Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364
FAX: (406) 522-4131

MONTANA WATER COURT, LOWER MISSOURI DIVISION
BEAVER CREEK TRIBUTARY OF MILK RIVER - BASIN 40M

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CLAIMANTS: DBCO, LLC; Roger Ereaux OBJECTOR: United States of America (US Fish & Wildlife Service)	**40M 170174-00**

ORDER DENYING CLAIMANTS' MOTION TO WITHDRAW OR AMEND ADMISSIONS AND MOTION TO EXTEND TIME TO FILE DISCOVERY RESPONSES

STATEMENT OF THE CASE

The subject of this case is claim 40M 170174-00 for a groundwater well. The claimants are DBCO, LLC and Roger Ereaux. The United States of America, Fish and Wildlife Service ("FWS") objected to priority date, volume, and flow rate.

On September 28, 2011, claimants moved to amend the flow rate from 4.4 CFS to 400 GPM and the volume from 3,200 acre-feet to 645 acre-feet. A Master's Report was issued on October 17, 2014 which recommended implementing the changes proposed by the claimants.

Both parties filed timely objections to the Master's Report. FWS objected that the amendment resolved issue remarks concerning volume and flow rate but failed to address its objection to priority date. Claimant DBCO also objected to the Master's Report, asserting the 400 gpm flow rate requested in its previous 2011 amendment was based on mistaken information, and should be increased to 666.67 gpm. It also asked to increase its previously requested volume from 645 acre-feet to 912.5 acre-feet. The claimants asked to expand the place of use and change the purpose of use to add irrigation, stock watering and wildlife habitat to the already claimed commercial use for a hot springs resort.

Claimant DBCO, LLC's Verified Objection to Master's Report Filed 10-17-2014 and to Correct Water Right Claim (Oct. 29, 2014).

The claim was recommitted to the Master and a deadline was set for settlement. After the settlement deadline was extended three times and the parties failed to settle, the Master scheduled the claim for hearing. The Master's order specified that discovery was to be completed by September 14, 2015.

In July 2015 DBCO moved the Court to add the DNRC to the service list; remove all issue remarks; strike the phrase "Hot Springs Resort" under the purpose clarification, claiming it was ambiguous; and to toll the scheduling order to allow claimant DBCO to try and resolve all issues potentially raised by the DNRC. Based on this motion, a Settlement Master was appointed and the deadlines in the scheduling order were suspended.

In the meantime, FWS served discovery on claimant DBCO, including requests for admissions. These discovery requests were sent to claimant on August 10, 2015.

Despite the appointment of a Settlement Master, the parties were once again unable to reach settlement and on January 28, 2016 the Chief Water Judge assumed jurisdiction and issued a new scheduling order.

The new scheduling order required that discovery be completed by March 28, 2016. The January 28, 2016 Scheduling Order stated the term "completed" meant that all discovery requests "shall have been served sufficiently in advance so that required responses are due on or before" March 28, 2016. Scheduling Order at 2 (January 28, 2016). The scheduling order also set a deadline of April 27, 2016 for filing pretrial motions. DBCO did not answer the pending FWS discovery requests by the date in the scheduling order.

FWS sent a second discovery request to claimant DBCO and a first discovery request to claimant Roger Ereaux on February 24, 2016. FWS also informed claimant DBCO that it had not responded to the original discovery requests and that its requests for admission were deemed admitted.

Claimants did not respond to the second discovery requests and FWS filed a motion for summary judgment on April 20, 2016. The FWS motion relied in part on admissions arising from the claimants' failure to answer discovery requests.

The claimants responded by filing a number of motions of their own. These included a request to extend time to answer previous discovery requests, a request to vacate the pending scheduling order, and a request to withdraw or amend prior admissions.

The claimants eventually filed discovery answers in May 2016. The answers denied all of FWS's requests for admission. These answers were provided several months after they were due, after the March 28, 2016 discovery deadline in the scheduling order, and after the deadline for filing pretrial motions.

The pending scheduling order, including the deadline for filing pretrial orders, was vacated pending a decision on the FWS motion for summary judgment and a decision on the claimants' motion to withdraw or amend their prior admissions. The answer to the latter question impacts the summary judgment motion and will therefore be considered first.

ISSUE

1. Are claimants entitled to withdraw or amend their admissions?

APPLICABLE LAW

A request for admission is automatically deemed admitted if no response is filed, or a response is filed late. Rule 36(a)(3), M. R. Civ. P. A matter admitted is conclusively established unless a court permits it to be withdrawn. Rule 36(b), M. R. Civ. P.

The test for considering the merits of withdrawal has two parts. A court may permit withdrawal or amendment of an admission if it "would promote the presentation of the merits of the action and if the court is not persuaded that that it would prejudice the requesting party in maintaining or defending the action on the merits." Rule 36(b), M. R. Civ. P.

