JEFFREY BOSSERT CLARK
Assistant Attorney General
JEFFREY H. WOOD
Principal Deputy Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

LISA LYNNE RUSSELL, Chief
GUILLERMO A. MONTERO, Assistant Chief
SEAN C. DUFFY (NY Bar No. 4103131)
MARISSA PIROPATO (MA Bar No. 651630)
CLARE BORONOW (admitted to MD bar)
FRANK J. SINGER (CA Bar No. 227459)
ERIKA NORMAN (CA Bar No. 268425)
Trial Attorneys
Natural Resources Section
601 D Street NW
Washington, DC 20004
(202) 305-0445 (Duffy)
Erika.norman@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 6:15-CV-01517-TC

DEFENDANTS' NOTICE OF ERRATA TO THEIR MOTION TO STRIKE PLAINTIFFS' TRIAL EXHIBIT LIST, OR, IN THE ALTERNATIVE, OBJECTIONS TO PLAINTIFFS' TRIAL EXHIBIT LIST

On October 19, 2018, Defendants filed their Motion to Strike Plaintiffs' Trial Exhibit List, or, in the Alternative, Objections to Plaintiffs' Trial Exhibit List (ECF No. 397) ("Motion to Strike"). Defendants file this Notice of Errata to correct an inadvertent mathematical error in their Motion to Strike.

After filing their brief, Defendants discovered that they had miscalculated the number of hours of direct trial testimony Plaintiffs projected in their Amended Witness List (ECF No. 387). Specifically, Defendants state on p. 4 of their Motion to Strike:

> Plaintiffs have listed 47 potential fact witnesses and 21 potential expert witnesses and projected 293 hours of direct trial testimony, which amounts to more than 41 court days of *purely* direct testimony assuming the court is in session for seven hours each day. Even if Plaintiffs were to spend less than ten minutes on average per exhibit (including time spent laying a foundation for the admission of the exhibit) their direct examination time would be used up in full introducing the 1,908 exhibits they have on their exhibit list. Plaintiffs would have no time left to elicit any other testimony, which they no doubt intend to do.

The aforementioned statements should be replaced with the following, which reflects the correct numbers and calculations:

> Plaintiffs have listed 47 potential fact witnesses and 21 potential expert witnesses and projected 182 hours of direct trial testimony, which amounts to more than 30 court days of *purely* direct testimony assuming the court is in session for six hours each day. Even if Plaintiffs were to spend less than six minutes on average per exhibit (including time spent laying a foundation for the admission of the exhibit) their direct examination time would be used up in full introducing the 1,938[1] exhibits they have on their exhibit list. Plaintiffs would have no time left to elicit any other testimony, which they no doubt intend to do.

[1] Plaintiffs' Exhibit List filed on October 19, 2018 (ECF 402) contains 1,938 exhibits.

A corrected Motion to Strike is attached to this Errata as Exhibit A. Defendants have made no other changes to their Motion to Strike, except to the caption. Defendants intend to file a reply to Plaintiffs' response to their motion by the November 16, 2018 deadline.

Dated: November 9, 2018

Respectfully submitted,

JEFFREY BOSSERT CLARK
Assistant Attorney General
JEFFREY H. WOOD
Principal Deputy Assistant Attorney General
Environment & Natural Resources Division

/s/ Erika Norman
LISA LYNNE RUSSELL
GUILLERMO A. MONTERO
SEAN C. DUFFY (NY Bar No. 4103131)
MARISSA PIROPATO (MA Bar No. 651630)
CLARE BORONOW (admitted to MD bar)
FRANK J. SINGER (CA Bar No. 227459)
ERIKA NORMAN (CA Bar No. 268425)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
601 D Street NW
Washington, DC 20004
Telephone: (202) 305-0445
Facsimile: (202) 305-0506
Erika.norman@usdoj.gov

Attorneys for Defendants

EXHIBIT A

JEFFREY BOSSERT CLARK
Assistant Attorney General
JEFFREY H. WOOD
Principal Deputy Assistant Attorney General
Environment & Natural Resources Division

LISA LYNNE RUSSELL, Chief
GUILLERMO A. MONTERO, Assistant Chief
SEAN C. DUFFY (NY Bar No. 4103131)
MARISSA PIROPATO (MA Bar No. 651630)
CLARE BORONOW (admitted to MD bar)
FRANK J. SINGER (CA Bar No. 227459)
ERIKA NORMAN (CA Bar No. 268425)
Trial Attorneys
Natural Resources Section
601 D Street NW
Washington, DC 20004
(202) 305-0445 (Duffy)
Erika.norman@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 6:15-CV-01517-TC

