

1 Robert B. Allison, District Judge
2 Department No. 2
3 Flathead County Justice Center
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7 IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF
8 THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

9 * * * * *
10 COMMUNITY ASSOCIATION FOR)
11 NORTH SHORE CONSERVATION, INC.,)
12 a Montana nonprofit mutual benefit)
13 corporation,)
14)
15 Plaintiff,)
16 vs.)
17)
18 FLATHEAD COUNTY and its BOARD OF)
19 COUNTY COMMISSIONERS, a political)
20 subdivision of the State Montana,)
21)
22 Defendant.)
23)
24 and)
25)
26 JOLENE DUGAN,)
27)
28 Intervenor.)

Cause No. DV-15-121B

ORDER AND RATIONALE ON
PLAINTIFF'S MOTION REQUESTING
DEADLINES, JOINDER OF PARTY,
IMPOSITION OF TEMPORARY ACCESS
LIEN AND OTHER RELIEF

20 This matter is before the Court on Plaintiff's motion requesting deadlines, joinder of
21 party, imposition of temporary access lien and other relief. On the basis of said motion,
22 supporting and opposition memoranda, the Court, being fully advised in the premises, now
enters the following:

ORDER

IT IS HEREBY ORDERED that Plaintiff's motion to add Roger Sortino as a party is
DENIED.

IT IS FURTHER ORDERED that Plaintiff shall choose and hire an engineer to act as a
Special Master to develop a reasonably expedient plan for removal of the bridge. Intervenor

1 shall be financially responsible for the Special Master's fees in addition to the cost of the
2 removal.

3 IT IS FURTHER ORDERED that Plaintiff will file with the Court a Notice informing
4 the Court of the party to serve as Special Master, the Court will then issue an Order of Reference
5 appointing the Special Master and setting forth the Special Master's duties and responsibilities.
6

7 RATIONALE

8
9 There is a final judgment in this case requiring Intervenor Jolene Dugan (Dugan) to
10 remove the bridge at issue, which was constructed with what was found to be an invalid permit,
11 within the Lakeshore Protection Zone of Flathead Lake. The District Court's determination on
12 summary judgment that the bridge must be removed, and the site returned to its original state
13 was appealed to the Montana Supreme Court. The District Court's summary judgment was
14 affirmed. The execution of the judgment has become as problematic as the effort to establish
15 that the construction permit was wrongfully issued and void. Plaintiffs are understandably
16 frustrated with the lack of progress by Dugan regarding execution of the judgment. The Court
17 shares this frustration. On March 10, 2020 a show cause hearing was held, and Dugan was
18 ordered to appear and show cause why she should not be found in contempt for failure to
19 comply with the judgment. At the hearing Dugan was charged with filing a plan by April 13,
20 2020 from an engineer for demolishing the bridge. The Court held that deadlines for
21 performance would be set once the Court received the plan.

22 On April 13, 2020 Dugan filed a report from Randall J. Overton (Overton) "a consulting
23 hydrogeologist." Overton claims that he was not involved in building the bridge, but it appears
24 he had a role in the application to amend the permit for the bridge to make it bigger. Overton's
25 report has two sections. The first section is a paragraph-long discussion of how the bridge will
26 be deconstructed. The second section is an overview of the permits Overton asserts are
27 necessary. Overton opines that the deconstruction project triggers local, state, and federal
28 regulatory requirements and permits from Flathead County, US Army Corps of Engineers, with
concurrence from DNRC, DEQ, Fish Wildlife and Parks will be necessary. Overton states that
the Lakeshore Protection Act is implicated as are the Rivers & Harbors Act and the Clean Water
Act. In addition, 2 different floodplain permits would be needed. Plaintiffs filed an objection to
the report.

29 Shortly afterward Dugan filed a Supplemental Report to the Court supported by
30 affidavits from Jolene Dugan and her father Randall Sortino. The supplemental report and
31 affidavits inform the Court that Sortino, who is acting on Dugan's behalf regarding the bridge
32 removal under a Durable Power of Attorney, has suffered massive financial losses due to Covid
33 19. Sortino asserts that he has lost his entire 4.5-million-dollar retirement fund and he has little
34 money on which to live. This means he must sell a parcel of land adjoining the parcel on which
35 the bridge sits to pay for the removal of the bridge which he estimates will cost between

1 \$300,000 and \$500,000. He states that this development has delayed going to the planners.
2 Sortino claims there is a complication as well in that to maximize the sales value of the adjacent
3 property he needs to get permits to fill a portion of the parcel. The property is currently listed
4 for \$1.7 million and has a \$425,000 loan against it. Jolene Dugan also sets forth her situation.
5 She has severe physical problems and was hospitalized and nearly died due to a gas leak. She
6 has three children, no job and lives in rental housing. Her only asset is a 2001 Jeep Cherokee,
7 and she has no money to pay for the bridge removal.

