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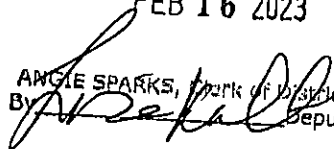
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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION <i>IN LIMINE</i> NO. 1 (PRECLUDE CUMULATIVE EXPERT WITNESS TESTIMONY)
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I. INTRODUCTION

In their Motion *in Limine* No. 1, Defendants seek to bar Plaintiffs “from presenting cumulative or redundant expert testimony,” but fail to describe with any degree of specificity what specific testimony would be cumulative or redundant. For the reasons set forth below, the Court should deny Defendants’ Motion *in Limine* No. 1 without prejudice and allow Plaintiffs’ experts to fully testify as to the opinions contained in their respective expert reports. Such a ruling will not preclude Defendants at trial from objecting to specific questions on the grounds that the question calls for a response on a matter on which there has been unnecessarily cumulative evidence offered by Plaintiffs. Moreover, as a practical matter, cumulative trial testimony is highly unlikely given the limited amount of time (30 hours) each side will have to present their respective case in chief and to cross the opponents’ witnesses. *See* Order on Plaintiffs’ Unopposed Motion *In Limine* No. 1 Re: Management of Trial Time, dated Feb. 2, 2023.

Further, Plaintiffs note Defendants’ Motion *in Limine* No. 1 is unnecessary if this Court grants Plaintiffs’ Motion *in Limine* No. 6 and declares the Parties’ Expert Reports shall not be excluded from evidence pursuant to the rule against hearsay and, conditional upon the resolution of any other evidentiary objections at trial, may be admitted into evidence.

For the reasons set forth herein, Defendants’ Motion *in Limine* No. 1 should be denied.

II. BACKGROUND

Plaintiffs’ Complaint (Doc. 1) contains 251 paragraphs, with paragraphs 106 to 210 generally describing the current state of the climate crisis and how Montana’s aggregate acts contribute to both the climate crisis and the Youth Plaintiffs’ injuries. Defendants’ Answer (Doc. 53) responds to these allegations largely by denying each paragraph or claiming a lack of information. For instance, paragraphs 106 and 107 of the Complaint allege:

106. Carbon dioxide is the GHG that is most responsible for trapping excess heat within Earth's atmosphere. Excess CO₂ and other GHGs from human activity create an "energy imbalance" that drives warming temperatures and climate disruption. A substantial portion of every ton of CO₂ emitted by human activity persists in the atmosphere for as long as a millennium or more. As a result, CO₂ steadily accumulates in the atmosphere. It is the cumulative effect of GHG emissions that causes climate disruption. The Earth will continue to heat up even as more emissions of today and tomorrow continue to increase atmospheric concentrations of GHGs.

107. This means that the harm from present day GHG emissions will be disproportionately borne by today's children and future generations, including the Youth Plaintiffs. This scientific concept has been well understood by the Defendants for decades.

Defendants respond to these paragraphs claiming: "Montana lacks sufficient information to admit or deny the allegations and therefore denies them." Indeed, Defendants' Answer is replete with similar denials. Again, by way of example, paragraph 108 of the Complaint alleges:

108. Notwithstanding their longstanding knowledge of the dangers that climate disruption and GHG emissions pose, more particularly described below, Defendants have developed and implemented a State Energy Policy in Montana for decades, which involves systemic authorization, permitting, encouragement, and facilitation of activities promoting fossil fuels and resulting in dangerous levels of GHG emissions, without regard to climate change impacts or the fundamental rights of Youth Plaintiffs and future generations of Montanans. Mont. Code Ann. § 90-4-1001(c)-(g), State Energy Policy. Moreover, pursuant to the Climate Change Exception to MEPA, Mont. Code Ann. § 75-1-201(2)(a), Defendants have deliberately ignored the dangerous impacts of the climate crisis.

