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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION)	Cause No. CDV-10-1043
)	
Plaintiff,)	ORDER RE: DEFENDANT BOUMA'S
vs.)	RULE 60(b), M.R.CIV.P. MOTION FOR
)	RELIEF FROM JUDGMENT
NEAL BOUMA and HAROLD POULSEN,)	
)	
Defendants.)	

This matter comes before the Court on Defendant Neal Bouma's (hereafter Bouma) Motion for Relief from Judgment pursuant to Rule 60(b), M.R.Civ.P. and Brief in Support filed November 23, 2012. Plaintiff Montana Department of Natural Resources and Conservation (hereafter DNRC) filed an Answer Brief Opposing Bouma's Motion on December 10, 2012. Bouma filed a Reply Brief in Support of his Motion on December 31, 2012.

FACTUAL & PROCEDURAL BACKGROUND

The Court assumes familiarity with the facts of this case. *See*, Ct.'s Or. Re: Cross Mots. for S.J., 1-3 (Dec. 22, 2011). The Court granted DNRC's Motion for Summary Judgment in its December 22, 2011 Order. The main issue presented to the Court in the parties' summary judgment briefing and argument involved a Montana Water Use Act (hereafter Water Use Act) enforcement action, specifically, determining whether Bouma's appropriation of water constituted a violation of the Water Use Act. *Id.* at 3-8. The Court found, "[b]ecause

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STATE OF NEW YORK

IN SENATE

January 14, 2013

REPORT OF THE

COMMISSION ON THE STATE OF THE ENVIRONMENT

AND THE QUALITY OF LIFE

IN THE STATE OF NEW YORK

FOR THE YEAR 2012

BY THE COMMISSIONERS OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

AND THE DEPARTMENT OF SOCIAL SERVICES

AND THE DEPARTMENT OF TAXATION AND FINANCE

AND THE DEPARTMENT OF HEALTH

AND THE DEPARTMENT OF LABOR

AND THE DEPARTMENT OF TRANSPORTATION

AND THE DEPARTMENT OF VETERINARY MEDICINE

AND THE DEPARTMENT OF WATER

AND THE DEPARTMENT OF ZOOLOGICAL CONSERVATION

AND THE DEPARTMENT OF CORRECTIONS

AND THE DEPARTMENT OF EDUCATION

AND THE DEPARTMENT OF HEALTH SERVICES

AND THE DEPARTMENT OF INDUSTRY, SERVICE AND TRADE

AND THE DEPARTMENT OF JUSTICE

AND THE DEPARTMENT OF NYS OFFICE OF GENERAL SERVICES

AND THE DEPARTMENT OF NYS OFFICE OF THE STATE CLERK

AND THE DEPARTMENT OF NYS OFFICE OF THE STATE COMPTROLLER

AND THE DEPARTMENT OF NYS OFFICE OF THE STATE THESAURUS

AND THE DEPARTMENT OF NYS OFFICE OF THE STATE ARCHIVIST

AND THE DEPARTMENT OF NYS OFFICE OF THE STATE HISTORIC PRESERVATION

AND THE DEPARTMENT OF NYS OFFICE OF THE STATE LIBRARIAN

Defendants [Bouma and Poulsen] do not possess any water rights permitting or authorizing the impoundment or storage of water for any purpose or beneficial use for any of the three dams on Defendants' property, they are in violation of the Water Use Act.” *Id.* at 8. Shortly after the Court's Order re: Cross Motions for Summary Judgment, DNRC filed a document styled as a “Motion for Penalties, Order of Removal of the Dams, and Entry of Judgment” and requested the Court to order removal of the dams. DNRC's Mot. for Penalties, Or. of Removal of Dams, 5 (Jan. 10, 2012). DNRC argued, “Defendants were on notice in 2009 that removal of the dams creating the impoundments was a distinct possibility.” *Id.* Bouma filed a Response to DNRC's Motion for Penalties, Order of Removal of Dams, and Entry of Judgment on January 23, 2012. Bouma's Resp. to DNRC's Mot. for Penalties, Or. of Removal of Dams (Jan. 23, 2012). Bouma argued that DNRC's Motion for an Order of Removal of Dams must be denied because “it seeks relief in excess of what is necessary to guarantee full stream flow-through in the ponds on Bouma's property.” *Id.* at 1-2. Bouma asserted,

[removal of the dams] is unreasonable, as Bouma would be required to go through lengthy permit processes by a third party before the barriers can be removed. Further, the request is unnecessary, as the desired result of DNRC's suit (i.e., unimpeded stream flow restoration) can be achieved by simply breaching the barriers.

