

Melissa Hornbein
Barbara Chillcott
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dlefridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olson (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957
pgregory@gregorylawgroup.com

FILED

FEB 16 2023

ANGIE SPARKS, Clerk of District Court
By *Angie Sparks* Deputy Clerk

Attorneys for Plaintiffs

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. 2 (PRECLUDE IRRELEVANT EXPERT WITNESS TESTIMONY)
--	--

I. INTRODUCTION

Defendants rely *only* on the relevance standard under Rules 401 and 402, M. R. Evid., in seeking to exclude testimony from expert witnesses Dr. Mark Jacobson and Dr. Lise Van Susteren. Def. Mot. *in Limine* No. 2 at 2. Importantly, Defendants *do not* argue that either Dr. Jacobson or Dr. Van Susteren lack the requisite expertise or qualifications to qualify as experts. In general, expert testimony in the form of an opinion may be allowed “if the specialized knowledge of the expert will assist the trier of fact to understand the evidence or determine a fact in issue.” *Smith v. Roosevelt Cnty.*, 242 Mont. 27, 34, 788 P.2d 895, 899 (1990). The specialized knowledge of Dr. Jacobson and Dr. Van Susteren in their respective fields will assist the Court both to determine the youth Plaintiffs’ standing, which has again been challenged by Defendants, and to address the constitutionality of the statutes and aggregate actions of Defendants at issue. Defendants’ motion for summary judgment further underscores how these issues, and the expert testimony of Dr. Jacobson and Dr. Van Susteren, are clearly relevant. As a result, Defendants’ Motion *in Limine* No. 2 should be denied.

II. LEGAL STANDARD

In general, under Rule 402, M. R. Evid., relevant evidence is admissible. Rule 401, M. R. Evid., defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *State v. Rendon*, 273 Mont. 303, 307, 903 P.2d 183, 185-86 (1995). Evidence is relevant if it will have any value, as determined by logic and experience, in proving the proposition for which it is offered. *State v. Duffy*, 2000 MT 186, ¶ 43, 300 Mont. 381, 6 P.3d 453. For purposes of Rule 401, evidence is relevant if the item of evidence has any tendency whatsoever to affect the balance of probabilities of the existence of a fact or issue of consequence.

Relevant evidence is excluded only if its probative value is substantially outweighed by the danger of “unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” M. R. Evid. 402 and 403; *State v. Cesnik*, 2005 MT 257, ¶ 16, 329 Mont. 63, 122 P.3d 456. It is within the Court’s discretion to balance the probative value of the evidence against its potential for unfair prejudice. *State v. Devlin*, 251 Mont. 278, 283, 825 P.2d 185, 188 (1991). Typically, Rule 402 applies to jury trials, where concerns such as unfair prejudice can arise from evidence that arouses the jury’s hostility or sympathy for one side without regard to its probative value, evidence that confuses or misleads the jury, or evidence that might unduly distract the jury from the key issues. *State v. Huether*, 284 Mont. 259, 265, 943 P.2d 1291, 1295 (1997). As this matter is a bench trial, the concerns set forth in M. R. Evid. 403 are virtually non-existent.

Importantly, Defendants incorrectly assert that relevant evidence must also be “material.” Def. Mot. *in Limine* No. 2 at 2. Defendants cite no authority for this statement. It is an erroneous statement of Montana’s Rules of Evidence, because the word “material” does not appear in Rule 401 (defining relevance) or in Rule 402 (providing that irrelevant evidence is inadmissible). The word “material” was studiously avoided in the definition of relevance set forth in drafting Rule 401 of the Federal Rules of Evidence. The Advisory Committee believed the word “material” should not be used, because it has many different legal meanings. *See* Fed. R. Evid. 401 advisory committee’s note to 2011 amendment (language chosen to define relevance “has the advantage of avoiding the loosely used and ambiguous word ‘material’”). Ironically, after incorrectly stating the standard is “material,” Defendants then set forth the correct standard as to relevance: “The test of relevance is: ‘ . . . whether an item of evidence will have *any value*, as determined by logic and experience, in proving the proposition for which it is offered. The standard used to measure this

acceptable probative value is “*any tendency* to make the existence of any fact . . . more probable or less probable than it would be without the evidence.” *State v. Fitzpatrick*, Mont., 606 P.2d 1343, 1354, 37 St. Rep. 194, 207 (1980).” *McConnell-Cherewick v. Cherewick*, 205 Mont. 75, 79, 666 P.2d 742, 744 (1983) (emphasis added).