Defendants deny the allegations contained in Paragraph 108 of the Complaint. *See also*, e.g., Def. Answer ¶¶ 14-80, 143-56, 164-84, 202-08 (Defendants lack sufficient information and therefore deny the allegations). Thus, the testimony Defendants seek to exclude, whether and to what extent Defendants are responsible for "the dangers that climate disruption and GHG emissions pose," goes to the very heart of the testimony of Plaintiffs' experts and is necessary given Defendants' extensive denials in their Answer.

Without any citations to specific expert opinions in an expert report or deposition testimony, Defendants now seek to exclude “testimony,” asserting Plaintiffs’ experts “may testify” on a cumulative basis on these issues. To the extent any deposition testimony of Plaintiffs’ experts was cumulative, it was a result of the format of the questions posed by defense counsel, whereas the examination of Plaintiffs’ experts at trial by Plaintiffs’ counsel will be structured for the efficiency of the Court and to prove Plaintiffs’ case.

The experts referenced in Defendants’ Motion *in Limine* No. 1 are among the foremost authorities on the various aspects of the anthropogenic attributes of climate change globally and in Montana and, given the limited time available to each side, have no intention of presenting cumulative or redundant expert testimony about the climate crisis. For example:

Dr. Steven Running, Ph.D., M.S., and Dr. Cathy L. Whitlock, Ph.D., M.S.

- Since 1979, Dr. Running has been with the University of Montana, where he retired in 2017 and now is a University Regents Professor Emeritus of Global Ecology in the College of Forestry and Conservation. Dr. Running’s primary area of climate change research is the development of global and regional ecosystem biogeochemical models integrating remote sensing with bioclimatology and terrestrial ecology. Dr. Running is a Team Member for the NASA Earth Observing System (EOS). *See* Running & Whitlock Expert Report at 1, Attachment 1 (Dr. Running CV).
- Dr. Whitlock is a Regents Professor Emerita of Earth Sciences and a Fellow of the Montana Institute on Ecosystems at Montana State University. In 2011, Dr. Whitlock was founding co-director of the Montana Institute on Ecosystems, which has hubs at Montana State University and the University of Montana and serves as the statewide center for interdisciplinary environmental science. Dr. Whitlock is the lead author of

the *Montana Climate Assessment* (Whitlock et al. 2017), and recently co-authored a state-level *Montana Climate Solution Plan* (2020) and a special report of the Montana Climate Assessment entitled *Climate Change and Human Health in Montana* (Adams et al. 2021). Dr. Whitlock was also co-lead author of the *Greater Yellowstone Climate Assessment* (Hostetler et al. 2021). See Running & Whitlock Expert Report at 2-3, Attachment 2 (Dr. Whitlock CV).

- The 40-page joint expert report of Dr. Running and Dr. Whitlock summarizes the opinions they will proffer at trial. They designed their expert report jointly precisely to avoid a duplication of expert testimony, while providing a fluid and cohesive summary of global warming in Montana that merges their individual areas of expertise. In simplistic terms, at trial, Dr. Running will address “the forest” and Dr. Whitlock will address “the trees” of climate change in Montana, which are interdependent areas of expertise. For example, Dr. Running will focus his testimony more on the forces of climate change, the state of the overall global climate system, effects on western terrestrial ecosystems, and his specific role in warning the State of Montana about the climate crisis for decades. For example, Dr. Whitlock will focus more on climate change impacts in Montana specifically and the findings of her decades of research in that area, and her individual role in warning the State of Montana about those effects. They will both testify to aspects of different Plaintiffs’ injuries. However, their testimony will not be duplicative even though they shared preparation of their report for efficiency and fluidity of content for the Court’s benefit.

Dr. Jack A. Stanford, Ph.D., M.S.

