No. 137, Original

In The
Supreme Court Of The United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

Before the Honorable Barton H. Thompson, Jr.
Special Master

# CONSOLIDATED RESPONSE IN OPPOSITION TO WYOMING'S MOTIONS IN LIMINE TO EXCLUDE SCIENTIFIC LITERATURE IDENTIFIED AS EXHIBITS AND TO EXCLUDE AFFIDAVITS IDENTIFIED AS EXHIBITS BY MONTANA

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October 7, 2013

Montana hereby submits this Response in Opposition to Wyoming's Motion in Limine to Exclude Scientific Literature Identified as Exhibits by Montana ("Scientific Literature Motion") and Motion in Limine to Exclude Affidavits Identified as Exhibits by Montana ("Affidavit Motion") (together, the "Motions"). Wyoming requests the Court to exclude exhibits it identifies as scientific literature and therefore, inadmissible hearsay, pursuant to Fed. R. Evid. 801. Scientific Literature Motion at 2. It further requests that the Court exclude affidavits that were previously submitted during the course of this case, also because they are hearsay under Fed. R. Evid. 801. Affidavit Motion at 2. Wyoming asserts that these exclusions are proper because the scientific literature and affidavits do not fall within any recognized exception to the hearsay rule.

Wyoming's request is overly restrictive under the rules of the Court and the policies and procedures governing actions in the original jurisdiction. The Special Master has an obligation in this original jurisdiction case to provide the Supreme Court with a complete record. Nor does this case involve a jury trial and the concomitant concern that admission of evidence could potentially confuse or mislead a jury sitting as factfinder. Providing the Special Master with documentation relied on by expert witnesses is not prejudicial in this context, and will allow for convenient access by the Special Master and the parties to documents that will be relied on by these witnesses. For these reasons, among others stated herein, the Motions should be denied.

## ARGUMENT

The purpose of a motion in limine is to obtain a ruling in advance of trial on the admissibility of evidence that would confuse or mislead the factfinder. See Fed. R. Evid. 402; Fed. R. Evid. 403; see also, *e.g.*, *Gold v. State Farm Fire & Cas. Co.*, Civil Action No. 10-cv-0825-RBJ-MJW, 2013 WL 1910515, at *6 (D. Colo. May 8, 2013). Such determinations are typically deferred until trial so that questions regarding the evidence may be resolved in the

proper context. See *Gold*, 2013 WL 1910515, at *6. In the overwhelming majority of circumstances, the exclusion of evidence is warranted only when a jury is sitting as fact finder. See Fed. R. Evid. 104, Advisory Committee Notes, 1972 Proposed Rule (recognizing that "the exclusionary law of evidence" is "the child of the jury system") (internal quotation marks and citation omitted); see also 11 Charles Alan Wright et al., Federal Practice and Procedure § 2885, at 623 (2012) ("In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence.").

This case is not a jury trial. It is an original proceeding before the United States Supreme Court, which has been assigned to a special master for the purpose of creating a complete record and making recommendations to the Court. The Federal Rules of Evidence do not technically apply, but rather serve as guidance. Sup. Ct. R. 17.2. The exhibits referred to by Montana in the Motions may properly be referred to by expert witnesses to support and illustrate their testimony. Under these circumstances, excluding them as exhibits would unnecessarily inconvenience the Court and the parties. Further, there is no danger of misleading a jury, and thereby causing prejudice. A special master is like a judge -- capable of viewing the evidence without being confused or misled.

As Special Master Kayatta explained in *Kansas v. Nebraska & Colorado*, discussing the need for pretrial *Daubert* motions:

> "[W]ere this a jury trial we were approaching, that's something I would have -- I would give very significant weight to. Here though, not only is it a nonjury proceeding, but it's also a proceeding where part of my job is not just to be the trial judge, but also to compile a record for independent review of my recommendations. So I would be very surprised if there were a *Daubert* issue that could be raised prior to trial that would cause me to strike a witness's testimony and not even have it presented at trial. It seems to me a much more efficient manner to proceed is bring the expert, put him on, make the *Daubert* and other objections; and I can then share my views both on the *Daubert* issue and on what I think of the expert testimony as well." Transcript, Telephone Conference before

> Special Master William J. Kayatta, Jr., *Kansas v. Nebraska & Colorado*, Orig. No. 126, at 62:20-63:13 (Mar. 23, 2012).