8 Before addressing the deficiencies of Overton's report, the Court will address the issues
9 raised by the Supplemental Report to the Court. At the risk of sounding unfeeling, the issues
10 raised in the Supplement Report are irrelevant and have no place before the Court in this action.
11 However it is funded, Dugan is responsible for removing the bridge. The Court will in no way
12 get involved in or weigh in on any project to obtain permits to add fill to the adjacent property.
13 The Court does not intend to wait around for Sortino to embark on a fill project on that parcel of
14 property. If the property is listed for \$1.7 million dollars and secures a \$425,000 loan it may be
15 possible to borrow more money. Dugan and Sortino had the money to build the bridge and for
16 some unfathomable reason determined that a foolhardy boondoggle, a vehicular bridge to
17 nowhere located where no roads are permitted, was a good way to spend that money, let alone
18 begging the question how a woman with three children, health issues, no job, and living in a
19 rental could afford same. This is the consequence.

20 Overton's report submitted by Dugan in April is insufficient and questionable. First,
21 Overton is a consulting hydrogeologist, presumably an expert in the management of water
22 resources. Perhaps the Court should have been more specific, but it had in mind an engineer who
23 could produce a detailed deconstruction plan, like a construction engineer. Overton, though he
24 claims he was not involved in constructing the bridge, was involved in seeking the amended
25 construction permit to increase the size of the bridge. Overton's report has no discussion or
26 detail of how the bridge will be deconstructed or how the lakebed will be restored afterward.
27 What Overton vaguely proposes is a plan which seems to involve an absurd level of complexity
28 and requires the construction of two new roadways which constitute a two part causeway to the
island and then does not include details or specifics on removing those roadways. There is an
existing roadway that was used to construct the bridge, the report makes no mention of that
roadway. Overton states that the same equipment used to build the bridge will be used to
deconstruct the bridge. It seems then that it would be possible to use the old roadway and that
there is no legitimate reason to build two new roadways in the Lakeshore Protection Zone
(LPZ). Also notable is the fact that the bridge was built with a single permit from the Flathead
County Commissioners to build in the LPZ but deconstructing the bridge requires upward of 6
permits. Had Dugan been one half that careful when building the bridge, this presumably
staggeringly expensive lawsuit, the appeal, and the attendant, ongoing, and continuing aftermath
with all of its undoubtedly burdensome costs both in terms of money and anxiety, could have
been avoided.

29 In response to Overton's report and the lack of progress, Plaintiff filed a Motion
30 Requesting Deadlines, Joinder of Party, Imposition of Temporary Access Lien and Other Relief.

1 Plaintiff states that it is seeking the Court's assistance in ensuring the judgment is enforced and
2 the bridge removed without unnecessary damage to the LPZ.

3 Dugan objects to the motion. Her response consists of claiming this is all a personal
4 crusade against her and her father and that she does not have the money to remove the bridge but
5 states that the bridge will be removed. Dugan threatens a lawsuit for taking of private property.
6 Dugan wants to incorporate the issue of selling the other parcel and obtaining the permit to fill
7 the parcel to the removal of the bridge. The Court has already declined to do so.

8 Plaintiff seeks to join Roger Sortino as the real party in interest. It seems like an obvious
9 understatement that adding someone as the real party in interest when the judgment is final
10 raises some due process issues. It is not possible to add a party who did not participate in the suit
11 as a party to the judgment.

12 Finally, Plaintiff seeks to have the Court set deadlines for benchmarks for the removal of
13 the bridge and makes multiple requests regarding permits and use of the existing road and other
14 work on the bridge property. The Court lacks jurisdiction to grant many of these requests. The
15 Court tasked Dugan with the responsibility of producing a plan for the removal. What Dugan
16 produced is inadequate and questionable. Dugan is no longer entitled to the benefit of the doubt
17 that genuine obstacles prevent progress and that she is acting in good faith to accomplish
18 removal of the bridge. Dugan now loses the ability to guide, control or give input on the
19 process of how to remove the bridge. The time has come for the Court to take the reins from
20 Dugan. The Court, however, lacks the engineering knowledge and expertise to develop a plan
21 and set deadlines. The Lakeshore Protection Act provides no guidance on how removal of an
22 offending structure should be accomplished other than to state that the party who constructed it
23 must remove it and return the site to natural state. The Court finds that this is a situation in
24 which it is appropriate to appoint a Special Master with the requisite expert knowledge to create
25 a plan and set deadlines for removal of the bridge. Pursuant to Rule 53(b)(1)(B), M.R.Civ.P., the
26 District Court may refer a matter to a Special Master if exceptional conditions exist requiring the
27 referral. The Court finds that exceptional conditions exist here.

28 Many of Plaintiff's requests will potentially become irrelevant if a new plan for removal
is developed by a Special Master. The Special Master will produce a report which will be
submitted to the Court for approval. If the Court adopts the Special Master's plan it will become
an order of the Court enforceable by the Court's powers of contempt. Plaintiff and its counsel
shall choose and hire the engineer to act as Special Master. The Court will not set a specific
deadline for Plaintiff as, unlike Intervenor, Plaintiff is motivated to make progress. As Dugan is
required by the final judgment in this matter to remove the bridge and a workable plan from
Special Master is necessary to achieve that goal, Dugan shall be responsible for the Special
Master's reasonable fees. Once the Plaintiff informs the Court in writing of the person chosen to
serve as Special Master, the Court will issue a Reference Order pursuant to Rule 53, M.R. Civ.
setting forth the Special Master's exact duties and responsibilities.

Dated and electronically signed below

Electronically Signed By:
Hon. Judge Robert B. Allison
Mon, Dec 07 2020 03:42:44 PM