- Dr. Stanford is Professor Emeritus at the Flathead Lake Biological Station of the University of Montana, where he worked since 1972. Dr. Stanford was the Director and Bierman Professor of Ecology (1980-2016). Dr. Stanford has published over 220 scientific papers and books on aquatic ecosystem processes, including influences of human activities. In 2011, Dr. Stanford received the Lifetime Achievement Award of the International Society for River Science. *See* Stanford Expert Report at 1, Attachment 1 (Dr. Stanford CV).
- Dr. Stanford will focus his testimony primarily on the interconnectedness of Montana's river and lake ecosystems that these Youth Plaintiffs depend on for their health, safety, and well-being and which are already experiencing significant degradation as a result of warming temperatures, caused by anthropogenic climate change and the State's fossil fuel energy policy. Dr. Stanford also will testify that the interconnectivity of aquatic ecosystems makes the Climate Change Exception to MEPA and its prohibition on Defendants from considering regional impacts of climate change indefensible from a scientific perspective. Finally, Dr. Stanford will testify that Montana's agricultural areas are also threatened by lowering river flows and drier conditions during longer, hotter growing seasons. Dr. Stanford will not duplicate the trial testimony of Dr. Running or Dr. Whitlock.

Mr. Peter Erickson

- Mr. Peter Erickson is an Affiliated Researcher at Stockholm Environment Institute. He has worked in environmental research and consulting for over twenty years. During the last fifteen years, his professional focus has been on GHG emissions accounting and

the role of policy mechanisms in reducing GHG emissions and developing low-carbon energy and services. Mr. Erickson has conducted and led research projects on these topics on behalf of numerous partners and clients, including international institutions (e.g., the United Nations Framework Convention on Climate Change, the World Bank), the U.S. government (the U.S. Environmental Protection Agency), state governments (e.g., State of Washington, State of Oregon), and local governments (e.g., City of Seattle). He has authored numerous peer-reviewed studies on how policies, actions, or infrastructure projects increase or decrease greenhouse gas emissions. *See* Erickson Expert Report at 1-2, Attachment 1 (Mr. Erickson CV).

- Unlike Drs. Running, Whitlock, and Stanford, Mr. Erickson's testimony will not focus on the impacts of climate change in Montana, but rather describes Montana's fossil fuel energy system, the quantity of coal, oil, and gas it produces, and the carbon dioxide emissions that result. This testimony is fundamentally unique and will not be cumulative with any other expert.

Dr. Lori G. Byron, MD, MS and Dr. Robert G. Byron, MD, MPH

- Dr. Lori Byron is a pediatrician. She has been board certified through the American Board of Pediatrics since 1988. She has decades of experience caring for children. In 2020, she earned a Master of Science degree in Energy Policy and Climate from Johns Hopkins. She organizes a group of pediatricians across the U.S. for the American Academy of Pediatrics who advocate on climate and health. She currently serves on the Executive Committee of the Council on Environmental Health and Climate Change with the American Academy of Pediatrics and on the Children's Health Protection Advisory Committee with the Environmental Protection Agency. She was an author on

the 2021 report *Climate Change and Human Health in Montana*, as well as other climate and health publications. See Byron & Byron Expert Report at 1, Attachment 1 (Dr. Lori Byron CV).

- Dr. Robert Byron is board certified in Internal Medicine through the American Board of Internal Medicine. Internal medicine specialists have training in the diagnosis, non-surgical management, and prevention of diseases affecting primarily adults, including understanding of processes that may start in childhood. He is one of the lead authors on *Climate Change and Human Health in Montana*, released in 2021, and a chapter author on the *National Climate Assessment, Volume 5*, currently under development. See Byron & Byron Expert Report at 2, Attachment 2 (Dr. Robert Byron CV).
- Drs. Lori and Robert Byron designed their expert report jointly precisely to avoid a duplication of expert testimony, while providing a summary of the impacts of climate change and air pollution on children in Montana, including the Youth Plaintiffs. As noted above, Drs. Lori and Robert Byron have different medical training and qualifications. To the extent both experts testify at trial, Plaintiffs will ensure that their testimony is not duplicative.