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).

III. DR. JACOBSON’S TESTIMONY IS RELEVANT AND SHOULD NOT BE EXCLUDED UNDER RULES 401 AND 402

A professor in the Department of Civil and Environmental Engineering at Stanford University, Dr. Mark Jacobson is Director of Stanford’s Atmosphere/Energy Program; Senior Fellow at Stanford’s Woods Institute for the Environment; and Senior Fellow at the Precourt Institute for Energy. Dr. Jacobson’s CV is Attachment 1 to his Expert Report, which is in the record as part of Doc. 222. Dr. Jacobson will offer relevant expert opinions in several areas contested by Defendants:

1. First, he will testify that converting the energy infrastructure of Montana to 100% wind, water, and sunlight (WWS) for all purposes before 2050 is technically and economically feasible at low cost and high benefit. (Doc. 222, Ex. 7 at 2.)
2. Second, Dr. Jacobson will testify that a transition to 100% clean, renewable energy by mid-century is a viable avenue for Montana to stop the unconstitutional promotion and reliance on fossil fuels as required under the contested statutes. He will testify that, even though not

all of the harm caused by Montana's historic emissions and fossil fuel development would be remediated, a transition to 100% clean, renewable energy would put Defendants on a clean and viable path to protect Montana residents' health and energy security and contribute to climate stabilization rather than to climate crisis. Dr. Jacobson will state that fossil fuels supply more than 85% of all-purpose energy in Montana, not out of necessity, but because of historic and ongoing government support that led to the development and maintenance of a widespread fossil-fuel infrastructure.¹ (*Id.* at 4.)

3. Third, Dr. Jacobson will testify that Montana could have begun the WWS transition by at least the late 1970s and early 1980s, which would have resulted in nearly a 100% WWS Montana energy system by today. Dr. Jacobson will briefly explain that, notwithstanding their knowledge of climate change, and the alternative energy systems available, Defendants chose to continue to promote a fossil fuel energy system as required under the contested statutes. (*Id.* at 19-20.)
4. Finally, Defendants, in seeking to exclude Dr. Jacobson, fail to mention his role as a rebuttal expert. (Doc. 240, Ex. E.). Dr. Jacobson will rebut the expert opinions of Defendants' expert Dr. Judith Curry. (Doc. 236, Ex. A.) The following examples show why Dr. Jacobson's testimony is clearly relevant:
 - a. After explaining why Dr. Curry is not a scientific expert on 100% renewable energy systems, without any experience publishing on 100% renewable energy systems, Dr. Jacobson will rebut Dr. Curry's false claims that Montana's energy resources are "far from optimal for providing 24/365 electricity owing to the climatological

¹ In section 3 of her Expert Report, Defendants' expert Dr. Judith Curry "addresses the feasibility of a rapid transition to 100% renewable energy, as articulated in . . . the Expert Report of Mark Jacobson." (Doc. 236, Ex. A at 16-26.)

and weather variability of renewable resources.” (Doc. 236, Ex. A at 16; Doc 240, Ex. E, at 1.)

- b. Dr. Jacobson will rebut Dr. Curry’s unsupported claim that, because of year-to-year fluctuations of hydropower, it is not a reliable source of electricity in Montana. (Doc. 236, Ex. A at 17; Doc 240, Ex. E, at 1.)
- c. Dr. Jacobson also will explain how many of Dr. Curry’s claims about Montana are not only wrong, but “not based on any type of scientific analysis.” (Doc 240, Ex. E at 4.)
- d. Dr. Jacobson will explain how Dr. Curry “falsely claims that wind and solar reduce the reliability of the grid and create energy insecurity,” when, in fact, “[t]he opposite is true. It is fossil fuels that create energy insecurity.” (Doc 236, Ex. A at 23; Doc 240, Ex. E at 5.)
- e. Dr. Jacobson will rebut Dr. Curry’s claim that this Court should consider the financial benefit of the Crow Nation developing its own coal, explaining that Dr. Curry errs because “not only is there no demand for this coal due to the decline in coal throughout the U.S. in favor of renewables and natural gas, but such coal causes death and illness not only to coal miners through black lung disease and other illnesses, but also to citizens downwind of coal combustion.” (Doc. 236, Ex. A at 24; Doc. 240, Ex. E at 8.)
- f. Importantly, Dr. Jacobson will rebut key claims by Dr. Curry that local CO₂ emissions do not affect local climate (Curry Report at 27) and that Montana’s CO₂

