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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 DIAMOND X RANCH LLC,  
7 Plaintiff/Counter-Defendant,  
8 v.  
9 ATLANTIC RICHFIELD COMPANY,  
10 Defendant/Counterclaimant/  
11 Third-Party Plaintiff,  
12 v.  
13 PARK LIVESTOCK CO.,  
14 Third-Party Defendant.

Case No. 3:13-cv-00570-MMD-WGC

ORDER

15 **I. SUMMARY**

16 Pending before the Court is Plaintiff and Counter-Defendant Diamond X Ranch,  
17 LLC's ("Diamond X") Objection to the March 13, 2018 Order of Magistrate Judge William  
18 G. Cobb ("Objection") (ECF No. 338). Defendant, Counter-claimant and Third-Party  
19 Plaintiff Atlantic Richfield Company ("ARCO") filed a response (ECF No. 342).

20 For the reasons discussed herein, the Objection is overruled.

21 **II. RELEVANT BACKGROUND**

22 This action concerns alleged contamination of a ranch ("the River Ranch") owned  
23 and operated by Diamond X through the release of acid mine drainage ("AMD") from the  
24 ARCO-owned Leviathan Mine. On January 25, 2018, Judge Cobb issued an oral ruling  
25 ("Expert Report Order") in which Judge Cobb excluded the entire supplemental expert  
26 report of Robert Anderson, reasoning that "the aspect [in the supplemental report] of the  
27 flood plain remedial plan regarding the earthen channel is too far beyond Mr. Anderson's  
28 initial report" and thus is not "tied or tethered to the preexisting conclusions" in Anderson's

1 initial report. (ECF No. 329 at 1-2.) Judge Cobb also excluded those portions of the  
2 supplemental expert report of Jeffrey Dagdigian, Ph.D., “for which he embraces  
3 Anderson’s earthen channel” and ordered that ARCO be allowed to take the deposition  
4 of Dr. Dagdigian. (*Id.*; ECF No. 336 at 3.)

5 Before Dr. Dagdigian’s scheduled deposition on February 14, 2018, Diamond X’s  
6 counsel provided ARCO’s counsel with “well over one hundred pages of new tables,  
7 figures and other documents not previously disclosed.” (ECF No. 336 at 3 (quoting ECF  
8 No. 333 at 4).) During the intervening weeks between the Expert Report Order and the  
9 scheduled deposition, Dr. Dagdigian retained a new expert, Innovative Construction  
10 Solutions (“ICS”), and had an employee at his firm type up her notes on the costs of an  
11 embankment. All of this was to “prepare a new floodplain mitigation channel design and  
12 cost estimate” in lieu of that prepared by Anderson and to then “change[] his excluded  
13 opinion and cost estimates for the floodplain remedy” to embrace the replacement costs  
14 identified by ICS. (ECF No. 336 at 4 (quoting ECF No. 333 at 2-3); *see also* ECF No. 338  
15 at 10.) Dr. Dagdigian also prepared a corrected and updated table, Table 3-6A, which  
16 provided an estimate of future costs for removing arsenic-contaminated soil from the  
17 relevant parcels (a solution identified as “Option 2”). (ECF No. 336 at 10; ECF No. 338 at  
18 11.) ARCO then filed a Motion to Enforce the Expert Report Order’s evidentiary  
19 exclusions. (ECF No. 333.)

20 Judge Cobb found that the Motion to Enforce was not a disguised motion in limine  
21 as Diamond X had argued; instead, relying on Fed. R. Civ. P. 37, Judge Cobb found that  
22 it was within the Court’s authority to address the Motion to Enforce and issue sanctions.  
23 (ECF No. 336 at 8.) In the written order (“Enforcement Order”), Judge Cobb generally  
24 held that Diamond X was prohibited “from offering testimony or evidence (i) on the costs  
25 for constructing a floodplain mitigation channel or (ii) that replaces, substitutes for, or  
26 serves as an alternative to the earthen channel developed by Mr. Anderson and  
27 embraced by Dr. Dagdigian in his November 15, 2017 supplemental report.” (*Id.* at 11.)  
28 More specifically, Judge Cobb excluded (1) any “utilization of the ICS opinions and

1 conclusions either directly or indirectly via Dagdigian’s reports” because those opinions  
2 were not contained in the original or supplemental reports of Dr. Dagdigian, and (2) the  
3 cost estimates and opinions as to the removal of arsenic hot spots found in Table 3-6A  
4 because this information was not timely provided as is required by Fed. R. Civ. P. 26. (*Id.*  
5 at 10-11.) Judge Cobb then issued sanctions—specifically, he granted ARCO’s request  
6 for reasonable attorney fees incurred in bringing the Motion to Enforce. (*Id.* at 12.)

