Elizabeth E. Howard, OSB No. 01295
E-Mail: ehoward@dunncarney.com
Anne D. Foster, OSB No. 993152
E-Mail: afoster@dunncarney.com
Kate L. Moore, OSB No. 04334
E-Mail: kmoore@dunncarney.com
Dominic M. Carollo, OSB No. 093057
E-Mail: dcarollo@dunncarney.com
Dunn Carney Allen Higgins & Tongue LLP
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204
Telephone: (503) 224-6440
Facsimile: (503) 224-7324

Attorneys for Defendants-Intervenors.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

OREGON NATURAL DESERT ASS'N, CENTER FOR BIOLOGICAL DIVERSITY, and WESTERN WATERSHEDS PROJECT,

Plaintiffs,

v.

TOM TIDWELL, et al.,

Defendants,

v.

HARLEY & SHERRIE ALLEN, et al.,

Defendants-Intervenors

No. Case No. 07-1871-HA
[Consolidated with Case Nos. 03-381 and 08-151]

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE THE REPORTS AND TESTIMONY OF JONATHAN RHODES AND CHRISTOPHER CHRISTIE

ORAL ARGUMENT REQUESTED

INTRODUCTION

Plaintiffs have filed motions seeking summary judgment on several of their claims. (Court Docket Nos. ("Dkt. Nos.") 400-402). In support of their summary judgment motions (as

well as their prior Preliminary Injunction motions), plaintiffs rely on the reports and testimony of Jonathan J. Rhodes ("Rhodes") and Christopher L. Christie ("Christie"). *See, e.g.*, Dkt. No. 403. Over the course of this litigation, the parties have undergone extensive discovery including production of Rhodes' and Christie's notes and draft reports and have taken the depositions of both Christie and Rhodes. As a result, Intervenors have determined that neither Rhodes nor Christie is qualified to render the opinions described in their reports. It is clear from discovery that Rhodes and Christie have formed their opinions based on insufficient facts and data, unreliable methods, inadequate training and faulty reasoning. It also appears that neither Rhodes nor Christie based their written reports on the facts of this litigation; instead each obtained their data and tailored their reports at the direction of plaintiffs' attorneys.[1]

For these reasons, pursuant to FRE 702, Intervenors respectfully request that this Court strike the reports and testimony of Rhodes and Christie.[2] In the alternative, and without waiving the above motion, Interveners move this Court under FRE 702 to exclude all or portions of Rhodes' and Christie's opinion testimony on the grounds that their opinions are not based on sufficient facts/data as well as reliable scientific methodology.[3]

ARGUMENT

A. The Standard for "Expert" Witness Qualification

[1] For example, attorney Dave Becker traveled to the allotments at issue with Christie and recorded measurements. *See* deposition of Christie attached as Exhibit 1 to the Declaration of Anne Foster ("Foster Dec."), pgs. 174-177. Afterwards, he told Rhodes what to say in his expert reports. *See* Deposition of Rhodes attached as Exhibit 2 to Foster Dec., pgs. 112-113. Finally, he has argued before this Court on countless occasions regarding the meaning of the data and these same reports. *See, e.g.*, Dkt. Nos. 400-402. These actions are arguably consistent with plaintiffs' stated objective—"the total removal of domestic livestock from western public lands." *See* interview with ONDA's executive director attached as Exhibit 3 to Foster Dec., pg. 1.

[2] In support of this Motion to Strike, Intervenors also rely on their arguments set forth in their Response to Plaintiffs' Motions for Summary Judgment (Dkt. Nos. 447) and their prior Motion to Strike the Testimony of Christopher Christie (Dkt. Nos. 223, 224).

[3] Nor is such testimony admissible as lay testimony. Much of this testimony is inadmissible because it is based on hearsay by unidentified persons not on personal knowledge, and on sheer speculation and conjuncture.

The admissibility of expert opinion testimony turns, in significant part, on whether the witnesses have the appropriate qualifications. The test to determine whether a witness qualifies as an expert requires that he have some special knowledge, skill, experience, training, or education on the subject matter about which he is offering his opinion. *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). "[T]he mere fact that [an individual] was previously admitted as an expert witness qualified to give testimony [on a particular topic] . . . is irrelevant to the determination whether he is qualified to give such testimony in this case." *Elcock v. Kmart Corp.*, 233 F.3d 734, 744 n.5 (3rd Cir. 2000); *see also Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 800 (4th Cir. 1989) ("It would be absurd to conclude that one can become an expert simply by accumulating experience in testifying.").