Id. at 3. This Court entered a Judgment and Order¹ and a Memorandum re Judgment on February 15, 2012. The Court's Memorandum re Judgment states in relevant part, “[w]ith respect to removal and restoration, Bouma argues that the permitting process for removal is complex and that simply breaching the dam would be sufficient. Bouma has long been on notice that DNRC believed that the dams were constructed unlawfully and that removal is the

¹ The Court notes that it entered a separate Judgment for Defendant Harold Poulsen, as DNRC and Poulsen reached an agreement and filed a Stipulation of Entry of Judgment. *See*, Court's Judm. (Poulsen) (Feb. 15, 2012).

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appropriate remedy. The Court agrees.” Memo. re Judm. 2 (Feb. 15, 2012). The Court’s Order and Judgment states in relevant part,

5. IT IS ORDERED that Defendant Neal Bouma shall restore the perennial stream to its pre-construction free flowing characteristics as near as possible, and shall secure any local, state, or federal permit or authorization required to comply with this Judgment;

7. IT IS ORDERED that Defendant Neal Bouma shall complete the removal of the dams and restoration of the stream flow within [nine] months from the date this Judgment is entered. If this Order is not complied with in the time set out for Bouma’s performance, [DNRC] may request a hearing where Bouma shall appear and show cause why this Order has not been complied with;

Judm. & Or., ¶¶ 5, 7, 11 (Feb. 15, 2012). In the instant action, Bouma seeks relief from this Court’s Final Judgment and Order paragraph number seven directing Bouma to “complete the removal of the dams” pursuant to Rule 60(b)(1) and (4), M.R.Civ.P. Bouma’s requested relief is to have this Court modify its Judgment and Order to “allow Bouma to breach the earthen dams and insert culverts which will prevent the impoundment of water, restor[e] the stream flow of the Unnamed Tributary of the Sun River, and correc[t] Bouma’s violation of the [Water Use Act].” Bouma’s Mot. for Relief from Judm., 2 (Nov. 23, 2012).

DISCUSSION

Bouma’s motion for relief from judgment asserts four grounds for relief. First, Bouma seeks relief under Rule 60(b)(1), M.R.Civ.P. based upon his counsel’s failure to raise the constitutional takings argument that removal of the dams would perpetrate a taking without just compensation. Second, Bouma seeks relief based upon mistaken application of facts and law regarding the necessity of removing the dams under § 85-2-114(1)(b), M.C.A. Third, Bouma seeks relief under Rule 60(b)(4), asserting that the Court’s judgment is void because it is based upon the conclusion of law that DNRC is able to seek remedies outside the Water Use Act, that is, DNRC seeking remedies relating to 310 permitting law under the Natural Streambed and

Land Preservation Act of 1975. § 75-7-101, M.C.A. Finally, Bouma asserts a bare-bones claim for relief under Rule 60(b)(4) that the Court's judgment is void because DNRC violated Bouma's equal protection rights by treating Bouma's Water Use Act violation inconsistently in comparison to similar dam owners.

1. Bouma is not entitled to just compensation for any alleged "taking" of his property

Bouma asserts he has a constitutionally protected property right in the dams at issue because the dams are fixtures of his real property, the dams have valid 310 permits and the dams serve lawful purposes besides impounding water. Bouma argues the removal of the dams on his property "is a taking without just compensation in violation of the Fifth Amendment to the U.S. Constitution and Article II, Section 29 of the Montana Constitution." Bouma Br. in Support of Mot. for Relief from Judm., 8 (Nov. 23, 2012). In asserting his claim for relief under Rule 60(b)(1), M.R.Civ.P., Bouma asserts that "[t]here were mistakes by Bouma's counsel [which] directly resulted in the mistaken application of the law that DNRC could require the removal of the dams, infringing Bouma's protected property rights." *Id.* at 10.

The failure of counsel to raise the constitutional takings issue is not sufficient in this instance to support a Rule 60(b)(1) motion based on mistake. The Montana Supreme Court case of *Karlen v. Evans* provides that Rule 60(b) motions in cases of an "attorney's mistake, inadvertence, misconduct or neglect in the representation of a client, either subsection (1) or subsection (6) may be applicable, depending upon the facts, the nature and the seriousness of the mistake, inadvertence, misconduct or neglect involved." 276 Mont. 181, 190, 915 P.2d 232, 238 (1996). The Montana Supreme Court defines "mistake" under Rule 60(b) as "some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence." *Sun Mt. Sports, Inc. v. Gore*, 2004 MT 56, ¶ 26, 320 Mont. 196, 85 P.3d 1286. Bouma's former

attorney answered the Complaint, asserting that “[t]he Complaint and requested relief implicate and deprive Bouma of his constitutional rights protected by Article II, Sections 3 and 17 of the Montana Constitution.” Bouma’s Answer to Verified Compl., 5 (Dec. 27, 2012). Given that the answer to the Complaint addresses Bouma’s constitutional argument, the circumstances in the instant case do not involve an unintentional mistake or omission by his former attorney in failing to further assert a constitutional takings defense. There is no justification of error to support relief under Rule 60(b)(1), M.R.Civ.P.