7 Diamond X now objects to the Enforcement Order.

### 8 **III. LEGAL STANDARD**

9 Magistrate judges are authorized to resolve pretrial matters subject to district court  
10 review under a “clearly erroneous or contrary to law” standard. 28 U.S.C. § 636(b)(1)(A);  
11 Fed. R. Civ. P. 72(a) (a “district judge . . . must consider timely objections and modify or  
12 set aside any part of the order that is clearly erroneous or is contrary to law”); *see also*  
13 LR IB 3-1(a) (“A district judge may reconsider any pretrial matter referred to a magistrate  
14 judge in a civil or criminal case under LB IB 1-3, when it has been shown the magistrate  
15 judge’s order is clearly erroneous or contrary to law.”). A magistrate judge’s order is  
16 “clearly erroneous” if the court has a “definite and firm conviction that a mistake has been  
17 committed.” *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).  
18 “An order is contrary to law when it fails to apply or misapplies relevant statutes, case  
19 law, or rules of procedure.” *Jadwin v. Cty. of Kern*, 767 F. Supp. 2d 1069, 1110-11 (E.D.  
20 Cal. 2011) (quoting *DeFazio v. Wallis*, 459 F. Supp. 2d 159, 163 (E.D.N.Y. 2006)). When  
21 reviewing the order, however, the magistrate judge “is afforded broad discretion, which  
22 will be overruled only if abused.” *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446  
23 (C.D. Cal. 2007). The district judge “may not simply substitute its judgment” for that of  
24 the magistrate judge. *Grimes v. City & Cty. of San Francisco*, 951 F.2d 236, 241 (9th Cir.  
25 1991) (citing *United States v. BNS, Inc.*, 858 F.2d 456, 464 (9th Cir. 1988)).

### 26 **IV. DISCUSSION**

27 Diamond X argues that the Enforcement Order is clearly erroneous for a variety of  
28 reasons, including that Dr. Dagdigian’s supplementation after the Expert Report Order is

1 consistent with that Order and that the Enforcement Order unfairly expands the Expert  
2 Report Order. (ECF No. 338 at 13-23.) However, these arguments miss the point. As  
3 ARCO points out, November 15, 2017—not February 2018—was the last date on which  
4 experts could supplement their opinions (ECF No. 342 at 8 (citing ECF No. 306)), and  
5 Judge Cobb clearly stated at the January 25, 2018 hearing that supplementation of expert  
6 opinions was permitted insofar as supplementation was tied or tethered to conclusions in  
7 the original expert reports. Dr. Dagdigian’s incorporation of ICS’s findings and addition  
8 of Table 3-6A effectively supplemented his expert report in ways untethered to his original  
9 report and well past the November 15, 2017 deadline. The Court therefore cannot find  
10 that Judge Cobb committed clear error when he excluded this supplemental information  
11 and awarded reasonable attorney fees to ARCO.

12 **A. The Scope of the Expert Report Order**

13 As a preliminary matter, Diamond X argues that this Court’s prior ruling in  
14 *Shakespear v. Wal-Mart Stores, Inc.*, No. 2:12-cv-01064-MMD-PAL, 2014 WL 5106048  
15 (D. Nev. Oct. 10, 2014), which Judge Cobb relied on to impose the sanctions in the  
16 Enforcement Order, is inapplicable and does not actually support the Enforcement Order.  
17 (ECF No. 338 at 14.) The Court disagrees.