Moreover, mere "practical" experience in a particular area within an industry does not immediately confer expert qualification upon an individual. For example, in *Jinro America Inc. v. Secure Inv., Inc.*, the Ninth Circuit held that a professional investigator proffered as an expert witness on Korean business culture and currency practices based merely on his personal investigative experiences had qualifications that were "glaringly inadequate" because he did not have the relevant legal, business, or financial expertise. 266 F.3d 993, 1005-06 (9th Cir. 2001). In *Jinro*, the proffered "expert" "provided no empirical evidence or studies to support his sweeping indictment of the Korean business community—other than to cite newspaper articles and a few anecdotal examples, some of them clearly hearsay." *Id.* at 1006. While the court recognized that persons experienced in a particular field may have a "practical" expertise or specialized knowledge that might qualify them to provide relevant and reliable information to a lay jury, the "practical" expertise must, among other things, relate to the content of the proffered testimony. *See id.*[4] As will be shown below, Rhodes does not have the training or expertise to

[4] *See also Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 724 (7th Cir. 1999) (an expert with a doctorate in metallurgy could not testify about the *toxicity* of manganese fumes since that requires expertise rooted in *medical* knowledge and training); *Goodwin v. MTD Products, Inc.*,

collect data. Neither does he have the expertise necessary to opine whether others have properly collected data or the meaning of such data once it is collected. Further, Intervenors will show that Christie has no training, education or experience with regard to evaluating data. As such, all testimony provided by these witnesses should be stricken.

B. The Standard for Admissibility of "Expert" Opinions.

"Expert" opinions are inadmissible if they do not satisfy the requirements of FRE 702. The Ninth Circuit warns that in cases where, as here, proffered experts seek to testify based on inadequate data and hearsay information, and to couch observations as generalized "opinions" rather than first-hand knowledge about specific facts, "care must be taken to assure that a proffered witness truly qualifies as an expert, and that such testimony meets the requirements of Rule 702." *Jinro America Inc.*, 266 F.3d at 1004.

> FRE 702 codified these concerns into the following three-prong test:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Supreme Court interpreted Rule 702 and articulated general guidelines for its application in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert*, the Supreme Court addressed the reliability requirement in the context of "scientific knowledge." In order to ensure "that an

---

232 F.3d 600, 608-09 (7th Cir. 2000) (a mechanical engineer is not qualified to give expert testimony on medical questions, including the cause of an eye injury allegedly resulting from a mechanical malfunction); and *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969 (10th Cir. 2001) (in a products liability suit, an orthopedic surgeon was not qualified to give expert testimony on the adequacy of warnings provided by the manufacturer of a "multi-hole nail" implanted in the plaintiff to hold bone fragment in place).

expert's testimony both rests on a reliable foundation and is relevant to the task at hand" under FRE 702, the Court developed a litmus test. *Daubert*, 509 U.S. at 590, 597. As the Court observed, expert opinions must be based on good grounds to be reliable:

> The word "knowledge" connotes more than subjective belief or unsupported speculation . . . . In order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id. at 590.

Though *Daubert* focused on scientific testimony, *Kumho* made clear that *Daubert's* standard of "evidentiary reliability" extends to "technical and other specialized knowledge," not just scientific testimony. *Kumho*, 526 U.S. at 141, 147-49. The Court in *Kumho* cautioned that,

> where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline.

Id. at 149. *Daubert* and *Kumho* require that the Court apply the following factors relevant to evaluating the reliability of expert testimony: (1) whether the methodology used can be tested; (2) whether the methodology has been subjected to peer review; (3) whether there is a known potential rate of error; (4) whether there are standards controlling the technique used; and (5) whether a known technique is generally accepted in the relevant scientific or technical community. *Daubert*, 509 U.S. at 594.

C. Plaintiffs' Expert's Testimony is Inadmissible.

1. Jonathan Rhodes' testimony should be excluded in its entirety.

a. Rhodes does not qualify as an expert because he does not have the requisite knowledge, skill, experience, training, or education.

Plaintiffs offer Jonathan Rhodes' testimony in support of the contention that the data

collected by Christie was properly obtained. Rhodes Expert Witness Disclosure ("Rhodes Exp. Rpt."), Dkt. No.402-2, ¶ 21-40; *see also* Expert Rebuttal Report of Rhodes ("Rhodes Rebuttal Rpt."), Dkt. No.402-4, ¶ 12-20 (together referred to as "Rhodes Expert Reports"). Plaintiffs also offer Rhodes' testimony as proof that livestock grazing in the Malheur National Forest has degraded salmonid habitat in the project area and "is clearly preventing recovery of bank stability at a natural rate." *See e.g.* Plaintiffs' concise statement of material facts, Dkt. No. 403, ¶¶ 7, 20; Rhodes Exp. Rpt., ¶ 59. However, Rhodes is not qualified to give expert testimony regarding data collection, recovery of bank stability or status of salmonid habitat.

