

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**

**MOTION IN LIMINE TO EXCLUDE SCIENTIFIC LITERATURE IDENTIFIED
AS EXHIBITS BY MONTANA**

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The State of Wyoming hereby moves in limine for an order excluding Montana exhibits 27 through 31, 41, 43, 44, 45 through 58, and 515 through 517. These exhibits all appear to be scientific literature, and therefore, hearsay pursuant to Fed. R. Evid. 801. Because Montana listed this literature as exhibits, Wyoming assumes that Montana intends to offer the exhibits at trial. Any such offer would violate the process outlined in Fed. R. Evid. 803(18) governing the admission of statements in learned treatises and periodicals. That rule provides that "[a] statement contained in a treatise, periodical, or pamphlet" is not excluded by the rule against hearsay if;

(A) *the statement* is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, *the statement may be read into evidence but not received as an exhibit.*

Fed. R. Evid. 803(18) (emphasis added).

As is apparent from the plain language of the rule, periodicals such as those identified on Montana's exhibit list are generally not admissible, and only specific statements otherwise qualifying under the rule may be read into evidence. Accordingly, all the scientific literature on Montana's exhibit list should be excluded under Fed. R. Evid. 802, which provides that hearsay is not admissible.

WHEREFORE the State of Wyoming requests that the Court enter an order excluding Montana exhibits 27 through 31, 41, 43, 44, 45 through 58, and 515 through 517.

Dated this 30th day of September, 2013.

Respectfully submitted,

THE STATE OF WYOMING



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail and by placing the same in the United States mail, postage paid, this 30th day of September, 2013.

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