emissions are insignificant.² (*Id.*) Dr. Jacobson will address how there are several scientific reasons why Dr. Curry’s claims are “wrong,” including how the CO₂ emissions per person in Montana (24.1 metric tonnes-CO₂/person) are the 6th highest in the United States; how “every tonne of carbon dioxide emitted matters”; and how “the same sources emitting CO₂ are also emitting health-affecting air pollutants that damage the children and adults of Montana.” (Doc. 222, Ex. 7; Doc. 240 at 8-9, 12.)

Defendants object to the relevance of all of this evidence but, as is readily apparent, Dr. Jacobson’s opinions, and the scientific analysis supporting his opinions, are of consequence to the Court’s determination in this action. M. R. Evid. 401. Dr. Jacobson’s testimony will bear on the issues of Plaintiffs’ injuries, causation by Defendants’ conduct and the underlying statutes, the ability of this Court to redress these injuries, the ability of Defendants to comply with any Court order in favor of Plaintiffs while maintaining a state-wide energy system that meets the needs of

² Given Defendants’ Answer, issues at trial on which the Parties’ experts will testify include whether greenhouse gases (GHGs) cause global warming, whether global warming causes climate change, whether human activity is the primary cause of these phenomena, whether Montana’s contribution of GHG emissions is a substantial factor in causing Plaintiffs’ injuries, and whether a reduction in Montana’s emissions will alleviate Plaintiffs’ injuries. Dr. Jacobson’s testimony is relevant to the question of whether Montana’s GHG emissions are significant. *See, e.g., 350 Montana v. Haaland*, 29 F.4th 1158, 1174 (9th Cir. 2022) (“Our conclusion that the 2018 EA failed to provide a convincing statement of reasons to explain why the Mine Expansion’s impacts are insignificant begins with Interior’s own uncontested summary of the scientific evidence concerning the cause and effects of climate change.”). *See* Kevin M. Stack & Michael P. Vandenbergh, *The One Percent Problem*, 111 Colum. L. Rev. 1385, 1388 (2011) (“With regard to climate change, it is natural to frame the problem in global terms; it is a global problem. But once it is framed that way, the size of the denominator—all activities that produce [GHGs], viewed globally—is staggering, and this framing makes almost any source of emissions, including entire industrial sectors within a given country, or even entire countries,” appear negligible.). *Cf. Sw. Elec. Power Co. v. E.P.A.*, 920 F.3d 999, 1032 (5th Cir. 2019) (observing, in a Clean Water Act case, that a pollutant “may form a ‘very small portion’ of a gargantuan source of water pollution” while still “constitut[ing] a gargantuan source of water pollution on its own terms”).

the State and its people, Montana's contribution to the climate crisis, and how Defendants' aggregate actions as a result of the contested statutes are unconstitutional.³ Because Dr. Jacobson's opinions are of consequence to the Court's determination in this action, Dr. Jacobson's testimony should not be excluded as irrelevant under Rules 401 and 402. The relevance of Dr. Jacobson's testimony is further illustrated by the fact that Defendants' expert, Dr. Curry, spends one-third of her Expert Report attempting to refute Dr. Jacobson's Expert Report.⁴ This underscores the relevance of Dr. Jacobson's testimony, including, but not limited to, as a rebuttal expert.

