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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

**KELSEY CASCADIA ROSE JULIANA**; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

**The UNITED STATES OF AMERICA**; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

Case No.: 6:15-cv-01517-AA

**PLAINTIFFS' REPLY IN SUPPORT OF SECOND MOTION *IN LIMINE* SEEKING JUDICIAL NOTICE OF PUBLICLY AVAILABLE DOCUMENTS**

## INTRODUCTION

Plaintiffs respectfully submit this reply brief in support of Plaintiffs' request that the Court take judicial notice of the publicly available documents introduced by Plaintiffs in their Second Motion *in Limine* Seeking Judicial Notice of Publicly Available Documents, ECF No. 340. This reply brief is supported by the attached Declaration of Andrea K. Rodgers ("Rodgers Decl."). In their response brief, Defendants do not object to the Court taking judicial notice of 295[1] documents, which Defendants describe as "documents that were created by defendant agencies and are believed by Defendants to be authentic." ECF No. 357. Those documents are identified in **Exhibit 2** to the Rodgers Declaration, and Plaintiffs respectfully request the Court take judicial notice of these documents for the reasons set forth in Plaintiffs' Second Motion *in Limine* and because Defendants do not dispute their authenticity. *See* ECF No. 340.

In their response brief, Defendants took "no position" on 312 documents for the reason that these documents "either were not created by the defendant agencies or could not be authenticated by Defendants." ECF No. 357 at 2. Because Defendants have provided ***no specific objection*** to the documents that they have taken "no position" on and for the reasons set forth below, Plaintiffs request the Court to take judicial notice of these 312 documents, which are identified in **Exhibit 3** to the Rodgers Declaration.

Defendants have objected to two documents. As Defendants' objections are unfounded for the reasons set forth below, Plaintiffs now ask the Court to take judicial notice of these

[1] In their response, Defendants did not object to 294 exhibits and objected to 3 exhibits. ECF No. 357 at 2. Plaintiffs conferred with Defendants about one of the exhibits to which Defendants objected, and as a result Defendants agreed to change their position on Exhibit 415 from "objection" to "no objection." Rodgers Decl. ¶ 3.

documents. The documents to which Defendants object are listed in **Exhibit 4** to the Rodgers Declaration.

## ARGUMENT

### I. All Categories of Documents Submitted Are Appropriate for Judicial Notice

The documents to which Defendants object or assert "no position" fall into the following categories: (1) Official Government Reports and Data; (2) Official Presidential Documents; (3) Published Articles; (4) Congressional Testimony and Reports; and (5) Reports by Intergovernmental Organizations. All of these categories of documents are appropriate for judicial notice. Fed. R. Evid. 201(b).

#### 1. Official Government Reports and Data

Official government reports and data are quintessential sources whose authenticity cannot reasonably be disputed under Federal Rule of Evidence 201. *See, e.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of 'matters of public record'"); *Interstate Nat. Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) ("[The court] may take judicial notice of records and reports of administrative bodies.").

Some government reports and data to which Defendants have taken "no position" were produced by federal agency Defendants. *See, e.g.*, Ex. 151 (Department of Commerce report); Ex. 165 (CEQ and Department of State report commissioned by President Carter); Ex. 176 (OSTP report to Congress); Ex. 228 (Department of the Interior report). These federal government agencies must adhere to rigid principles of scientific integrity and credibility. *See, e.g., About EIA: Statement of Commitment to Scientific Integrity by Principal Statistical Agencies* https://www.eia.gov/about/scientific_integrity.php (last visited Oct. 11, 2018) ("Our Nation relies on the flow of objective, credibly statistics to support the decisions of governments,

businesses, households, and other organizations."). These federal government documents were prepared by Defendants themselves, and regardless of Defendants' failure to independently authenticate the documents "due to the age or location of the original document," ECF No. 357 at 5, the documents are still sources of information the accuracy of which cannot reasonably be questioned by the authoring agencies. Fed. R. Evid. 201(b)(2).

