

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER FROM SUN RIVER TO MARIAS RIVER - BASIN 41Q

CLAIMANTS: Nancy McCarty; David Kirkpatrick; Ronald
Land

CASE 41Q-0040-P-2024
41Q 30952-00

ORDER GRANTING MOTION TO REINSTATE CLAIM

On May 8, 2024, Nancy McCarty, David Kirkpatrick, and Ronald Land (collectively, "Claimants") filed a motion to reinstate water right claim 41Q 30952-00. They refiled the motion on May 16, 2024, with exhibits. The Water Court dismissed the claim on January 31, 2017. The Court consolidates claim 41Q 30952-00 into this case to address the motion. For the reasons set forth in this Order, the Court grants the motion and reinstates the claim.

BACKGROUND

On August 7, 1981, Glen B. Kirkpatrick ("Glen") filed a statement of claim for the right to use water from McNeil Creek for domestic use. McNeil Creek is a tributary of Belt Creek near Neihart in Cascade County. The claim was assigned claim number 41Q 30952-00.

Glen died in 1988. On May 23, 1989, as part of the probate of Glen's estate, Glen's wife Frances Kirkpatrick ("Frances") took ownership of the property to which the

claim is appurtenant. (Motion, Ex. B). Evidently no ownership update form was filed with the Department of Natural Resources and Conservation (“DNRC”).

Frances died in 1990, and was survived by Glen and France’s children Nancy McCarty (“Nancy”), Pamela Thompson (“Pamela”), and David Kirpatrick (“David”). In 2006 and 2008, the DNRC sent letters to Glen and Frances asking them to file an ownership update form to reflect the change of ownership of the Neihart property. By this time both Glen and Frances were deceased.

Nancy, Pamela, and David jointly inherited the Neihart property formerly owned by their parents. For reasons that are not entirely clear, the deed of distribution transferring ownership to them as tenants in common was not executed until September 20, 2016 and recorded on October 5, 2016. (Motion, Ex. C). Again, evidently no ownership update was filed for the claim.

On May 27, 2010, the Water Court issued a Preliminary Decree for Basin 41Q. Because an ownership update was not filed following Glen and Frances’ deaths, and the probate of Frances’ estate was not yet done, claim 41Q 30952-00 appeared in the Preliminary Decree with Glen still listed as the owner and with the following issue remark:

AS OF 7/10/2008, THIS WATER RIGHT APPEARS TO BE OWNED BY FRANCES KIRKPATRICK, PO BOX 7109, OCEAN VIEW, HI 96737-7109

No one filed any objections, counterobjections, or notices of intent to appear.

Following the Preliminary Decree, a number of events occurred regarding the ownership records for the claim. On September 29, 2011, the DNRC sent a letter to the Hawaii address listed in the issue remark attempting to contact Frances, evidently still unaware of her passing. The Hawaii address actually was Pamela’s address. On November 23, 2011, the Water Court issued an order requiring Frances to confer with the DNRC to update ownership of the claim.

On March 1, 2012, the Water Court vacated the show cause hearing after learning that Glen and Frances were deceased and ordered the current owners of claim 41Q 30952-00 to file an ownership update with the DNRC.

On March 15, 2012, Nancy filed a request to extend the deadline to file an ownership update with the DNRC. The Water Court granted the extension and set a show cause filing deadline for the current owners of the claim to show cause why it should not be terminated for failure to resolve the ownership issues.

On July 17, 2014, the Water Court issued a master's report recommending dismissal of the claim as a sanction. On July 29, 2014, Pamela contacted the Water Court and indicated she will be filing an ownership update. The Water Court then set a number of filing deadlines, indicating that if an ownership update was not filed, the claim may be dismissed as a sanction under Rule 22, W.R.Adj.R.

On June 3, 2016, the Water Court issued another master's report recommending dismissal of the claim as a sanction due to the repeated failures to comply with the Court's orders. On June 16, 2016, Pamela filed a letter objecting to dismissal of the claim. These events all occurred prior to the execution and recording of the deed of distribution for Frances's estate.

The Water Court set two more filing deadlines following Pamela's objection, ordering her to file an ownership update. On January 10, 2017, the Water Court issued a third master's report recommending dismissal of the claim as a sanction for the continued failures to comply with the Court's orders. On January 31, 2017, the Court adopted the master's report, dismissing the claim.

Pamela died in 2019 and her proportionate interest in the Neihart property was transferred to her cousin, Ronald Land ("Ronald"), On February 28, 2024. Ronald submitted an ownership update form to the DNRC to add himself as an owner of the claim. After receiving the completed form, the DNRC notified Ronald that claim 41Q 30952-00 was dismissed. The Claimants then filed this motion.