DEFENDANTS' CORRECTED MOTION TO STRIKE PLAINTIFFS' TRIAL EXHIBIT LIST, OR, IN THE ALTERNATIVE, OBJECTIONS TO PLAINTIFFS' TRIAL EXHIBIT LIST

Introduction

Plaintiffs' massive trial exhibit list of 1,908 exhibits[1] cannot possibly represent the exhibits Plaintiffs actually intend to offer into evidence at trial. Foisting a massive exhibit list, packed with facially objectionable documents, on Defendants a mere two weeks before trial prejudices Defendants' ability to offer meaningful document-specific objections. Contrary to acceptable trial practice and the Federal Rules of Evidence, Plaintiffs have propounded an unwieldy exhibit list that, among other objectionable material, includes: (1) at least fifty-one periodical news articles; (2) a similar number of hearsay statements by various foreign and domestic non-governmental organizations; (3) more than one-hundred scientific articles; (4) twenty-seven videos and films, including four self-serving promotional documentaries produced by Our Children's Trust; and (5) dozens of irrelevant historical documents from the Early Republic Period and pre-Johnson era presidential administrations. Defendants object to Plaintiffs' exhibit list in its entirety and hereby move the Court at the outset to require Plaintiffs to submit a new exhibit list that reasonably reflects the admissible evidence Plaintiffs intend to introduce at trial.[2] Without a reasonably targeted exhibit list, Defendants are severely prejudiced in their trial preparations with hundreds of hours now required to be spent reviewing almost 2,000 documents and videos.

Notwithstanding the serious concerns raised by Plaintiffs' exhibit list, Defendants have completed an initial review and have endeavored to state their evidentiary objections in Column H in the attached Exhibit 1 (the original 1,883 exhibits) and Exhibit 2 (the additional 25 exhibits) in the limited time available in advance of the pre-trial conference. Defendants also reserve the

[1] Plaintiffs served an exhibit list containing 1,883 exhibits on Defendants on October 12, 2018. On October 18, 2018, Plaintiffs provided a supplemental exhibit list with 25 additional exhibits.
[2] Pursuant to Local Rule 7-1(a), the parties conferred on this motion. Plaintiffs oppose this motion.

right to object to the admission of any exhibit as inauthentic consistent with their responses to Plaintiffs' first two judicial notice motions (ECF Nos. 327, 357) and their forthcoming response to Plaintiffs' third motion, to the extent this Court does not rule on the authenticity of a document in connection with those three motions (ECF Nos. 254, 340, 380). Defendants also reserve the right to object to the admission of any exhibit where Plaintiffs have otherwise failed to lay a proper foundation. Finally, Defendants reserve the right to object to any exhibit on relevance, undue delay, cumulativeness, hearsay, or other grounds during the course of trial at such time when Plaintiffs offer the exhibit into evidence.

I. Plaintiffs' Exhibit List Should be Stricken and Plaintiffs Compelled to Provide a New Exhibit List That Reasonably Reflects the Evidence Plaintiffs Anticipate Introducing at Trial.

Plaintiffs' pretrial exhibit list fails to provide the Court and the United States with sufficient guidance regarding the exhibits Plaintiffs intend to introduce at trial. The Court should strike it and require Plaintiffs to file a new exhibit list that includes only exhibits which Plaintiffs reasonably intend to introduce at trial.

The purpose of pretrial submissions, such as witness and exhibit lists, is to streamline the trial process, sharpen the issues, and reduce the amount of time spent resolving evidentiary issues during trial. *See Tardiff v. Knox Cty*, 453 F. Supp. 2d 190, 191-92 (D. Me. 2006) (describing how pretrial orders regarding exhibit lists were intended to "expedite the performance of counsel at trial" and focus on the "problems of proof reasonably to be anticipated at trial"). The exhibit list filed by Plaintiffs fails to meet these purposes.

Plaintiffs took a "kitchen sink" approach that lists an unreasonably large number of documents – 1,908 – including no fewer than fifty-one periodicals, documents from the presidential administrations of George Washington through the current administration, dozens of

documents from the Early Republic Period, more than one-hundred scientific journal articles, and at least twenty-seven videos.[3] This volume of material is unworkable and unrealistic especially in light of how trial is set to proceed. Plaintiffs have listed 47 potential fact witnesses and 21 potential expert witnesses and projected 182 hours of direct trial testimony, which amounts to more than 30 court days of *purely* direct testimony assuming the court is in session for six hours each day. *See* Pls.' Am. Witness List (ECF No. 387). Even if Plaintiffs were to spend less than six minutes on average per exhibit (including time spent laying a foundation for the admission of the exhibit) their direct examination time would be used up in full introducing the 1,938 exhibits[4] they have on their exhibit list. Plaintiffs would have no time left to elicit any other testimony, which they no doubt intend to do.