Even considering the merits of this argument, the circumstances of the instant case do not support any compensation for an alleged taking. The Montana Supreme Court decision of *Kafka v. Montana Department of Fish, Wildlife & Parks* articulates the factors that must be examined in determining when compensation is required. 2008 MT 460, ¶ 69, 348 Mont. 80, 201 P.3d 8 (2008). This includes examining the character of the governmental action, the extent to which the regulation has interfered with distinct investment-backed expectations, and the economic impact of the regulation on the claimant. *Id.* (citation omitted). The government action at issue requires removal of the dams located on Bouma’s property because Bouma commenced construction of a “diversion” and thereby appropriated water without receiving a permit from DNRC in violation of § 85-2-302, M.C.A. The burden imposed on Bouma by the required removal of the dams is outweighed by the considerations which relate to the use of water within this state. Article IX, Section 3(2), of the 1972 Montana Constitution declares “all . . . waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.” Section 85-2-101, M.C.A. declares that “[i]t is the policy of this state . . . to encourage the wise use of the state’s water resources by making them available for appropriation . . . and to provide for the wise utilization,

development, and conservation of the waters of the state for the maximum benefit of its people . . .” Bouma violated the Water Use Act by appropriating water without a valid beneficial use permit, and negatively impacted downstream users with valid water rights. Any “investment-backed expectations” by Bouma regarding the dams located on his property were not reasonable, as the use of water and construction of any means of diversion is a highly regulated and permitted activity involving an overriding public interest. Whatever the economic impact on Bouma by the removal of the dams (which has not been established), the fact is that he constructed the dams without going through the required permitting process at his own peril. Given all of the foregoing, Bouma’s argument that he should be compensated for an alleged “taking” of his property fails.

2. The Court determined that removal of the dams is necessary

Bouma asserts that the Court “failed to consider that breaching the dams was all that was necessary under § 85-2-114, M.C.A.” and that this alleged mistake of fact and law by the Court entitles him to relief under Rule 60(b)(1), M.C.A.

First, the case of *Donovan v. Gaff* provides that Rule 60(b) motions based on judicial mistake filed after the time for appeal elapsed must be denied because Rule 60(b) motions cannot serve as a substitute for appeal. 248 Mont. 21, 25, 808 P.2d 491, 494 (1990). This matter has been addressed by the Court and Bouma had the opportunity to appeal any adverse decision. The Court considered Bouma’s assertion that breaching the dams may have been sufficient to restore the flow of water and squarely rejected Bouma’s assertion. The Court’s Memorandum re Judgment states in relevant part, “[w]ith respect to removal and restoration, Bouma argues that the permitting process for removal is complex and that simply breaching the dam would be sufficient. Bouma has long been on notice that DNRC believed that the dams were constructed

unlawfully and that removal is the appropriate remedy. The Court agrees.” Memo. re Judm. 2 (Feb. 15, 2012).² Given the foregoing, the Court determined that removal of the dams was the necessary measure to remedy the unlawful appropriation of water and interference with downstream user’s water rights pursuant to § 85-2-114, M.C.A.

3. Bouma’s arguments that the Court’s judgment is void must fail

Bouma argues that DNRC is not granted authority to administer 310 permitting law, and therefore, this Court’s judgment is void under Rule 60(b)(4), M.C.A. to the extent it requires removal of the dams and this remedy is more akin to a 310 remedy. DNRC argues that Bouma never received a permit to “commence construction of a diversion or impoundment” in violation of § 85-2-302(1), M.C.A., and this gives DNRC authority to seek removal of the dams. As stated previously, DNRC has authority under § 85-2-114, M.C.A. to petition the district court to “order the person wasting, unlawfully using, or interfering with another’s rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference.” The Court determined it is necessary to require removal of the dams to remedy the unlawful appropriation of water. This Court’s judgment is not void, as DNRC only sought remedies for Bouma’s violations of the Water Use Act.

Lastly, Bouma argues that DNRC violated Bouma’s equal protection rights by treating Bouma’s Water Use Act violation inconsistently in comparison to similar dam owners. Bouma’s equal protection claim fails because he failed to adequately plead a claim for relief and offered no authority to support a claim for relief.

For the foregoing reasons, IT IS HEREBY ORDERED that Defendant Bouma’s *Motion*

² Bouma has been on notice since commencement of this action that the specific relief DNRC requested in its Complaint was removal of the dams. Compl., 6, ¶ 32 (Nov. 16, 2010).

for Relief from Judgment is DENIED.

DATED this 22nd day of January, 2013


Kenneth R. Neill, District Court Judge

cc: Candace F. West / Kevin Peterson, Attorneys for Plaintiff
Ryan K. Mattick, Attorney for Defendant Neal Bouma
Michael P. Talia / Rachel A. Clark, Attorneys for Defendant Harold Poulsen