Defendants have also taken "no position" on documents produced and maintained by federal agencies who are not defendants to this case. ECF. No. 357 at 4–5. Federal Rule of Evidence 201 does not require documents to have been authored by parties to the case in order to be appropriate for judicial notice. *See* Fed. R. Evid. 201(b). The Ninth Circuit broadly acknowledges that courts "may take judicial notice of records and reports of administrative bodies." *Interstate Nat. Gas Co.*, 209 F.2d at 385. In fact, courts routinely judicially notice documents produced by non-parties. *See, e.g., id.* (taking judicial notice of Federal Power Commission report in an action between two natural gas companies); *Vasserman v. Henry Mayo Newhall Mem'l Hosp.*, 65 F. Supp. 3d 932, 943 (C.D. Cal. 2014) (taking judicial notice of California Industrial Welfare Commission Orders in a dispute between former employee and employer); *Coppola v. Smith*, 935 F. Supp. 2d 993, 1013 (E.D. Cal. 2013) (taking judicial notice of EPA report in a private CERCLA suit). Plaintiffs request the Court take judicial notice of official, publicly-available documents produced by or part of correspondence with non-party federal government agencies such as the Government Accountability Office (*e.g.*, Exs. 239, 253, 266, 268, 272, 369, 601), the U.S. Global Change Research Program[2] (*e.g.*, Exs. 276, 303, 452),

[2] Plaintiffs note that Defendants Department of State, Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Department of the Interior, Department of Transportation, and the Environmental Protection Agency are all participants in

the Congressional Budget Office (*e.g.*, Exs. 291, 309, 477), NASA (*e.g.*, Exs. 383, 535, 536), and the Council on Environmental Quality (*e,g.*, Ex. 193, Ex. 247). Notably, the Defendants have stated that they intend to file a motion *in limine* seeking judicial notice of 450 Congressional hearing reports, the same type of documents to which they nonsensically take "no position" on here. Rodgers Decl. ¶ 8.

Defendants also take "no position" on a number of state or local government documents (*e.g.*, Exs. 405, 493, 604). State or local governmental documents are appropriate for judicial notice as matters of public record. *Sausalito v. O'Neill*, 386 F.3d 1186, 1224 n. 2 (9th Cir. 2004) ("We may take judicial notice of a record of a state agency not subject to reasonable dispute"); *Vasserman*, 65 F. Supp. 3d at 943 (taking judicial notice of state commission orders). Plaintiffs have provided detailed source information and links for online access when available for these documents. This Court should take judicial notice of these state and local governmental records, the accuracy of which is without reasonable dispute.

**2. Official Presidential Documents**

Official executive and legislative acts are appropriate subjects for judicial notice. *See, e.g.*, *Vasserman*, 65 F. Supp. 3d at 942; *Hague v. Wells Fargo Bank, N.A.*, No. C11-02366 TEH, 2011 WL 3360026, at *1 n.2 (N.D. Cal. Aug. 2, 2011). Defendants have taken "no position" on all presidential documents associated with prior administrations, even though these documents are publicly available. *See, e.g.*, Ex. 246 (memorandum from President George W. Bush's OMB Director to heads of agencies); Ex. 296 (Executive Order issued by President Obama); Ex. 318 (remarks by President Reagan hosted on government website). Neither the Federal Rules of

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the thirteen-agency U.S. Global Change Research Program. *Agencies*, GlobalChange.gov, https://www.globalchange.gov/agencies (last visited Oct. 8, 2018).

Evidence nor precedent limit judicial notice of executive or legislative actions to current administrations. *See* Fed. R. Evid. 201(b) (judicial notice appropriate from "sources whose accuracy cannot reasonably be questioned"); *Steffan v. Cheney*, 780 F. Supp. 1, 15 (D.D.C. 1991) (taking judicial notice of report by a previous administration's Presidential Commission in a suit against federal agency defendants). This Court has the authority to take judicial notice of the official presidential documents submitted in Plaintiffs' Motion *in Limine*.

As to Exhibit 185, President Ronald Reagan's *Report to Congress: United States Government Activities Related to the Greenhouse Effect*, the sole official presidential document to which Defendants object, the bases for judicially noticing this exhibit are no different than those presented above. Defendants presumably object to judicial notice of this document because Plaintiffs were unable to locate an online version of the source. Rule 201 does not presuppose online access to sources sought for judicial notice, and the practice of judicially noticing documents and facts has been in use long before the internet was a fixture in litigation. *See* Fed. R. Evid. 201 (first enacted July 1975); *cf. Greeson v. Imperial Irr. Dist.*, 59 F2d 529, 531 (9th Cir. 1932) (taking judicial notice of facts in 1932). The document provided as Exhibit 185 is an official presidential document obtained by Plaintiffs from a former government employee, and the validity of this document is corroborated by reports in the Congressional Record. 134 Cong. Rec. 91, 150 (daily ed. Jan. 26, 1988). This Court should take judicial notice of Exhibit 185 along with all other official presidential documents submitted by Plaintiffs.