With regard to data collection, Rhodes' education consists of both a Bachelor's and Master's degree in hydrology. *See* Ex. 2, Rhodes Depo., pgs. 31 and 33. The only training Rhodes has ever received in *collecting* data along stream banks occurred well over 25 years ago. Specifically, in 1981, Rhodes was enrolled in a hydrologic field course where he recalls being "generally" trained in collecting data and evaluating banks. And in 1985, while in the desert of Reno, Nevada he "worked on field crews for a study where *bank evaluation was part of the work."* Ex. 2, Rhodes Depo., pg. 32 (emphasis added). In fact, Rhodes admits that other than the above classes, he has received no other formal education or training relating to *data collection*. Rather, Rhodes admits his current "expertise" in data collection stems from his reading of the MIM protocols in 2007 and 2008.

> Q. Maybe I should be more clear here.
>
> With regards just with education, have you gone to any classes? Have you received any training?...
>
> Any training other than obtaining your master's and graduating in 1981 with a Bachelor's of Science, any other education training or that sort of –
>
> MR. BECKER: Objection; compound.
>
> A. In terms of just bank data collection?
>
> Q. Yes, streams.

A. To the best of my recollection, no.

Q. So you haven't taken the MIM protocol training?

A. No, I have not. I've read the 2007 and 2008 protocols.

Ex. 2, Rhodes Depo., pgs. 33-34. Aside from reading the MIM protocol, plaintiffs claim that Rhodes has "years" of on-the-job training. However, it is clear that even on the job, Rhodes did not receive training; instead he provided advice to others in the field. *See* Ex. 2, pg. 36-37.

As is discussed in more detail below, repeating the same improper methods of data collection for at least 15 years (and training others in the same methods) does not make any witness an expert in appropriate scientific methods.[5] Despite this extremely limited training, plaintiffs offer Rhodes' opinions on the proper methods for data collection and the overall rate of recovery of stream banks in the Malheur National Forest. Rhodes Exp. Rpt., ¶ ¶ 21-40, Rhodes Rebuttal Report., ¶ ¶ 13-20. If such tangential experience is sufficient to pass muster under *Daubert*, all persons who have read an article or taken one class (nearly a quarter of a century prior) could qualify as an expert witness.

b. Rhodes' opinions are inadmissible.

Rhodes' testimony should also be excluded because it is not grounded in acceptable methodology, it is not repeatable, and it cannot be tested. *Kumho*, 529 U.S. at 149 ("where such testimonies factual basis, data, principles, methods, or their application are sufficiently called into question, … the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the [the relevant] discipline."). In other words, none of Rhodes'

[5] These improper methods are highlighted by Rhodes' own admission that he did not collect data in 2006 and 2007. Rather, he made "visual estimates" and converted those "visual estimates" into percentages which were used in the graphs throughout his report. *Compare* Ex. 2, Rhodes Depo., pgs. 44-45 to Rhodes Exp. Rpt., ¶41. *See also* Rhodes Depo. Pgs. 140-144 (Rhodes tells Christie to use visual estimates). Rhodes did not inform the court that his so-called "mean" data consisted merely of a visual estimates. See Ex. 2, Rhodes Depo.

testimony meets the requirements set forth under both *Daubert* and *Kumho*.

i. Rhodes' Research from 1999, and all "conclusions" based on this research should be stricken.

Rhodes relies on his own original research conducted in 1999 (hereinafter referred to as "1999 In Process Research") both as evidence for his qualifications as an expert and as evidence of the negative effects of livestock grazing on the stream banks in the Murders Creek and Lower Middle Fork allotments of the Malheur National Forest. *See* Rhodes Exp. Rpt., ¶¶ 6, 13, 45–46, 56, 59–63, 99–100; *id.*, p. 45 (literature cited listing "Rhodes, J.J. and Greene, M.J., *in process*"); *id.*, Table 2; Rhodes Rebuttal Rpt., ¶ 9–10, 11. This research is presented as a comparison between grazed and ungrazed reaches of streams. *See generally* Ex. 4, Rhodes' 1999 In Process Research; Ex. 5, Krueger Supp. Rpt., ¶ 1, 14.

