judgment is not met.

D. Lolo does not meet the fourth condition for relief.

The fourth condition requires Lolo to show that the 1970 Plan is not merely cumulative of other evidence. *Moore*, at ¶ 40. As described above, the 1970 Plan does not raise a genuine issue of material fact as to whether Lolo met its burden of proof. Instead, the 1970 Plan is cumulative of other evidence provided in the original Motion to Amend and, in fact, tends to support the place of use as claimed. The 1970 Plan suggests growth was not contemplated to the extent of the proposed service area. The 1970 Plan does not add anything more than the evidence already provided and is merely cumulative. The fourth condition for relief from judgment is not met.

[5] The June 24, 2025Order Granting Summary Judgment provides an overview of the caselaw on municipal service areas, including *Belgrade* and *Manhattan*. (Doc. 39.00 at 6-9).

CONCLUSION

Lolo has not met the conditions required for relief under newly discovered evidence. Lolo is not entitled to an altered or amended judgment. Even with the 1970 Plan, there is no genuine issue of material fact as to whether Lolo met the burden of proof. Lolo did not meet its burden to show that prior to July 1, 1973, the land within its proposed service area was contemplated or planned to be served nor did Lolo meet its burden to show reasonable diligence in serving the proposed service area.

Therefore, it is

ORDERED that the Motion to Alter and Amend Judgment is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW.

Electronically Signed By:
Hon. Judge Bina Peters
Tue, Jan 20 2026 01:10:42 PM

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