IV. DR. VAN SUSTEREN'S TESTIMONY IS RELEVANT AND SHOULD NOT BE EXCLUDED UNDER RULES 401 AND 402

Dr. Lise Van Susteren is a board certified general and forensics clinical psychiatrist and is Clinical Associate Professor of Psychiatry and Behavioral Sciences at George Washington University in Washington DC with 29 years of experience. Dr. Van Susteren has evaluated and treated youth, individuals, couples, and families, and specializes in evaluating and treating individuals who have experienced trauma. Over the last twenty years, Dr. Van Susteren has studied and lectured on climate change and mental health, has participated in the development of youth climate anxiety assessment tools, as well as conducted research and reviewed data in assessing the mental health of young people faced with climate change. She has served on the Advisory Board of the Center for Health and the Global Environment at Harvard University T.H. Chan School of Public Health. In May 2018, Dr. Van Susteren received the Distinguished Fellow Award of the American Psychiatric Association, its highest membership honor. In May 2022, she was honored

³ These contested issues are all raised in Defendants' pending Motion for Summary Judgment. (Doc. 290.)

⁴ *But see* Plaintiffs' Motion *in Limine* No. 5. (Doc. 268.)

by the Washington Psychiatric Society for her work on climate and mental health. Dr. Van Susteren's CV is Attachment 1 to Doc. 222, Ex. 9.

Plaintiffs' claims are grounded in the protections afforded by Montana's Constitution. The remedies they seek are equitable in nature. Plaintiffs' mental health injuries are relevant for the purpose of establishing that they have been harmed by Defendants' conduct and, therefore, have standing to pursue the constitutional claims at issue. The extent of Plaintiffs' harm also has relevance for assessing the constitutional violations claimed and the scope of declaratory and equitable remedies that are warranted to redress the harm. As the Montana Supreme Court has made clear, legitimate allegations of mental health injuries can suffice to establish a plaintiff's standing. *See, e.g., Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112, 120 (1997) (finding "specific psychological effects" caused by the challenged statute can satisfy standing requirements).

Dr. Van Susteren's testimony at trial will focus on Plaintiffs' standing and constitutional injuries, rendering opinions on the impacts of climate change on the mental health of children, including Plaintiffs; the ways in which the challenged statutes and Defendants' actions that promote fossil fuels harm Plaintiffs; and how a favorable remedy in this case would provide immediate psychological benefits to Plaintiffs. In essence, her testimony will be that, based on a reasonable degree of scientific certainty, climate change is harming the mental health and wellbeing of Montana's children and these Plaintiffs, those injuries are made worse by Defendants' conduct, and Plaintiffs' injuries would be meaningfully alleviated if this Court rules in their favor. Among other matters, Dr. Van Susteren will opine that a court order declaring Montana's actions to promote fossil fuels are unconstitutional would ease the psychological suffering waged on these Plaintiffs by their own government.

In support of their Motion *in Limine* No.2, Defendants purport to quote a passage from this Court's Order on the Motion to Dismiss to the effect that "[t]he Court has determined that 'Plaintiffs' mental health is not really and genuinely in controversy.'" Motion *in Limine* No. 2 at 4. Defendants then assert that, because Plaintiffs' mental health "is not in controversy," there is no reason for Dr. Van Susteren to testify on mental health. This quotation is incorrect and taken completely out of context.⁵ Currently, Defendants are seeking summary judgment on all three elements of standing and *are* strongly contesting evidence of Plaintiffs' mental health injuries as well as whether a court order in their favor would alleviate these injuries. (Doc. 290, pages 4-5). There is no stipulated fact by Defendants as to Plaintiffs' mental health injuries and there is not yet a finding of fact by this Court, supported by evidence, which will form the basis of this Court's decision on the merits and likely appellate review by the Montana Supreme Court. Plaintiffs are entitled to introduce expert testimony on mental health injuries as one element of their standing claims and their constitutional infringements. Thus, Dr. Van Susteren's testimony is relevant to Defendants' challenge to Plaintiffs' standing and the merits of their case.