Rule 36, M. R. Civ. P. was amended in 2011 and the only Montana Supreme Court case interpreting the new rule is *Bates v. Anderson*, 2014 MT 7, 373 Mont. 252, 316 P.3d

857. In *Bates*, the district court found that allowing the dilatory party to withdraw their admissions would help resolve the case on the merits. *Bates*, ¶ 12. Despite this finding, it refused to allow withdrawal because the opposing party relied on admissions to support a summary judgment motion.

The Montana Supreme Court stated that "mere inconvenience does not constitute prejudice for the purpose of Rule 36" and that reliance on deemed admissions in the preparation of a summary judgment motion was not prejudicial. *Bates*, ¶ 22. There must be actual prejudice related to the difficulty a party may face in proving its case after having depended on the admissions, such as "'the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously deemed admitted.'" *Id* (quoting *Raiser v. Utah Co.*, 409 F.3d 1243, 1246 (10th Cir. 2005).

The Supreme Court recognized that while allowing admissions to be withdrawn was a matter of judicial discretion, that discretion must be exercised by focusing "'on the effect upon the litigation and prejudice to the resisting party rather than...on the moving party's excuses for an erroneous admission.'" *Bates*, ¶ 25 (quoting *In re Durability Inc.*, 212 F.3d 551, 556 (10th Cir. 2000).

The Supreme Court also observed that mitigating factors existed because the party seeking to withdraw admissions had provided responses well before the close of discovery and before a scheduling order had been entered.

The Supreme Court intimated its decision might have been different if dilatory conduct had caused other problems such as "undue delay in the pre-trial proceedings and/or...abuse of the judicial process." *Bates*, ¶ 26. These factors could be taken into account in determining whether the lower court abused its discretion. *Bates*, ¶ 26.

The present case is both similar to and distinguishable from *Bates*. As with *Bates*, allowing the claimants to withdraw their admissions would likely improve the prospects for disposition on the merits, and like *Bates*, the admissions made by the claimants form the basis of the objector's summary judgment motion.

Unlike *Bates* however, there are impacts to the opposing party that go beyond the inconvenience of preparing a summary judgment motion based on admissions. Discovery has closed and no discovery answers were provided before the discovery deadline. The Court set a supplemental discovery deadline in its scheduling order and that deadline was also ignored. The deadline for submitting pretrial motions also passed without discovery answers being made available.

As a consequence of these problems, FWS was unable to properly frame follow-up discovery. The inability to "conduct[] meaningful follow-up discovery" is prejudicial. *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 78, 303 Mont. 274, 16 P.3d 1002.

In addition, FWS was deprived of opportunities to identify witnesses and evidence, and the ability to file pretrial motions using discovery answers provided by the claimants. These problems were exacerbated by the claimants' injection of new issues into the case via its objections to the Master's Report. FWS was not able to properly respond to these new issues.

Although the claimants eventually provided discovery answers, those answers were months late. This delay has upset the schedule of this case by requiring that the scheduling order be vacated and has impaired the objector's ability to prepare for trial.

In response, the claimants propose that they be allowed to withdraw their prior admissions and request that a new scheduling order be issued. The claimants' proposed solution amounts to a request to re-start this case back at the point of objections to the initial Master's Report.

Claimants' counsel has attempted to excuse the failure to provide timely answers to discovery by asserting that his client's health problems were the cause of delay. That explanation is not credible.

Mr. Depuydt's[1] health problems were not brought up until after discovery responses were overdue and after claimants' counsel had already admitted that discovery

[1] L. John Depuydt was appointed power of attorney for claimant Roger Ereaux in April 2016. The Water Court was notified of Mr. Depuydt's appointment via a filing on April 14, 2016. The April 14, 2016 filing was submitted to the Court by Stewart Lewin, who had previously entered his appearance on behalf of claimant DBCO. The April 14, 2016 filing also indicated Mr. Lewin would be representing Mr. Ereaux via Mr. Depuydt.

was late because he had not had started working on responses and was unaware of the consequences of not providing timely answers. It therefore appears that the claimant's health problems did not cause the delays in this case and were offered as a justification for failure to respond only after the consequences of failing to work on discovery answers became apparent to claimants' counsel.

ORDER

The claimants' motion to withdraw or amend its discovery answers and its motion to extend the time for filing discovery answers are DENIED.

DATED this 20th day of July, 2016.

Russ McElyea
Chief Water Judge

Stuart F. Lewin
Lewin Law Office
615 Third Avenue North
Great Falls, MT 59401
(406) 727-8464
stuartlewin@gmail.com

Maribeth Anderson
1312 N. Monroe Ste. 252
Spokane, WA 99201
maribeth@mandersonlaw.org

Joseph T. Mathews Lead Trial Attorney
Caitlin B. Imaki, Trial Attorney
James J. DuBois, Trial Attorney
Natural Resources Section
Environment & Natural Resources Division
US Department of Justice
PO Box 7611
Washington, D.C. 20044-7611
Phone (202) 305-0432
Phone (202) 305-0247
Fax (202) 305-0506
joseph.mathews@usdoj.gov
caitlin.imaki@usdoj.gov
james.dubois@usdoj.gov