

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23–0314

DEBRA V. SCHUTTER and SIDNEY J. SCHUTTER,

Claimants and Appellants,

v.

STATE OF MONTANA BOARD OF LAND COMMISSIONERS,

Objector and Appellee.

APPELLEE’S RESPONSE TO MOTION FOR STAY

On Appeal from the Montana Water Court, Upper Missouri Division
Gallatin River Basin (41H); Case 41H-0243-R-2021
The Honorable Stephen R. Brown, Presiding

Rachel K. Meredith
Office of the Governor
1301 E. 6th Avenue
PO Box 200801
Helena, MT 59620-0801
406-444-5503
rachel.meredith@mt.gov

Brian C. Bramblett
Montana Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601
(406) 444-9758
bbramblett@mt.gov

*Attorneys for Appellee, State of Montana Board
of Land Commissioners*

Jon Metropoulos
Metropoulos Law Firm, PLLC
1 South Montana Avenue, Suite L-3
Helena, MT 59601
(406) 461-4296
jon@metropouloslaw.com
*Attorney for Amicus Rocky Mountain
Stockgrowers Association and Greenfields
Irrigation District*

Colleen A. Coyle
PO Box 1326
Bozeman MT 59771
406-570-2740

KD Feedback
PO Box 907
702 Main Street
Lincoln MT 59639
kdfeedback@gmail.com

*Attorneys for Claimants and
Appellants, Debra V. Schutter and
Sidney J. Schutter*

Austin Knudsen
Montana Attorney General
Michael Noonan
Assistant Attorney General
Montana Dept. Of Justice
215 N Sanders St
Helena MT 59601-4522
Phone: 406-444-2026
michael.noonan@mt.gov
*Attorneys for Amicus State of
Montana*

Appellants' Motion for Stay of Appeal ("Motion") seeks to address an issue not before this Court: "Whether [DNRC has] authority to unilaterally implement a change in policy enabling it to assert an ownership interest in the Appellant Schutters' private water right in the name of the Board of Land Commissioners (the "Board") absent any sort of official rule making procedure or public hearing and opportunity to be heard." Attempts to reframe the dispute over ownership of Water Right 41H-1316900 as a matter of agency overreach, rather than undisputed facts and law, should be rejected. The Motion constitutes an improper request for a new trial/relief from judgment, fails to satisfy any of the requirements for such relief, and should be denied.

The Motion is improper.

While couched as a motion for stay, Appellants ask the Court to remand this case to the Water Court on argument and evidence not raised in the original proceeding or on appeal. The Motion is premised on authority related to a *trial court's* discretion to provide relief from a judgment or grant a new trial upon discovery of new evidence. *Motion*, 1-2; *Kartes v. Kartes*, 175 Mont. 210, 214, 573 P.2d 191, 193(1977)(citing Rule 59 and 60(b)(1) M.R.Civ.P. and 93-5603, RCM 1947 (recodified as §25-11-102, MCA)).

This Court is an appellate court, with limited jurisdiction to decide original and remedial writs. M.R.App.P. 14(1). Appellants' Motion does not invoke this

Court's original jurisdiction and it would be improper to consider a motion that was not first considered by the Water Court. Appellants provide no legal support for the proposition that this Court can stay an appeal or remand to the Water Court based on alleged newly discovered evidence and the *Motion* should be denied.

Appellants fail to satisfy the requirements for a new trial.

Even if the *Motion* were proper, it fails to satisfy the requisite criteria for a new trial or relief from judgment. The criteria stated in *Kerrigan v. Kerrigan*, 115 Mont. 136, 139 P.2d 533, 535(1943)¹ are as follows:

(1) That the evidence must have come to the knowledge of the applicant since the trial; (2) that it was not through want of diligence that it was not discovered earlier; (3) that it is so material that it would probably produce a different result upon another trial; (4) that it is not cumulative . . . ; (5) that the application must be supported by the affidavit of the witness whose evidence is alleged to have been newly discovered, or its absence accounted for; and (6) that the evidence must not be such as will only tend to impeach the character or credit of a witness.

The newly discovered evidence alleged in the Motion is "a change in Department of State Lands Policy." *Motion*, 2. However, Appellants were aware of this "policy" because it was discussed in *In re Adjudication of Existing Rights No. 43A-A*, 2000 WL 36119213, (Water Ct. June 29, 2000)(“*Kunnemann*”), which Appellants cite extensively in their briefing to the Water Court and on appeal.

¹ Appellants recitation of the *Kerrigan* factors omitted the affidavit requirement identified by that Court.

Dckt. 23, p 3; Dckt. 32, p 5-6; Opening Br. 9, 10, 11, 12, and 13; Reply Br. 13, 14, and 15. *Kunnemann* explained that prior to 1992:

the policy of the DSL was to assert State interest only in water rights that were diverted on and used on State land and not to claim ownership of a water right with a point of diversion off school trust land. According to the TLMD and Tom Hughes, Water Rights Specialist for the TLMD, the TLMD did not amend its policy or begin claiming water rights put to beneficial use on State land regardless of point of diversion until after 1991.

