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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE DIVISION**

KELSEY CASCADIA ROSE JULIANA, *et al.*, Case No.: 6:15-cv-01517-TC

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

**DEFENDANTS' RESPONSE TO  
PLAINTIFFS' NOTICE OF  
SUPPLEMENTAL DISPUTED FACTS  
IN SUPPORT OF PLAINTIFFS'  
OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

Defendants respond to Plaintiffs' Notice of Supplemental Disputed Facts Raised by Defendants' Expert Reports in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (ECF No. 338) as follows:

**The Court Need Not Consider Plaintiffs' Supplemental Disputed Facts To Decide Defendants' Pending Motion For Summary Judgment**

At the outset, the Court should reject Plaintiffs' late and hastily cobbled together submission because it is untimely and procedurally improper. Briefing on the motion for summary judgment concluded on July 12, 2018 and the Court took the motion under advisement following oral argument on July 18, 2018, more than a month ago. *See* July 18, 2018 Hr'g Tr. 77:7-11. Indeed, the Court indicated during the status conference on August 27, 2018 that it anticipated issuing its decision on Defendants' pending dispositive motions "shortly" and "in the next couple of weeks, maybe, at most." Aug. 27, 2018 Hr'g Tr. 6:11-21. Plaintiffs' submission is untimely. Further, Local Rule 7-1(f) expressly prohibits "other memoranda" beyond a response and a reply on summary judgment "unless directed by the Court." Plaintiffs did not seek leave to file, nor did Plaintiffs seek to meet and confer with Defendants as required by Local Rule 7-1(a)(2).

But even if the Court were inclined to consider Plaintiffs' submission, none of the purported "disputed facts" establishes a genuine dispute as to any material fact, because Plaintiffs' claims are legally deficient in ways that cannot be saved by any amount of factual development, and because *Plaintiffs'* submissions on issues for which it bears the burden are insufficient regardless of the government's reports. Whether this court possesses jurisdiction over this suit and, even if it did, whether Plaintiffs' Fifth Amendment substantive due process claim and public trust doctrine claim should be dismissed turn, at least in part, on *purely* legal determinations, among them: (1) whether this suit is a "Case[]" or "Controvers[y]" within the

meaning of Article III; (2) whether there is a legally cognizable right under the Due Process Clause to a climate system capable of sustaining human life; (3) whether there can be a viable “state-created danger” claim against the federal government under the Due Process Clause; and (4) whether the Public Trust Doctrine applies to the federal government. The Court need not consider any facts or expert testimony propounded by either side to decide these issues, and determinations in the government’s favor would be fatal to Plaintiffs’ case. Likewise, for the reasons already discussed in Defendants’ opening and reply briefs, Plaintiffs’ alleged climate-related injuries when taken at face value fail as a matter of law.

Accordingly, Defendants respectfully request that the Court disregard Plaintiffs’ Notice of Supplemental Disputed Facts. Plaintiffs’ submission is late and procedurally flawed. But even if considered by the Court, Defendants’ expert reports do not transform the purely legal issues the Court must decide into factual ones.

DATED: September 5, 2018

Respectfully submitted,

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*/s/ Sean C. Duffy*

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