Plaintiffs' exhibit list has prejudiced Defendants pre-trial preparations and ability to offer document-specific objections. And, if allowed to stand, will undoubtedly prolong the trial and waste the time of the Court. It should be stricken. In the event the Court declines to issue an order striking Plaintiffs' exhibit list outright, it should nonetheless exclude at the outset the following categories of objectionable documents.

II. Plaintiffs Should Be Precluded From Offering News Articles Into Evidence.

Plaintiffs list no fewer than fifty-one periodical articles on their exhibit lists, including twenty-one *New York Times* articles alone.[5] To the extent Plaintiffs purportedly seek to offer

[3] Defendants' exhibit list, while also long, contains approximately 650 exhibits exclusive of deposition exhibits, records Plaintiffs produced to Defendants, and Congressional hearings. Defendants made efforts to effectively reduce their exhibit list by the 446 Congressional hearing transcripts by preparing a summary of those voluminous documents under Federal Rule of Evidence 1006. Further, the exhibits included on Defendants' list – reports and documents generated by the federal agencies – are likely to be deemed admissible by the Court.

[4] Plaintiffs' Exhibit List filed on October 19, 2018 (ECF 402) contains 1,938 exhibits.

[5] *See* Ex. 1, rows 23, 31, 35, 62, 66, 114, 117, 143-44, 208, 255-56, 259, 291-92, 342, 343, 346, 472, 475, 490, 493, 506, 509, 520, 552-53, 555-56, 558-59, 574, 624, 630, 791, 803-07, 871,

articles published in *The New York Times*, *E&E News*, *Washington Post*, *Wall Street Journal*, *CNN*, *Bloomberg*, *Reuters*, *Scientific American*, *Economist*, *Bend Bulletin*, *Oregonian*, *Reveal News, Climate One*, *The Conversation*, *Business Insider*, *Foreign Affairs*, *The Register-Guard*, *KMTR*, *KOIN 6*, and *KVAL* into evidence, the statements contained therein are inadmissible as hearsay (or double hearsay). *Larez v. City of Los* Angeles, 946 F.2d 630, 643 (9th Cir. 1991) (holding that newspaper article offered to prove that defendant made statement quoted in article was hearsay); Fed. R. Evid. 801(c), 802. Further, there is no conceivable non-hearsay purpose for Plaintiffs seeking to introduce these exhibits. And even if Plaintiffs could identify such a purpose, the probative value of newspaper articles is substantially outweighed by the dangers of unfair prejudice to Defendants resulting from their inability to cross-examine the declarant, wasting the Court's time, and needlessly presenting cumulative evidence. Fed. R. Evid. 403. In a case where Plaintiffs will offer copious expert testimony there is no need for the Court to rely on journalistic reporting to weigh the facts.

III. Plaintiffs Should Be Precluded From Offering Publications or Statements From Non-Governmental Organizations Into Evidence.

Plaintiffs list no fewer than forty-five statements from foreign and domestic non-governmental organizations and state agencies, for example, World Allergy Organization, World Health Organization, World Climate Programme, Solar Energy Industry Association, Solar Energy Research Institute, International Renewable Energy Agency, and UNICEF.[6] Among these, Plaintiffs include statements from various medical organizations, such as the American

913, 916-18, 920, 922-23, 958, 969, 1752; Ex. 2, row 2. Defendants reserve their rights to object to any other exhibits that were inadvertently excluded from this list or other lists set forth in these Objections.

[6] *See* Ex. 1, rows 24-29, 81, 328, 337, 647, 648-54, 656, 670-79, 775-76, 886, 912, 925-26, 1701-02, 1781-89.

Academy of Pediatrics (Ex. 1, row 24), American Academy of Psychiatry and the Law (Ex. 1, row 25), and the American Psychiatric Association (Ex. 1, rows 26-29).

None of the aforementioned organizations are parties to this lawsuit and to the extent Plaintiffs seek to offer their out-of-court statements for the truth of the matters asserted they are inadmissible as hearsay. Fed. R. Evid. 801(c), 802. Further, about half of these statements are untethered from any expert testimony and were the subject of one of Plaintiffs' Motions in Limine,[7] making their relevance to this case for a non-hearsay purpose dubious at best.