Special Master Kayatta went on to explain that his reluctance to entertain *Daubert* motions rested on "the structure of this proceeding and given what would be [his] caution in constructing a record that allows the Court to make an independent judgment, if it should disagree, and not wanting to have a path unnecessarily cut off that would require a remand." *Id.*, at 63:15-21; see, *e.g.*, *United States v. State of Wyoming*, 331 U.S. 440, 459-61 (1947) (remanding to allow the special master to take evidence regarding good faith, which had been erroneously excluded). The same circumstances exist here and warrant denial of Wyoming's Motions.

**I. The Scientific Literature Exhibits Should Be Admitted**

Statements made in published treatises and scholarly journals are admissible as witness. Fed. R. Evid. 803(18); *United States v. Norman*, 415 F.3d 466, 473 (5th Cir. 2005). This is because they are written by and for professionals and are subjected to professional scrutiny prior to publication. Statements from scientific journals may be read into evidence. However, under the Federal Rules of Evidence, they are not received as exhibits. Fed. R. Evid. 803(18). But, as noted above, the Rules of Evidence are fashioned primarily for jury trials.

The policy behind the Rule's prohibition is expressed as the need to avoid "the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired." Fed. R. Evid. 803(18), Advisory Committee Notes. This policy is not an issue in the context of a proceeding such as this, where the Special Master is in a position to weigh the validity and relevance of the treatise in the context of the expert testimony. However, given that the rules of evidence do not strictly apply, and that the policy underlying the prohibition of receiving the treatise as an exhibit is not a concern here, the Scientific Literature

Motion should be denied and the scientific literature in question should be admitted into the record for the convenience of the parties, and in the interest of providing a complete record for the Court.

**II. The Affidavit Exhibits Should Be Admitted**

It is true that affidavits are generally deemed hearsay under Fed. R. Evid. 801. While Wyoming correctly notes that there is no explicit exception in Fed. R. Evid. 803 or 804 for the admissibility of the affidavits it identifies in its Affidavit Motion, Wyoming ignores entirely, the exception found in Fed. R. Evid. 807, which supports the admission of affidavits that would otherwise be inadmissible as hearsay. See, *e.g.*, *Cynergy, LLC v. First American Title Ins. Co.*, 706 F.3d 1321, 1329-30 (11th Cir. 2013). Rule 807 provides that when certain criteria are met, "a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception." These criteria generally require that the statement include circumstantial guarantees of trustworthiness, be offered as evidence of a material fact, be more probative on the point for which it is offered than any other evidence, and that admission of the statement will best serve the interests of justice.

The affidavits identified by Wyoming in its motion generally meet these criteria. The purpose for identifying these affidavits as exhibits is to ensure a complete record before the Special Master and the Court, to provide the parties and the Special Master access to the testimony before and during the hearing, and to refresh the recollection of witnesses at trial. Because the affiants will be present as witnesses, there is no issue regarding trustworthiness. Further, because the affiants will be at trial, they will be subject to cross-examination, which is the major concern of the Hearsay Rule. The affidavits will be offered as evidence of material facts, and, to the extent that the affidavits refresh the memory of the witnesses, they will be at

least as probative on the points for which they are offered as live testimony. Finally, to the extent that the interests of justice are served by a complete and accessible record before the Court, introducing the affidavits as exhibits serves that purpose as well. Given that the rules of evidence do not strictly apply here, there is no reason why the affidavits should not be included among the exhibits offered into the record.

## CONCLUSION

The expert witnesses and affiants who can testify to the reliability of the scientific literature and affidavits will be present at trial and subject to cross-examination. In addition, the exclusionary rules of evidence should not be applied in a nonjury trial. This is particularly true here, in a case in the Court's original jurisdiction, where the Special Master has an obligation to provide the Court with a complete record. Therefore, the Motions should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of Montana's Response in Opposition to Wyoming's Motions in Limine to Exclude Scientific Literature Identified as Exhibits and to Exclude Affidavits Identified as Exhibits by Montana was served electronically, and by U.S. Mail on October 7, 2013, to the following:

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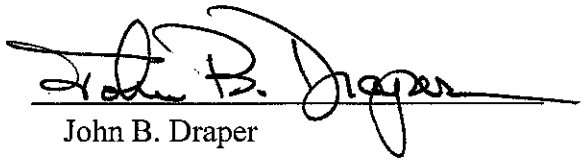
I further certify that all parties required to be served have been served.



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