ISSUE

Should the Court reinstate claim 41Q 30952-00?

DISCUSSION

The Water Court follows five steps before reinstating a water right to its pre-dismissal status: (1) the party seeking reinstatement files a motion to reinstate, together

with a supporting brief; (2) the moving party provides notice to other persons who were parties to the proceedings involving the claim before it was dismissed; (3) the moving party meets the criteria in Rules 55(c) and 60(b)(1) or (6), M.R.Civ.P.; (4) the moving party satisfies any Court-imposed conditions, such as payment of delinquent fees; and (5) all objections, counterobjections, notice of intent to appear, or intervention are reinstated, as are any unresolved issue remarks. *In re Horvath*, Case No. 76G-548, 2006 Mont. Water LEXIS 4, *7 (May 22, 2006); *In re Circle S Ranch, Inc.*, 2019 Mont. Water LEXIS 8, *13.

A. Steps One and Two

The Claimants properly followed step one of the reinstatement process by filing a motion to reinstate the claim with a brief in support. Step two of the reinstatement process does not apply because no other party objected, moved for sanctions, or was otherwise involved in the proceedings involving the claim before it was dismissed.

B. Step Three

The third step is the heart of the reinstatement process. *Downs v. United States (Bureau of Indian Affairs)*, Case 43P-164-P-2019; 2021 Mont. Water LEXIS 1075, *4. Under this step, the Water Court evaluates reinstatement motions as analogous motions to set aside a default or a default judgment under M.R.Civ.P. Rule 55(c). *Id.* Further, “Rule 60(b) is the applicable standard that parties . . . must meet before the Water Court will reinstate a dismissed water right claim.” *Id.*

The Claimants appear to base their motion on Rule 60(b)(1), asserting that the claim was dismissed due to a misunderstanding with filing an ownership update with the DNRC and the interaction between the water rights records and the various probate proceedings. Rule 60(b)(1), M.R.Civ.P. states:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]

Parties seeking to set aside default judgment under Rule 60(b) must meet a four-part test that evaluates: (1) whether the defaulting party proceeded with diligence; (2) the

defaulting party's excusable neglect; (3) whether the defaulting party has a meritorious defense to the claim; and (4) if permitted to stand, whether the judgment will affect the defaulting party injuriously. *Detienne v. Sandrock*, 2017 MT 181, ¶ 29, 388 Mont. 179, 187, 400 P.3d 682, 688; *Frye v. Roseburg Forest Prods. Co.*, 2020 MT 10, ¶ 9, 398 Mont. 347, 350, 456 P.3d 573, 576. These four factors are analogous to the “good cause” factors previously applied under the former version of Rule 55. *Downs*, at *6.

1. Did the Claimants proceed with diligence?

The Montana Rules of Civil Procedure require that a Rule 60(b)(1) motion be filed “within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.” Rule 60(c)(1), M.R.Civ.P. Notwithstanding this deadline, the Water Court has leniency with Rule 60(c)(1) because the Court’s orders are interlocutory prior to issuance of a final decree. Section 85-2-235, MCA. Until final decree, no final judgment is entered, and the Court has “plenary power over its interlocutory orders and should be able to revise them when it is consonant with justice so to do.” *Smith v. Foss*, 177 Mont. 443, 447, 582 P.2d 329, 332 (1978); *see also, In re Delia Kelly*, Case 76HF-61, 2002 Mont. Water LEXIS 8, *4-6 (citing *Smith v. Foss*). However, the Water Court’s leniency does not extend to allowing an unreasonable amount of time to file a reinstatement motion. “Reasonable time” requires a factual inquiry that may vary from case to case. *Dambrowski v. Champion Int’l Corp.*, 2003 MT 233, ¶ 14, 317 Mont. 218, 222, 76 P.3d 1080, 1082.

Here, claim 41Q 30952-00 was dismissed in 2017, but the Claimants evidently were unaware. Prior to dismissal, Pamela had objected several times to the Water Court’s orders and attempted to work with DNRC to update ownership. Unfortunately Pamela died before the issue was resolved and she was the main point of contact.

The Claimants discovered the claim was dismissed sometime in March of 2024 after Ronald sent an ownership update form to the DNRC to add himself as an owner of claim 41Q 30952-00. The Claimants moved to reinstate the claim promptly after discovering the claim was dismissed. Before this discovery, the Claimants believed the claim was active and that the DNRC resolved the ownership issues. Thus, the Claimants’

delay in pursuing reinstatement of the claim was reasonable, so Claimants acted with diligence under the circumstances.

