

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)
PRELIMINARY DECREE

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CLAIMANTS: Richard B. Ingersoll; Cottonwood Cabins LLC;
71 Ranch LP

CASE 40A-0379-R-2022
40A 198330-00
40A 198331-00
40A 205649-00

**ORDER ASSUMING CASE, ORDER LIFTING STAY, ORDER DENYING
MOTION TO STRIKE, ORDER CLARIFYING, AND ORDER SETTING
SCHEDULING CONFERENCE**

This case was stayed pending a ruling on Cottonwood Cabins LLC's Objection to Order on Motion in Limine and 71 Ranch LP's Motion to Strike. Associate Water Judge Bina R. Peters assumes this case and lifts the stay for further proceedings. As explained below, the Motion to Strike is denied and the Objection to the Order on Motion in Limine is granted to the extent it requests clarification.

Background

The primary issue raised by the outstanding motions is what further limitations, if any, should be in place based on 71 Ranch's late disclosure of witnesses and evidence prior to trial.

Proceedings in this case have extended over several years. Discovery closed on September 19, 2023. In October 2023, in a separate district court matter, a Complaint was filed by Errol Galt concerning a potential 310 permitting violation by Richard B. Ingersoll ("Ingersoll"). No violations were determined, and a 310 permit was ultimately approved. (Doc. 53.00, Exh. 1)¹.

¹ As used in this Order, the abbreviation "Doc." refers to the document sequence number in the Court's Full Court Enterprise case management system.

Five months later, in February 2024, Proposed Prehearing Orders were filed in this case. Cottonwood Cabins LLC (“Cottonwood Cabins”) and Ingersoll filed a joint Proposed Prehearing Order. (Doc. 46.00). 71 Ranch LP (“71 Ranch”) filed a separate Proposed Prehearing Order. (Doc. 47.00). On the same day the Proposed Prehearing Orders were filed, 71 Ranch also filed supplemental discovery responses identifying witnesses and exhibits that had not been previously disclosed. (Doc. 49.00). The supplemental discovery responses also appeared to expand the scope of testimony of some of its previously disclosed witnesses.

Cottonwood Cabins and Ingersoll filed a Motion in Limine arguing 71 Ranch’s supplemental discovery responses were prejudicial, and late disclosures should be excluded. (Doc. 52.00). The Motion in Limine also requested sanctions against 71 Ranch for abuse of discovery. *Id.* On November 26, 2024, the Water Court issued an Order on Motion in Limine (“the Order”) (Doc. 55.00). The Order stated:

“ORDERED that Cottonwood’s Motion is GRANTED as to any testimony or exhibits regarding the 310 Complaint.

ORDERED Cottonwood’s Motion is GRANTED as to Hurless’s testimony regarding the 2014 application and 2016 DOWL letter.

ORDERED that the remainder of Cottonwood’s Motion is DENIED.”

(Doc. 55.00).

The Water Master also re-opened discovery for the limited purpose of allowing Cottonwood Cabins and Ingersoll to cure 71 Ranch’s late disclosures. *Id.*

Cottonwood Cabins objected to the Order, in part, to clarify the scope of testimony permitted, but also to “exclude those prejudicial topics first identified in 71 Ranch’s Supplement for Mr. Ohlson and Mr. Radliff and limit them to testifying exclusively regarding the 310 Permit Application.” (Doc. 58.00). In response, 71 Ranch filed a Motion to Strike the Objection to the Order on Motion asserting Cottonwood Cabins used the wrong rules as the basis for its Objection to the Order. (Doc. 59.00).

The Court now addresses the Motion to Strike and Objection to the Order on Motion in Limine (“Objection”).

Analysis

I. Motion to Strike

71 Ranch filed a Motion to Strike the Objection. (Doc. 59.00). According to 71 Ranch, Cottonwood and Ingersoll improperly used Rule 23, W.R.Adj.R. and Rule 53(e), M.R.Civ.P. as the basis for the Objection. In short, 71 Ranch asserts the Objection is an improper filing because the Order was not final or reviewable. *Id.*

Generally, a Court has plenary power over its interlocutory orders and may revise such orders when it is consonant with justice to do so. *Smith v. Foss*, 177 Mont. 443, 447, 582 P.2d 329 (1978); 7 Moore’s Federal Practice, para. 60-20, p. 242. “District courts have the authority to control trial administration and inherent discretionary power to control discovery” *B Bar J Ranch, LLC v. Carlisle Wide Plank Floors, Inc.*, 2012 MT 246, ¶ 13, 366 Mont. 506, 288 P.3d 228; citing *Anderson v. Werner Enters., Inc.*, 1998 MT 333, ¶ 13, 292 Mont. 284, 972 P.2d 806.

The Court has authority to clarify the Order to effect an efficient and clear administration of discovery before trial.