**3. Published Articles**

The Ninth Circuit recognizes that courts "have discretion to take judicial notice under Rule 201 of the existence and content of published articles." *United States v. W.R. Grace*, 504 F3d 745, 766 (9th Cir 2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 568 n.13

(2007)). Plaintiffs have submitted scientific articles produced by major national educational institutions (Exs. 319, 392) and national trade associations (Ex. 367). This Court should take judicial notice of these articles, if not for their contents then "to indicate what was in the public realm at the time" for purposes of Rule 201. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (citation omitted).

Plaintiffs also request this Court to judicially notice news reports containing public statements of Defendants or noting Defendants' official acts. As publications of major news outlets, these articles and the statements contained within are "generally known within the trial court's territorial jurisdiction." Fed. R. Evid. 201(b)(1); *see also Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458–59 (9th Cir. 1995) (taking judicial notice of a fact reported in news and "generally known in Southern California and which would be capable of sufficiently accurate and ready determination."); *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1209 (N.D. Cal. 2017) (finding that veracity of statements made by Attorney General Jeff Sessions in an op-ed could not be questioned). The news reports for which Plaintiffs request judicial notice include reporting on official acts of government Defendants (*e.g.*, Exs. 121, 138, 327, 334) and quoting statements of the Defendants themselves (Exs. 125, 333, 337). These reports are appropriate for judicial notice as information without reasonable dispute generally known in the public realm through their publication in the proffered newspapers of record. Fed. R. Evid. 201(b)(1), (2).

Further, Defendants have taken "no position" on documents produced by the National Academy of Sciences (NAS) or its subpart the National Research Council (NRC), which collaborates directly with federal agencies, including Defendants. *See, e.g.*, Exs. 171 at iii (listing review panel including representatives from federal agencies); 288; 317. The Ninth Circuit has previously found NAS and NRC documents as sufficiently reliable for judicial notice, and this

Court should find the same. *See, e.g.*, *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 782 F. Supp. 1392, 1398 (N.D. Cal. 1992), *rev'd on other grounds*, 994 F.2d 583 (9th Cir. 1992) (judicially noticing NRC report); *Greenberg v. Target Corp.*, No. 17-CV-01862-RS, 2017 WL 9853748, at *1 (N.D. Cal. Aug. 28, 2017) (judicially noticing NAS report).

**4. Congressional Testimony and Reports**

Taking judicial notice of congressional testimony and reports is a standard, long-held practice within the Ninth Circuit and beyond, and this Court should continue to recognize the trusted accuracy of these sources. *See, e.g.*, *United States v. Choate*, 576 F.2d 165, 207–08 (9th Cir. 1978); *Greeson v. Imperial Irr. Dist.*, 59 F.2d 529, 531 (9th Cir. 1932) (courts should judicially notice "reports of Commissions made to Congress, and proceedings thereon") (citing *The Appollon*, 22 U.S. (9 Wheat.) 362, 6 L. Ed. 111 (1824)). The statements made to Congress were delivered under oath by government officials and reflect congressional notice of the facts contained within the statements. Plaintiffs request that this Court take judicial notice of hearings before Congress (*e.g.*, Exs. 173, 178, 263, 506) and reports provided to Congress by the Congressional Research Service[3] (*e.g.*, Exs. 117, 292, 501). *See* Rodgers Decl. ¶ 8 (noting forthcoming motion *in limine* by Defendants to seek judicial notice of "official publications of the US Congress).

[3] The Congressional Research Service (CRS) is a "legislative branch agency" that "works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, regardless of party affiliation." *Congressional Research Service Careers*, Library of Congress, https://www.loc.gov/crsinfo/ (last visited Oct. 11, 2018).