18 While Diamond X is correct that *Shakespear* is dissimilar from the Expert Report  
19 Order insofar as in *Shakespear* the Court excluded the expert witness testimonies  
20 altogether and here only portions of Dr. Dagdigian’s supplemental report were excluded,  
21 the underlying premise is the same. There, the magistrate judge had prohibited the  
22 plaintiff from using “as evidence at trial, at any hearing, or any motion, the testimony or  
23 opinions” of two expert witnesses. *Shakespear*, 2014 WL 5106048, at \*1. The district  
24 judge then overruled the plaintiff’s objection to the magistrate judge’s order, finding that  
25 the plaintiff had “unreasonably waited until the expert disclosure deadline to disclose two  
26 expert witnesses . . . and their reports.” *Id.* In the relevant decision in *Shakespear*, the  
27 court found that the plaintiff had violated the two prior orders by stating her intent to call  
28 the same two expert witnesses at trial and by citing to the expert’s opinions in her motions

1 in limine. *Id.* The court further found the plaintiff’s reading of the scope of the magistrate  
2 judge’s order—that the two expert witnesses were precluded only from offering their  
3 opinions as to the plaintiff’s future medical needs, costs, and any other permanent  
4 impairment—to be unreasonable in light of the court’s previous orders, which had clarified  
5 the meaning of the original magistrate judge’s order. *See id.* at \*2.

6 Similarly, here, the Enforcement Order clarified the scope of the Expert Report  
7 Order and resolved any seeming ambiguity regarding the exclusion of information or  
8 opinions concerning the earthen channel. In the Enforcement Order, Judge Cobb clarified  
9 the scope of the Expert Report Order’s exclusion of portions of Dr. Dagdigian’s  
10 supplemental report, stating that because “ICS’ opinions and report were not contained  
11 within the original or supplemental reports of Dr. Dagdigian, *to be consistent with its prior*  
12 *ruling* the court will not allow utilization of the ICS opinions and conclusions either directly  
13 or indirectly via Dagdigian’s reports.” (ECF No. 336 at 10 (emphasis added).) In other  
14 words, Judge Cobb clarified that nothing in the Expert Report Order permitted Dr.  
15 Dagdigian to substitute Anderson’s findings with opinions that were untethered to Dr.  
16 Dagdigian’s original report in advance of ARCO’s February 14, 2018 deposition of him.  
17 Diamond X contends that by excising “from his own supplemental report any embrace of  
18 the design and cost estimate discussed in the Anderson Supplemental Report” and  
19 replacing it with “different design and cost information from other, non-Anderson sources,”  
20 Dr. Dagdigian (and therefore Diamond X) did not violate the Expert Report Order. (ECF  
21 No. 338 at 13.) Judge Cobb however made clear that Diamond X did violate the Order  
22 because it supplemented Dr. Dagdigian’s reports with information untethered to Dr.  
23 Dagdigian’s prior reports after the deadline to supplement and after Judge Cobb ruled on  
24 the scope of permissible supplementation. (See ECF No. 336 at 10.) Similarly, as for  
25 Table 3-6A, Judge Cobb made clear that while the general subject of Option 2 may have  
26 been found in Dr. Dagdigian’s original or even supplemental report, the cost estimates in  
27 Table 3-6A were not available in either report and were created after the Expert Report  
28 Order. This is ultimately true of both the ICS data and the information found in Table 3-

1 6A, making clear that Magistrate Judge Cobb’s Expert Report Order excluded any items  
2 untethered to the original expert reports and which were developed after the November  
3 15, 2017 expert disclosure deadline.

4 **B. The Magistrate Judge did not Unfairly Expand the Expert Report Order**

5 Diamond X argues that the Enforcement Order unfairly expanded the scope of the  
6 Expert Report Order by excluding testimony or evidence about the “costs or needs” of a  
7 floodplain mitigation channel when the Expert Report Order only excluded Anderson’s  
8 specific design and cost projections about the earthen embankment. (ECF No. 338 at 15,  
9 22.) The Court finds Diamond X’s arguments as to this issue unavailing.

10 Diamond X’s argues that the earthen embankment and channel alternative was  
11 Dr. Dagdigian’s, as opposed to Anderson’s, idea, and thus something Dr. Dagdigian could  
12 seek alternative supplementation for—either from ICS or from another employee at his  
13 firm. (See ECF No. 338 at 15-20.) However, this is irrelevant. Judge Cobb found that  
14 this information, which was added to the expert file after the Expert Report Order was  
15 issued, constituted opinions aimed to replace the exclusion of the earthen channel  
16 remedial option. This makes clear that the scope of the Expert Report Order was the  
17 earthen channel remedial option itself, not Anderson’s version of it. This is consistent  
18 with the language used by Judge Cobb at the January 25, 2018 hearing and lends to a  
19 reasonable interpretation that he was excluding the earthen channel option itself. (See  
20 ECF No. 330 at 94 (“As to Dagdigian . . . I am going to grant [the motion to exclude expert  
21 reports] only to the extent that Dagdigian, it appears, in [his supplemental report] pages  
22 33 through 37 . . . embraces the [ ] earthen channel. . . But I am going to allow everything  
23 else in his initial or in his supplemental report that he has presented. And [allow] [his  
24 supplemental report’s] sections 3.0, 4.0, 6.2, 6.3 except to the extent that I’ve eliminated  
25 his testimony relative to the earthen channel . . .”).)