Unfortunately, this research was not available in this case (*i.e.*, during the preliminary injunction proceedings) until after the parties exchanged documents during expert discovery, but it is now clear that this report was the foundation for Rhodes' declarations previously submitted to this court as evidence of the effects of livestock grazing on the Malheur National Forest. *See, e.g.*, First Rhodes Decl., ¶ 6, 8, 21–23 (Dkt. No. 36); Third Rhodes Decl., ¶ 16 (Dkt. No. 84); *id.*, Table 2. It is also now clear that all of Rhodes' opinions based on this 1999 In Process Research were not based on accepted scientific methodologies and principles. In his Expert Reports, Rhodes uses the terms "statistical evidence," "good evidence," and "ample evidence" to argue that livestock grazing is negatively affecting streams on the MNF. *See, e.g.*, Rhodes Exp. Rpt., ¶¶ 60, 61; Rhodes Rebuttal Rpt. ¶¶ 9.

During his deposition, Rhodes confirmed that the "statistical evidence" mentioned in his Expert Reports related to his 1999 In Process Research. *See e.g.* Expert Rpt., Pgs. 56, 60 and 61; Ex. 2, Rhodes Depo., pgs. 59-61. However, both in conducting the 1999 In Process Research, and in relying on it in his Expert Reports, Rhodes ignored basic scientific principles regarding experimental design and the proper use of statistics. For example, Rhodes relies on his In

Process Research for the propositions that:

- "*studies conducted in the MNF* [Malhuer National Forest] within the MCA have repeatedly documented that stream reaches that are subjected to livestock grazing are wider than reaches that have not been subjected to livestock grazing for several years." Rhodes Exp. Rpt., ¶ 56. (emphasis added).

- "There is *ample statistical evidence* that when livestock use is eliminated for several years, bank stability damaged by grazing in eastern Oregon streams recovers relatively quickly." Rhodes Exp. Rpt., ¶ 60 (emphasis added).

- There is also *good evidence* within Murderers Creek that livestock grazing is significantly retarding the rate of recovery of bank stability." Rhodes Exp. Rpt., pg. 61 (emphasis added); *see generally*, Rhodes Rebuttal Rpt., pgs. 9-10 and 37.

Not surprisingly, Rhodes fails to elaborate in either of his Expert Reports as to the methodology by which his original research was conducted or otherwise satisfy the requirements of *Daubert* and *Kumho*.[6] When pressed, Rhodes admitted at his deposition that as a result of the methods he used in collecting this 1999 data, *all findings from his 1999 In Process Research were questionable.* Rhodes also admits at his deposition that he failed to inform this Court that the research he uses as the foundation of his Expert Reports was statistically insignificant.

Specifically, with regard to his conclusions and calculations in his 1999 In Process Research, Rhodes states that:

> "the results *cannot be interpreted as true indications of statistical significance*…The measurements along the streams are likely auto-correlated, and, therefore are *not independent*."

See Rhodes In Process Research, Ex. 4, pg. 10 (emphasis added).

When asked to clarify the above statement, Rhodes agreed that his 1999 In Process Research had no statistical significance and was not based on random and independent data.

[6] In fact, the only evidence before this court is that Rhodes' research does not and cannot satisfy *Daubert*. *See e.g.*, Ex. 5, pgs. 4 and 9 ("I do not believe the Expert Report submitted by Mr. Rhodes is credible based on the numerous errors and inconsistencies in following proper scientific procedure.").

Q: But in this report you agree that there is question about the statistical significance of your data.

A: *There is a question about whether it is truly statistically significant*, and that is the same for any kind of data that is collected along a stream system.

Q: Where in your report did you tell the court that there is a question of whether or not the statistical analysis you are relying on is questionable?

A: I'm not sure. I don't think I also in the expert report pointed out that with any statistical data including the stuff that the forest service submitted. I didn't look at it as a treatise on independent and statistical significance.

Ex. 2, Rhodes Depo., pgs. 71-72 (emphasis added). One of the persons present at Rhodes' deposition was Dr. William C. Krueger, the former department head of Oregon State University's Rangeland Ecology and Management Department. Dr. Krueger has published over 67 refereed publications and mentored over 27 graduate students, including 12 PhD students. First Krueger Decl., ¶ 2 (Dkt. No. 230). He has also been a peer reviewer for prominent rangeland ecology journals. Ex. 5, ¶ 2. After attending Rhodes' deposition and reviewing his In Process Research, Dr. Krueger concluded that Rhodes' 1999 In Process Research is not based on reliable scientific principles or methods and as such, would not be accepted by his peers. *See* Ex. No. 5, ¶ 1, 13–32. Specifically, Krueger notes that Rhodes failed to indicate in his research the timing and intensity of grazing at any of the locations. As a result of his failure to note these basic facts, it is "impossible to determine if the results of the study … actually relate to any place other than the place it was done and in the year it was done." Ex. 5, pg. 5, ¶ 18. Krueger explains the necessity of such basic information:

> "In order to extrapolate information from one study to another area (as Rhodes is trying to do) several factors must be common to both." Ex. 5, pg. 5, ¶ 18 (the sites must have the same "ecological conditions," the same "grazing pressure," the same "weather patterns," and the same "physiological needs").