III. ARGUMENT

Rule 702 allows admission of “scientific, technical, or other specialized knowledge” by a qualified expert if it will “assist the trier of fact to understand the evidence or to determine a fact in issue.” M. R. Evid. 702. Expert testimony is admissible under Rule 702 “if it is both relevant and reliable.” *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002) (footnote

omitted).¹ Expert testimony is relevant or helpful to the trier of fact if it “concerns matters beyond the common knowledge of the average layperson and is not misleading.” *Moses v. Payne*, 555 F.3d 742, 756 (9th Cir. 2009); *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007). Drs. Running, Whitlock, Stanford, Lori Byron, and Robert Byron and Pete Erickson have uniquely specialized and different types of scientific knowledge that is relevant, reliable, and will assist the Court in resolving factual questions at trial.

Defendants’ Motion *in Limine* No. 1 should be denied because they ask the Court to exclude unspecified testimony of the aforementioned expert witnesses on the alleged basis that such testimony will be unnecessarily cumulative and redundant. At no point, however, do Defendants actually specify what portions of expert testimony should be excluded, which is their burden. *See Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 2571332, at *11 (N.D. Cal. June 30, 2012) (rejecting motion to exclude testimony as cumulative where Defendants had “not submitted a more narrowly tailored request to exclude” and because exclusion as cumulative “is an issue better resolved at trial.”). Furthermore, to exclude evidence on a motion *in limine*, “the evidence must be inadmissible on all potential grounds.” *BNSF Ry. Co. v. Quad City Testing Lab’y, Inc.*, No. CV-07-170-BLG-RFC, 2010 WL 4337827, at *1 (D. Mont. Oct. 26, 2010) (citations and internal quotation marks omitted). “Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context.” *Id.* (citations and internal quotation marks omitted).

¹ Rule 702 of the Montana Rules of Evidence contains language identical to its federal counterpart. *See* Comm’n Comments to M. R. Evid. 702 (1976). Thus, federal interpretation has persuasive application to the Montana rule. *U.S. Fid. & Guar. Co. v. Rodgers*, 267 Mont. 178, 181-82, 882 P.2d 1037, 1039 (1994).

As described above, Defendants' Answer to the Complaint is littered with denials and half-denials about various aspects of climate change occurring in Montana. Plaintiffs' expert reports, on the other hand, contain hundreds of pages of detailed facts, scientific research and analysis, and expert opinions from the world's leading scholars on discrete aspects of climate change in Montana. The breadth and specificity of these expert reports are necessary due to lack of admissions made by Defendants in their Answer, and no joint stipulation of facts as to any of the core scientific evidence in this case.

Beyond failing to identify any specific testimony to be excluded, Defendants also have not provided the Court with a single case supporting their position. In fact, Defendants even concede they are not intending "to bar Plaintiffs' experts from discussing different alleged impacts of climate change." Def. Mot. *in Limine* No. 1 at 5. Given the extremely vague request presented by this motion, and the ongoing relevant factual-scientific disputes in this case, Plaintiffs ask the Court to deny this motion without prejudice. Defendants remain free at trial to raise new motions or objections to exclude the currently unidentified "cumulative or redundant expert testimony about global warming," if it arises. "In order to preserve an objection to the admission of evidence for appeal, the objecting party must make a timely *and specific* objection on the record." *State v. Clausell*, 2001 MT 62, ¶ 25, 305 Mont. 1, 22 P.3d 1111 (citing M. R. Evid. 103(a)(1)) (emphasis added). At the point such motion or objection is made during trial, Plaintiffs will be in a better position to respond and the Court will be in a better position to rule on the admissibility of specific purportedly "cumulative or redundant expert testimony about global warming."

IV. CONCLUSION

As it stands now, all the Court has before it is a conclusory, generalized motion *in limine* to exclude unidentified expert testimony that may, or may not, be cumulative or redundant about

climate change in Montana. That is hardly a sufficient record to exclude any of Plaintiffs' expert witnesses from testifying at trial. The Court should deny without prejudice Defendants' Motion *in Limine* No. 1 and allow Plaintiffs' experts to testify at trial about the matters disclosed in their expert reports.

Respectfully submitted,

DATED this 16th day of February, 2023.

/s/ Barbara Chillcott

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I certify that a true and correct copy of the foregoing was delivered by email to the following on February 16, 2023:

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