26 Similarly, the Court finds unpersuasive Diamond X’s arguments that the ICS Bid  
27 and internal notes from an employee at Dr. Dagdigian’s firm are permissible “evidentiary  
28 details” and not wholly new opinions. (See ECF No. 338 at 18-19.) Regardless of whether

1 this information from ICS and Dr. Dagdigian’s fellow employee about the earthen channel  
2 were merely “evidentiary details,” Judge Cobb clearly found this mitigation alternative to  
3 be untethered to Dr. Dagdigian’s *original* report when he excluded it for a second time in  
4 the Enforcement Order, which is the relevant inquiry based on his interpretation at the  
5 January 25, 2018 hearing of the parties’ stipulation regarding expert discovery (see ECF  
6 No. 330 at 4, 15-16). Similarly, Diamond X’s arguments concerning Table 3-6A focus on  
7 how the costs are evidentiary details tied back to Dr. Dagdigian’s supplemental report  
8 and how this information does not pertain to the earthen channel alternative. (ECF No.  
9 338 at 20.)<sup>1</sup> However, the time to incorporate those costs was the November 15, 2017  
10 deadline; ultimately, what matters is that these additions were untimely, which Judge  
11 Cobb highlighted in the Enforcement Order.

12 Judge Cobb is in the best position to construe his own Expert Report Order.  
13 Moreover, the Enforcement Order did not unfairly expand the Expert Report Order.<sup>2</sup>  
14 Accordingly, the Court finds Diamond X has not demonstrated that Judge Cobb  
15 committed clear error.<sup>3</sup>

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17 <sup>1</sup>Diamond X’s Objection appears to posit the existence of a Table 3-6 in Dr.  
18 Dagdigian’s Supplemental Report. (See ECF No. 338 at 20-21; ECF No. 338-1 at ¶¶ 4-5;  
19 ECF No. 338-3.) However, Diamond X does not point to the ECF number and pincite for  
20 the portion of the supplemental report where this table may be found. Instead, Diamond  
21 X cites to a page in the supplemental report that summarizes Option 2 but does not  
include a table of costs. (ECF No. 338 at 20 (citing ECF No. 334-7 at 45).) Moreover, it  
does not appear that the supplemental report contains a Table 3-6 (only a Table 3-5,  
which is not the table attached as Exhibit B to Diamond X’s objection).

22 <sup>2</sup>Diamond X argues that Judge Cobb committed clear error in the Enforcement  
23 Order because “Diamond X has not proffered any testimony or other evidence regarding  
24 the documents that Dr. Dagdigian added to his expert file” and because “the proper  
25 mechanism for addressing anticipated evidentiary issues . . . is a motion in limine.” (ECF  
26 No. 338 at 6 n.1.). While the issue could have been raised via a motion in limine, that is  
not the only available remedy. Judge Cobb did not commit clear error in considering the  
Motion to Enforce.

27 <sup>3</sup>Diamond X also argues that the Enforcement Order should be reversed “because  
28 it is undeniable that ARCO had a full and fair opportunity to cross-examine Dr. Dagdigian  
about the supplemental materials at the February 14, 2018 deposition.” (ECF No. 338 at  
20.) This is a red herring—in an objection, the district judge looks solely at whether the

1 **V. CONCLUSION**

2 The Court notes that the parties made several arguments and cited to several  
3 cases not discussed above. The Court has reviewed these arguments and cases and  
4 determines that they do not warrant discussion as they do not affect the outcome of  
5 Diamond X's Objection.

6 It is therefore ordered that Diamond X's Objection (ECF No. 338) is overruled.

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8 DATED THIS 3<sup>rd</sup> day of May 2018.

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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE

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magistrate judge committed clear error as a matter of law and not whether the magistrate judge acted pursuant to considerations of equity.