II. Objection to Order on Motion in Limine

Cottonwood Cabins and Ingersoll filed an Objection to the Order. (Doc. 58.00). Cottonwood Cabins and Ingersoll requested the Water Court clarify the permitted testimony and also exclude additional testimony by Otto Ohlson and Russ Radliff that was not previously excluded in the Order on Motion in Limine. *Id.*

Late disclosures of expert and lay witnesses are discouraged to ensure fairness in litigation and to avoid surprise or prejudice to the opposing party. See generally *Weimar v. Lyons*, 2007 MT 182, 338 Mont. 242, 164 P.3d 922. The Court has discretion to allow late disclosures when an opposing party is put on notice and when there is time prior to trial to prevent prejudice. *Tripp v. Jeld-Wen, Inc.*, 2005 MT 121, ¶ 25, 327 Mont 146, 112 P.3d 1018; *B Bar J. Ranch, LLC v. Carlisle Wide Plank Floors, Inc.*, 2012 MT 246, ¶ 13, 366 Mont. 506, 288 P.3d 228.² The discovery process prior to trial is intended to promote

² In *Tripp*, a witness was disclosed late in proceedings, but the disclosure was six months prior to trial. The expert status of the witness was not disclosed until two weeks before trial. In *B Bar J. Ranch, LLC*, the District Court granted a motion to amend a scheduling order to allow for late disclosure of an expert witness. The District Court did not abuse its discretion in amending the scheduling order to allow the late disclosure.

the ascertainment of truth by assuring the mutual knowledge of all relevant facts gathered by both parties, to promote fairness and prevent surprise or prejudice. *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634 (citing *Massaro v. Dunham*, 184 Mont, 400, 405, 603 P.2d 249, 252 (1979)).

The Court acknowledges Cottonwood Cabins and Ingersoll's frustration with 71 Ranch's late disclosures and the additional time and expense necessary to prepare for hearing based on the disclosures. However, a trial has yet to be set in this matter. It has been over a year since the late disclosures of witnesses by 71 Ranch and the Court is willing to provide additional time to Cottonwood and Ingersoll to prevent surprise and promote fairness so that the parties can be prepared for trial.

As requested in the Objection, the Order is clarified to assure that the parties understand what testimony by Otto Ohlson, Russ Radliff, and Rhett Hurless was specifically excluded. However, the Court declines to reconsider its Order denying the exclusion of other evidence. At the trial in this case, the parties may object as necessary concerning the testimony and exhibits sought to be introduced.

Conclusion

The Court has authority to control the discovery process. While late disclosures are discouraged, Cottonwood Cabins and Ingersoll are provided an opportunity to conduct discovery to prevent surprise and prejudice.

Accordingly, it is

ORDERED that the Stay of this case is LIFTED.

ORDERED that the Motion to Strike is DENIED.

ORDERED that the request to clarify the Order on Motion in Limine is GRANTED and the Order on Motion in Limine is clarified as follows:

The Court allowed testimony by Otto Ohlson and Russ Radliff, except testimony specifically concerning the 310 Complaint filed by Errol Galt against Cottonwood Cabins and/or Ingersoll. The Order on Motion in Limine also excluded testimony by Rhett Hurless. The exclusion applies to

Hurless' testimony disclosed in 71 Ranch's February 7, 2024 supplemental discovery responses, specifically testimony about "GB Entergy Park, LLC, Application for Beneficial Use Permit and the DOWL Letter and attachments of September 6, 2016." (*See* Doc. 49).

ORDERED that to the extent the Objection requests a reconsideration of the Order on Motion in Limine and further exclusion of evidence or witnesses, the Objection is DENIED.

ORDERED that a telephonic scheduling conference is set for **May 8, 2025, at 10:00 a.m. Mountain Time**. The purpose of the conference to discuss the time necessary for Cottonwood Cabins and Ingersoll to conduct additional discovery limited to curing 71 Ranch's late disclosure of witnesses and exhibits. Information on how to access the conference is as follows:

1. At the designated conference time, dial **1-646-558-8656**.
2. At the prompt, enter Meeting ID **852 7636 0403**.
3. If asked for a participant ID, just enter #.
4. At the prompt, enter Password **874119**.

The conference may also be accessed at the following link:

<https://mt-gov.zoom.us/j/85276360403?pwd=ipDrF6PRKunq2D7ERJfCbtSUblgAJ.1>

Failure to comply with the terms of this Order may result in sanctions, including entry of default and termination of a water right claim, modification of the claim to conform with information before the Court, or dismissal of objections. Rule 22, W.R.Adj.R. Any request for a continuance must be made before the filing deadline, in accordance with Rules 2 and 3, U.D.C.R., and must include a showing of good cause.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail

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