Finally, like Dr. Jacobson, Dr. Van Susteren filed a Rebuttal Report and will rebut certain expert opinions of Defendants' expert Dr. Judith Curry. (Doc. 240, Ex. G.) Again, in seeking to

⁵ In fact, this quote not only does not appear at page 6 of this Court's Order on the Motion to Dismiss, this quote does not appear at all in that Order. The obvious reason this quote did not appear in this Court's Order on the Motion to Dismiss is that, in moving to dismiss, Defendants did not contest the injury element of standing. (Doc. 12 at 7-14.) Because Defendants did not contest injury for purposes of standing, Plaintiffs' mental health was "not really and genuinely in controversy" at the Motion to Dismiss stage. Moreover, the "genuinely in controversy" language is the standard under Montana Rules of Evidence 35 for whether independent medical examinations are appropriate and is inapplicable to the relevance for Dr. Van Susteren's trial testimony. In fact, this Court's Order on the State's Rule 35 Motion directly references how Plaintiffs' mental health injuries remain at issue for trial: "Some of their alleged injuries are mental and emotional in nature, including fear, anxiety, and despair caused by climate change and the government action/inaction that is allegedly making it worse." (Doc. 225 at 7.)

exclude Dr. Van Susteren, Defendants' motion fails to mention her role as a rebuttal expert. In particular, Dr. Van Susteren will rebut section 2.3 of Dr. Curry's Expert Report as to the scientific consensus that the impacts of climate change are harming children's mental health, as well as Dr. Curry's inability to render expert testimony in this area due to her complete lack of education, training, or experience in the fields of psychology or psychiatry, or in the mental health treatment of children (or adults).⁶ Dr. Van Susteren will testify, contrary to Dr. Curry's opinions, that the science clearly establishes that young people, including Plaintiffs, are suffering from a range of climate-related psychological impacts that cry out for urgent judicial action to remedy the injustices in this case. Finally, Dr. Van Susteren will rebut the qualifications of Defendants' rebuttal expert, Dr. Debra Sheppard, if the Court allows Dr. Sheppard to testify.⁷

Defendants object to the relevance of Dr. Van Susteren's testimony. Yet, Dr. Van Susteren's opinions, and the mental health research supporting these opinions, are of consequence to the Court's determination of standing in this action and the merits, which Defendants contest.⁸ M. R. Evid. 401. Because Dr. Van Susteren's opinions are of consequence to the Court's determination in this action, especially on the issue of constitutional standing and infringements, Dr. Van Susteren's testimony should not be excluded as irrelevant under Rules 401 and 402.

V. CONCLUSION

Given the clear relevance of the testimony of Dr. Jacobson and Dr. Van Susteren on issues which Defendants dispute (such as Plaintiffs' standing and the constitutionality of the statutes and government conduct Plaintiffs challenge), and the role of these two witnesses as rebuttal experts,

⁶ *But see* Plaintiffs' Motion *in Limine* No. 5. (Doc. 268.)

⁷ *See* Plaintiffs' Motion *in Limine* No. 4. (Doc. 266.)

⁸ Plaintiffs will not here restate the points made in the briefing leading up to this Court's Order on Motion Under Rule 35(a) for Independent Medical Examinations. (Doc. 185.)

this Court should deny Defendants' Motion *in Limine* No. 2. The opinion testimony of Plaintiffs' experts is based on their specialized knowledge and training, and will greatly assist this Court to understand the evidence or determine facts in issue, such as standing and constitutional infringements. If, after considering the testimony of Dr. Jacobson and Dr. Van Susteren at trial, the Court determines that one or more areas covered by these experts are irrelevant, then the Court can disregard those areas in arriving at its decision.

DATED this 16th day of February, 2023.

/s/ Barbara Chillcott

Barbara Chillcott
Melissa Hornbein
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dlefridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olson (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group

1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957
pgregory@gregorylawgroup.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549

MICHAEL RUSSELL
THANE JOHNSON
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
michael.russell@mt.gov
thane.johnson@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

MARK L. STERMITZ
Crowley Fleck PLLP
305 S. 4th Street E., Suite 100
Missoula, MT 59801
Phone: 406-523-3600
mstermitz@crowleyfleck.com

SELENA Z. SAUER
Crowley Fleck PLLP
1667 Whitefish Stage Road
Kalispell, MT 59901
ssauer@crowleyfleck.com

/s/ Barbara Chillcott
Barbara Chillcott