2. *Was the movant's neglect excusable?*

“Excusable neglect requires some justification for an error beyond mere carelessness or ignorance of the law on the part of the litigant or his attorney.” *Frye v. Roseburg Forest Prods. Co.*, 2020 MT 10, ¶ 12, 398 Mont. 347, 456 P.3d 573. Here, the Claimants explain they were under the impression that the DNRC would update ownership of the claim in 2012. The Claimants were unaware that the DNRC did not update ownership or that the claim was being adjudicated on the issue of ownership. The Claimants further explain that they did not know that Pamela failed to update the ownership of the claim following the numerous deadlines set by the Water Court, but presume this occurred because the property was not transferred until late 2016 to Glen and Frances’s children and Pamela began suffering from serious health issues at that time. Thus, the neglect in causing the dismissal of the claim by sanction is excusable. The neglect also is excusable due to the apparent length of time it took to complete the probate of Frances’s estate, which seems to have affected title to the property to which the claim is appurtenant.

3. *Do the Claimants have a meritorious defense?*

The third part of the test requires a moving party to articulate what meritorious defense exists if the case or claim is reinstated. *In re Horvath*, Case 76G-548, 2006 Mont. Water LEXIS 4, *7. In doing this, the movant does not have to prove the merits of a defense but has to allege a defense exists. *See also, In re Marriage of Shannon*, 2004 MT 25, ¶ 12, 319 Mont. 357, 361, 84 P.3d 645, 647. While the Claimants do not expressly say what meritorious defense exists if the claim is reinstated, the obvious defense is that the Claimants are in the position to update the ownership of the claim. No other elements were at issue in the previous proceedings – the claim did not receive issue remarks or objections during the Preliminary Decree process. The claim was dismissed solely as a sanction. While claimants have an obligation to keep ownership current so they can receive proper notice, dismissal over an ownership issue is a particularly harsh result

when, as here, the Claimants had attempted to be responsive to the Court's orders and the claim had no other issues. Thus, the Claimants successfully allege a meritorious defense.

4. *If permitted to stand, would the dismissal of the claim affect the Claimants injuriously?*

Claim 41Q 30952-00 is a domestic claim from McNeil Creek, a tributary to Belt Creek, to service a residence within the town of Neihart. Without this water right, the Claimants may have to find an alternative water source to service the household, if there is not one. Thus, the dismissal of the claim will affect the Claimants injuriously.

C. Steps Four and Five

As to the final two elements of the reinstatement test (the party must satisfy any court-imposed conditions, such as payment of delinquent fees; and all objections, counterobjections, notices of intent to appear, or interventions are reinstated, as are any unresolved issue remarks) nothing further is required. No fees are due nor are any conditions necessary. Reinstatement also does not revive any unresolved issue remarks, objections, or appearances. Reinstatement will not require further proceedings that may delay the progress of the adjudication. *In re Sunlight Ranch Co.*, Case 43O-0263-P-2019, 2022 Mont. Water LEXIS 930.

In summary, while the Court is reluctant to reverse a prior sanctions order, the particular circumstances of this claim warrant reinstatement.

ORDER

Therefore, it is ORDERED claim 41Q 30952-00 is reinstated. Claimants Nancy McCarty, David Kirkpatrick, and Ronald Land are added as owners of the claim, and the ownership issue remark is resolved. Nothing further is required to close these proceedings.

A post decree abstract of the claim is included with this Order to confirm the modifications to the claim have been made in the State's centralized water rights record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail:

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, FROM SUN TO MARIAS RIVERS
BASIN 41Q

Water Right Number: 41Q 30952-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: RONALD K. LAND
2461 RHODESIAN DR. #71
CLEARWATER, FL 33763

DAVID KIRKPATRICK
2135 PRICKLEY PEAR WALK
LAWRENCEVILLE, GA 30043

NANCY MCCARTY
3226 SE SELLWOOD ST.
MILWAUKIE, OR 97222

Priority Date: JULY 26, 1890

Type of Historical Right: FILED

Purpose (Use): DOMESTIC

Flow Rate: 10.00 GPM

Volume: 1.00 AC-FT

Households: 1

Source Name: UNNAMED TRIBUTARY OF BELT CREEK

Source Type: SURFACE WATER
ALSO KNOWN AS MCNEIL CREEK

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		SWNESE	32	14N	8E	CASCADE

Source Name: UNNAMED TRIBUTARY OF BELT CREEK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PIPELINE

Subdivision: LEISTIKOW ADD (NEIHART) TRACT/LOT: 39 BLOCK: 5

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			SWNESE	32	14N	8E	CASCADE

Subdivision: LEISTIKOW ADD (NEIHART) TRACT/LOT: 39 BLOCK: 5