Kunnemann, *4.

The objection to 43A-42435-00 (the water right at issue in *Kunnemann*) is in the publicly-available Montana Water Rights Query System (MWRQS), and also references the change in “policy” referenced in the 1995 and 2019 objections attached as Exhibit 2 to the Motion. Exhibit A. Further, all objections, both those in Appellants’ Exhibit 2 and at issue in *Kunnemann*, were publicly noticed in the adjudication and maintained in the MWRQS.

Simple discovery, review of the public adjudication records, or reading the *Kunnemann* case would have led to discovery of the alleged policy shift.

McConnell-Cherewick v. Cherewick, 205 Mont. 75, 80, 666 P.2d 742, 745(1983)(denying motion where evidence could have been acquired through discovery); *Kartes*, at 214-15, at 194(diligence not satisfied where movant failed to go through the documents containing newly discovered evidence); *Cowles v. Sheeline*, 259 Mont. 1, 18, 855 P.2d 93, 103(1993)(movant must show that new

evidence could not have been discovered and produced at trial with the exercise of reasonable or due diligence); *Groves v. Clark*, 1999 MT 117, ¶ 30, 294 Mont. 417, 982 P.2d 446. Appellants’ failure to demonstrate diligence requires denial of the Motion. *Jenkins v. Kitsen*, 62 Mont. 515, 205 P. 243, 244(1922)(motion for new trial must be accompanied by an affidavit establishing diligence).

Next, the internal practices of DNRC’s predecessor agency are not material to the question of whether the Land Board is an owner of a water right.² The Land Board’s constitutionally-derived ownership of a pre-1973 water right is established in adjudication of the facts and law, not policy. *Dep’t of State Lands v. Pettibone*, 216 Mont. 361, 376, 702 P.2d 948, 957(1985). Accordingly, there is no basis upon which the Court can conclude that Appellants’ “evidence” would lead the Water Court to materially alter its ownership ruling.³

Finally, the argument that DNRC exceeded its authority in attempting to “take” a private water right without Land Board consideration or approval is unfounded and asserted without reasonable factual inquiry. Motion, 4. In 1973, the Land Board delegated Department of State Lands (DSL) with “all of the

² To the extent either practice constituted a “policy,” the original “policy” referenced in Appellants’ Exhibit 1 seems premised on a misapplication of law. Existence of an easement or ditch right to the point of diversion is distinct and separate from water right ownership. *See* Land Board Answer Br. 13-14. Regardless, the propriety of the original policy and subsequent change is not before this Court.

³ Indeed, the Water Court reinstated and adjudicated Water Right 40A-W-034949-00 and 40A-W-034950-00 referenced in Exhibit 1 in the Land Board’s ownership after consideration of the change in policy. Exhibit B.

functions vested in the board under the laws of Montana except those functions expressly reserved by the Board. . .” Exhibit C. The Land Board ratified DNRC’s delegated authority in 1996. Exhibit D.

In 1980, the Land Board tasked DSL “to do the complete water right adjudication” in response to DSL’s recommendation that participation was required “to meet the requirements of the Trust . . .” Exhibit E(180-2 and 380-3). Notably, ownership of the *Pettibone* water rights was established through objection to water rights claimed by State land lessees during adjudication. *Pettibone*, 216 Mont. at 376, 702 P.2d at 957. DNRC relied on the same authority and process to establish Land Board ownership in Water Right 41H-1316900. DNRC’s participation in adjudication, pursuant to the Land Board’s delegation, has been in fulfillment of the constitutional obligations to the school trust beneficiaries.

Given the foregoing delegation, constitutional obligation, and DNRC/DSL’s long-standing participation in adjudication, Appellants’ “evidence” will not lead to a different result on remand.

Conclusion

The Land Board respectfully requests this Court deny Appellants’ Motion.

Dated this 14th day of March, 2024.

By: /s/ Brian C. Bramblett
Brian C. Bramblett
Rachel K. Meredith
Attorneys for Objector/Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4), I certify that this Response is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 1,238 words.

Dated this 14th day of March, 2024.

By: /s/ Brian C. Bramblett
Brian C. Bramblett
Attorney for Objector/Appellee

CERTIFICATE OF SERVICE

I, Brian C. Bramblett, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 03-14-2024:

Colleen A. Coyle (Attorney)
PO Box 1326
Bozeman MT 59771
Representing: Debra V. Schutter, Sidney J. Schutter
Service Method: eService

KD Feedback (Attorney)
PO Box 907
702 Main Street
Lincoln MT 59639
Representing: Debra V. Schutter, Sidney J. Schutter
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: State of Montana
Service Method: eService

Rachel K Meredith (Attorney)
44 W. 6th Avenue
Suite 200
Helena MT 59601
Representing: Montana Board of Land Commissioners
Service Method: eService

Jon Metropoulos (Attorney)
1 South Montana Ave. Suite L-3
Helena MT 59601
Representing: Rocky Mountain Stockgrowers Association, Greenfields Irrigation District
Service Method: eService

Electronically signed by Jean Saye on behalf of Brian C. Bramblett

Dated: 03-14-2024