Further, even to the extent Plaintiffs' experts may rely on some of these statements (*see, e.g.*, Ex. 1, row 912, 1782-83), doing so would not render them admissible for any purpose other than evaluating the expert's opinions. Fed. R. Evid. 703.

IV. Plaintiffs Should Be Precluded From Offering Cumulative Scientific Articles Into Evidence As Expert Reliance Materials.

Plaintiffs list more than one-hundred scientific articles, including by example, thirteen articles published in *Science*, thirteen articles published in *Nature*, and eleven articles published by *Science Direct*.[8] To the extent Plaintiffs seek to offer these articles into evidence for the truth of the matters asserted therein, they are inadmissible as hearsay. Fed. R. Evid. 801(c), 802. And to the extent those scientific articles are not offered for their truth but to assist the Court in deciding the weight to give Plaintiffs' experts' opinions under Rule 703, the probative value of the indiscriminate admission of expert reliance materials in this case is substantially outweighed by considerations of wasting the Court's time in a trial *conservatively* estimated to last at least fifty days and needlessly presenting cumulative evidence.

---

[7] *See* Ex. 1, rows 81, 328, 647, 649, 650-54, 656, 670-75, 679, 776, 886, 1701-02, 1781, 1785-89.

[8] *See, e.g.*, Ex. 1, rows 5, 9, 60-01, 84, 103, 111, 169, 171, 198, 200, 213-14, 216, 222, 258, 277, 325, 341, 389, 400, 403, 447, 495, 513, 532, 538, 550, 562, 569, 572, 616, 629, 787, 782, 808, 813, 851, 856, 853, 888, 901, 909-11, 1753-54, 1760, 1796; Ex. 2, row 23.

For example, Plaintiffs should not be permitted under Rule 403 to offer—on top of Dr. Ove Hoegh-Guldberg's testimony on coral reefs—ten articles on the very same subject.[9] Plaintiffs also list no fewer twenty articles on the subject of arctic ice and ice melt, which will also be the subject of five hours of direct testimony by Dr. Eric Rignot.[10] Pls.' Am. Witness List at 9. At the very least, this Court should direct Plaintiffs to be far more circumspect in seeking the admission of publications or statements from non-governmental organizations as expert reliance materials.

V. Plaintiffs Should Be Precluded From Offering Videos and Films, Including Documentary Films Into Evidence.

Plaintiffs have at least twenty-seven videos on their exhibit list. They fall into several categories and all are objectionable:

(1) Thirteen C-SPAN videos of former Presidents giving remarks (Ex. 1, rows 172-84). The first video of former President Obama (Ex. 1, row 172) is more than thirty minutes long. Statements made by former Presidents have little relevance as "[t]his lawsuit is, at its heart, a challenge to the environmental and energy policies of the federal government as expressed through the action (or inaction) of federal agencies." Opinion & Order 14-15 (ECF No. 369). Further, even assuming the statements were relevant, the probative value of showing more than a dozen videos is substantially outweighed by considerations of wasting the Court's time and needlessly presenting cumulative evidence. Fed. R. Evid. 403.

(2) Three video compilations of NBC, ABC, and CBS news reports (Ex. 1, rows 685-86, 1852) and one video of a CNBC news report (Ex. 1, row 116). These videos are

[9] *See* Ex. 1, rows 45, 169, 198, 277, 328, 333, 389, 513, 780, 909-11.
[10] *See* Ex. 1, rows 247-49, 262-63, 276, 392-93, 436, 440, 533, 608, 781, 849, 855, 898, 915, 1792.

inadmissible as hearsay and have no relevant non-hearsay purpose. Fed. R. Evid. 801(c), 802, 401. And even if admissible, watching video compilations of network news represents a prejudicial waste of time for both the parties and the Court. Fed. R. Evid. 403. Fed. R. Evid. 403.

(3) Five videos of Plaintiff Levi's home and surrounding area (Ex. 1, rows 1853-57) and one video of Plaintiff Jamie's sheep barn (Ex. 1, row 1858). The probative value of five videos for a single Plaintiff that is already slated to offer two hours of oral testimony is substantially outweighed by considerations of wasting the Court's time with cumulative evidence. Fed. R. Evid. 403. Further, to the extent Plaintiffs do not call Plaintiff Jamie at trial, Defendants would object to the admission of the sheep barn video. Fed. R. Evid. 801(c), 802, 804.

