UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. ESTATE OF E. WAYNE HAGE et al., Defendants.	)	2:07-cv-01154-RCJ-LRL **ORDER**

The United States has sued Wayne N. Hage ("Wayne Jr.") both individually and in his capacity as executor of the estate of his father, E. Wayne Hage ("Wayne Sr."), for the unauthorized grazing of cattle on federal land. The Court has denied motions to dismiss and for offensive summary judgment, granted Defendants leave to amend to plead counterclaims, and granted the United States' motion to dismiss Defendants' counterclaims in part. The United States has now moved to strike ten recently named witnesses. For the reasons given herein, the Court denies the motion.

I. RELEVANT PROCEDURAL HISTORY

On January 6, 2010, the magistrate judge issued the Scheduling Order, requiring all discovery to be completed by June 30, 2010. (*See* Sched. Order 1, Jan. 6, 2010, ECF No. 125). During a telephonic conference, the magistrate judge extended discovery to September 30, 2010 and designation of experts to July 30, 2010. (*See* Mins., June 7, 2010, ECF No. 155). The

magistrate judge then approved a stipulation to extend discovery to October 14, 2010. (*See* Order, Sept. 13, 2010, ECF No. 176).

The Court has continued the trial several times in reaction to the extension of discovery and for other reasons. On May 24, 2011, it continued the trial to October 3, 2011. (*See* Mins., May 24, 2011, ECF No. 239). On July 12, 2011, Defendants filed their proposed pretrial order. On July 25, 2011, the United States filed the present motion to strike several witnesses allegedly first disclosed in a supplemental disclosure on July 6, 2011. On August 4, 2011, the Court continued the trial to March 19, 2012 and ordered the parties to submit a new proposed stipulated scheduling order.

II. LEGAL STANDARDS

Pretrial disclosures must be made at least thirty days before trial, unless a court orders otherwise. Fed. R. Civ. P. 26(a)(3)(B). Expert testimony must be disclosed at least ninety days before trial. Fed. R. Civ. P. 26(a)(2)(D).

III. ANALYSIS

There could have been a late-disclosure violation under Rule 26 directly in this case. Specifically, if the Court had not continued trial until March 19, 2012, Rule 26 would have required most disclosures to be made by September 3, 2011 and expert-witness disclosures to be made by July 5, 2011, the day before the subject disclosures were made. But the trial has been continued and previous versions of the scheduling order have been superseded by the Court's solicitation of a new proposed stipulated scheduling order. It is not clear what the new scheduling order will say about when disclosures must be made, and the five-and-a-half-month extension greatly reduces any chance of prejudice from a July 6, 2011 disclosure of witnesses. Whatever force it had before, the United States' argument that the disclosures were made less than three months before trial now has less, because the disclosures were made (at the latest) eight-and-a-half months before trial.

Next, it is the Court itself that indicated certain types of expert witnesses would be required at trial to sort out those local ranching customs and practices that will affect the Court's findings of fact and conclusions of law as to the scope of Defendants' rights. There is no indication Defendants are attempting to surprise the United States by naming the new expert witnesses.

Finally, the United States complains that the July 6, 2011 supplemental disclosure of expert witnesses was accompanied by no expert reports as required by Rule 26(a)(2)(B). But not all expert witness disclosures must include experts' reports. Witnesses who will not rely on reports related to the facts of the case, but who will provide expertise in a field generally, need not produce reports. *See* Fed. R. Civ. P. 26(a)(2)(C). However, such a disclosure must still include a statement of the areas of expected testimony and the facts and opinions to which the witness expects o testify. *See id.* The July 6, 2011 disclosure attached to the United States' motion indicates that Defendants included such information, as does the corrected disclosure of the same date, which is also attached. (*See* Disclosures, July 6, 2011, ECF No. 249-1; Corrected Disclosures, July 6, 2011, ECF No. 249-2). Based on the new trial date, and unless the new scheduling order requires something different, if Defendants' experts intend to rely on or introduce expert reports, the expert disclosures must be corrected again and the relevant reports attached no later than December 20, 2011.

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Strike Recently Named Witnesses (ECF No. 249) is DENIED.

IT IS SO ORDERED.

Dated this 3rd day of October, 2011.

ROBERT C. JONES
United States District Judge