**5. Documents Issued by Intergovernmental Organizations**

Plaintiffs request judicial notice of a number of documents created by intergovernmental agencies. *See, e.g.*, Exs. 142 (Intergovernmental Panel on Climate Change)[4]; 284 (United Nations Framework Convention on Climate Change)[5]; Ex. 427 (Organisation for Economic Co-operation and Development)[6]; Ex. 430 (International Energy Agency).[7] Documents published by intergovernmental organizations such as the United Nations are considered "published by a governmental entity and are not subject to reasonable dispute" and thus "are appropriate for judicial notice." *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954, 958 (C.D. Cal. 2015), *aff'd*, 730 F. App'x 464 (9th Cir. 2018). The documents published by intergovernmental organizations that Plaintiffs request this Court to judicially notice are "sources whose accuracy cannot reasonably be questioned." Fed. Rule of Evid. 201(b)(2). This Court should take judicial notice of these documents accordingly.

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[4] The Intergovernmental Panel on Climate Change (IPCC) "is the leading international body for the assessment of climate change" and was established by the World Meteorological Organization (WMO) and United Nations Environment Programme (UNEP) in 1988. *Organization*, IPCC, http://www.ipcc.ch/organization/organization.shtml (last visited Oct. 10, 2018). The IPCC "is open [for membership] to all member countries of the WMO and the United Nations," with 195 current member states. *Id.*

[5] The United Nations Framework Convention on Climate Change (UNFCCC) is "the United Nations entity tasked with supporting the global response to the threat of climate change" and "provides technical expertise and assists in analysis and review of climate change information." *About the Secretariat*, United Nations Climate Change, https://unfccc.int/about-us/about-the-secretariat (last visited Oct. 10, 2018).

[6] The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental organization that "collects and analy[z]es data [from member countries]" and uses that data to make policy recommendations to governments. *What We Do and How*, OECD, http://www.oecd.org/about/whatwedoandhow/ (last visited Oct. 10, 2018).

[7] The International Energy Agency (IEA) is an intergovernmental organization that provides authoritative analysis on matters related to energy security, economic development, environmental awareness, and engagement worldwide. *Our Mission*, IEA, https://www.iea.org/about/ourmission/ (last visited Oct. 10, 2018).

## II. Attorney-Client and Deliberative Process Privileges Do Not Apply to Exhibit 128

Defendants have objected to Exhibit 128 on the grounds of attorney-client and deliberative process privileges. ECF No. 357 at 5-6. Exhibit 128 is a federal government document produced by Defendant Department of Energy that is widely available in the public domain, resulting in waiver of Defendants' asserted attorney-client and deliberative process privileges. The fact that disclosure of this document was involuntary does not automatically preclude waiver of the attorney client-privilege. *Gomez v. Vernon*, 255 F3d 1118, 1131 (9th Cir 2001). Rather, attorney-client privilege may be waived by implication through involuntary disclosure "if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter." *Gomez*, 255 F.3d at 1131.

Defendants carry "the burden of affirmatively demonstrating non-waiver" of the attorney-client privilege. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981). While Defendants note that the document contains markings indicating confidentiality, Defendants have proffered no other support that they took "all reasonable means of preserving the confidentiality," of the document to safeguard it from leakage. *See Gomez*, 255 F.3d at 1131. Similarly, Defendants have provided no support for the documents' protection under the deliberative process privilege aside from a bald assertion that it falls under that privilege. As such, Defendants have not satisfied their burden of establishing that either of these privileges protect Exhibit 128 from judicial notice. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1019 (E.D. Cal. 2010) ("The burden of establishing application of the deliberative process privilege is on the party asserting it."); *see also Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1149 (9th Cir. 2008) (finding record insufficient where government did not provide enough information to support deliberative process privilege). As a document published in various news outlets and

thus "generally known within the trial court's territorial jurisdiction," this Court should take judicial notice of Exhibit 128.

Defendants' objection to Exhibit 185 is unwarranted and this Court should take judicial notice of it as an authentic document broadly available within the public domain and within the scope of Federal Rule of Evidence 201(b)(1).

## CONCLUSION

For these reasons, Plaintiffs respectfully request this Court take judicial notice of the documents described in **Exhibits 2, 3, and 4** to the Rodgers Declaration filed herewith.

DATED this 12th day of October, 2018.

Respectfully submitted,

*s/ Andrea K. Rodgers*
Andrea K. Rodgers (OR Bar 041029)