(4) Four promotional "documentary films" that appear to be produced by Our Children's Trust (Ex. 1, rows 1847-51), all but one featuring one of the Plaintiffs. These films are inadmissible hearsay. Fed. R. Evid. 801(c), 802. They also contain subjective opinions, not facts, and should be excluded on that basis as well. Fed. R. Evid. 602. Further, the admission of these self-serving videos would unfairly prejudice Defendants, especially so if the declarant in the film does not testify, and would waste the Court's time with evidence not likely to assist it in evaluating the merit of Plaintiffs' claims of injury. Fed. R. Evid. 401, 403.

VI. Plaintiffs Should Be Precluded From Offering Copious Historical Documents From the Early Republic and Pre-Johnson Administrations Into Evidence.

Plaintiffs list at least thirty exhibits relating to the Early Republic Period (1780-1830). These include documents relating to George Washington's Mount Vernon (Ex. 1, rows 1873, 1880-81), Thomas Jefferson's Monticello (Ex. 1, rows 1876-77, 1879, 1882), and James

Madison's Montpelier (Ex. 1, rows 1861-71), as well as maps and other documents authored by the Prussian naturalist Alexander von Humboldt in the early 1800s (Ex. 1, rows 1874-75, 1878).[11] These documents are not relevant to Plaintiffs' claims that Defendants have injured them in the twenty-first century and should not be admitted into evidence. Fed. R. Evid. 401. Their relevance even to legal questions of Constitutional interpretation is highly suspect. It stretches the imagination to conceive how the Court would use a "reproduction of Jefferson's mould board" (Ex. 1, row 1882) —an agricultural tool— to find that Plaintiffs have a fundamental right to a climate system capable of sustaining human life. If Plaintiffs wish to cite the more traditional tools of Constitutional interpretation—*e.g.*, contemporary writings of the framers, the Federalist Papers, and the notes from the Constitutional Convention itself—they can do so in their post-trial briefs.

Plaintiffs also list more than fifty documents from the presidential libraries as well as other documents from presidential administrations dating back to George Washington. Documents generated before the Lyndon B. Johnson administration (1963-1969) are not relevant to Plaintiffs' claims or what little relevance they have is substantially outweighed by considerations of wasting the Court's time, and needlessly presenting cumulative evidence.[12] The crux of Plaintiffs' claims is that Defendants have known for more than fifty years that carbon dioxide from the burning of fossil fuels was causing global warming. *See* First Am. Compl. ¶ 1 (ECF No. 7). Based on Plaintiffs' own allegations, nothing probative can be gained from reaching back into documents generated before the middle of the last century. Furthermore, documents from later presidential administrations are not automatically relevant or

[11] *See*, Ex. 1, rows 89, 185, 324, 450, 451, 570-71, 590-94, 960, 1873-74, 1878, 1881.
[12] *See*, Ex. 1, rows 334-336 (Herbert Hoover), 286-287 (Franklin D. Roosevelt), 955-957 (Theodore Roosevelt), 332 (Harry S. Truman), 245-246 (Dwight D. Eisenhower).

admissible: they must bear on the facts in dispute in this case. For example, not every presidential statement about "children" is relevant or admissible (*see, e.g.*, Ex. 1, rows 245-46, 286-87, 332, 839-41, 957). At the very least, the Court should limit Plaintiffs to presidential documents authored during the Johnson and subsequent administrations and to exclude documents surveying at a high level many wide-ranging topics and not limited to the issues germane to this case. *See, e.g.*, Ex. 1, rows 47, 52, 484, 838, 944 (State of the Union Addresses).

Conclusion

Defendants respectfully request that the Court issue an order striking Plaintiffs' exhibit list and requiring Plaintiffs to submit a new exhibit list containing only those documents and things reasonably likely to be offered (and admitted) into evidence during their case-in-chief. In the event the Court declines to issue an order striking Plaintiffs' exhibit list, Defendants request that the Court sustain its objections to Plaintiffs' exhibit list as set forth herein and in the attached Exhibits.

Dated: November 9, 2018

Respectfully submitted,

JEFFREY BOSSERT CLARK
Assistant Attorney General
JEFFREY H. WOOD
Principal Deputy Assistant Attorney General
Environment & Natural Resources Division

/s/ Erika Norman
LISA LYNNE RUSSELL
GUILLERMO A. MONTERO
SEAN C. DUFFY (NY Bar No. 4103131)
MARISSA PIROPATO (MA Bar No. 651630)
CLARE BORONOW (admitted to MD bar)
FRANK J. SINGER (CA Bar No. 227459)
ERIKA NORMAN (CA Bar No. 268425)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
601 D Street NW
Washington, DC 20004

Telephone: (202) 305-0445
Facsimile: (202) 305-0506
Erika.norman@usdoj.gov

Attorneys for Defendants