In other words, commonality is the touchstone of scientific comparison. Simply put, when making general conclusions, one must be sure you are comparing "apples to apples."

Here, there is no way for Rhodes (or anyone else) to use the 1999 data or Rhodes' In

Process Research as support for any conclusion because basic scientific requirements were never met.

Rhodes also failed to follow the procedures referenced from the literature in establishing random and independent sampling and in the proper use of statistics. Ex. 5, pg. 5, ¶ 19.

> "When conducting research in natural ecosystems it is extremely important to properly use and understand statistics since it is the only scientific tool that provides objective analysis of the probable differences between treatments being evaluated by the scientists. … Two fundamental factors are essential to conducting a reliable statistical test that compares differences among treatments: The samples must be random and independent."

Ex. 5, ¶¶ 3-4. During his deposition, Rhodes first admits that it is important to collect data in a "scientifically or statistically unbiased way" and then admits that the 1999 In Process research was not unbiased because it was neither independent nor random.

> Q: And the fact that it's likely that the data points are not independent from each other raises serious questions just on the basic fundamental understanding of statistical analysis?
>
> MR. BECKER: Objection; vague, ambiguous.
>
> A: Yeah, I think it makes it questionable. You would have to do an analysis of independence and autocorrelation.
>
> BY MS. FOSTER: (Continuing)
>
> Q: Did you do that?
>
> A: No, we did not. I don't think that's standard practice in collecting data along the stream reach that people do test for independence and correlation.

Ex. 2, Rhodes Depo., pg. 74.

> Q: Where in this expert report that you've provided to the parties do you indicate that the report you're relying on has questionable significance?
>
> A: I don't know. I would have to take a look at it, and it may not be in there.

Ex. 2, Rhodes Depo., pg. 78.

In summary, both Rhodes and Krueger agree:

> "the work…is not suitable for publication in a scientific journal, if subjected to peer review, because of numerous flaws in the experimental design and

> presentation of data collected. [The work] is simply not the product of reliable scientific principles or methods." Ex. 5, pg. 4, ¶ 14.

As explained by Dr. Krueger, Rhodes does appreciate the importance of using statistics both in interpreting and communicating the results and significance of data:

> Even though they [Rhodes and Green] indicated [that] statistical tests were invalid they indicate the confidence intervals and statistical significance throughout the [in process] report inferring that the statistics are valid.

Ex. 5, ¶ 20. Unbelievably Rhodes carried the above-described invalid use of statistics forward into his Expert Reports and now Plaintiffs rely on these invalid Expert Reports in support of their most of the claims in this case. *See, e.g.,* ONDA Op. Brf. at 6, 31, 44, 47 (Dkt. No. 402). As further explained by Dr. Krueger, in the scientific world, the use of the word "significant" is a statistical term, one that Rhodes has used quite recklessly in his Expert Reports. *See* Ex. 5, ¶ 27. The extent to which Rhodes ignores basic scientific principles is remarkable.

In response to Dr. Roper's explanation of the Forest Service's PACFISH monitoring data, Rhodes attempts to rebut the Forest Service's data—which is based on over 1000 monitoring sites across four states[7]—by arguing that (according to his invalid 1999 research) the bank stability of streams naturally progresses "much faster" than that documented in Malheur National Forest DMAs. Rhodes Exp. Rbtl., ¶ 9. Again, he calls the findings from this research "statistically significant." *Id.* As demonstrated above, Rhodes has already admitted that this is simply not the case.

Because the 1999 In Process Research is so fundamentally flawed, Rhodes' reliance on that work in his Expert Report is simply not credible. *See id.,* ¶¶ 29–31. Despite Rhodes admission that his 1999 report has no statistical significance, plaintiffs continue to rely on this 1999 research in support of their claims. Frankly, it is inconceivable to Intervenors that plaintiffs

[7] For an explanation the scope, extent and experimental design of the Forest Service's PACFISH monitoring program, *see* Permittee Res. Brf. at 10–13(Case No. 07-1871-HA) (Dkt. No. 447).

have found it appropriate to rely on "expert opinions" such as the one proffered by Rhodes to engage in the ongoing litigation related to the Malheur National Forest. Perhaps Krueger states it best:

> The Rhodes expert report *grossly exaggerates dates, estimates, measurements and the findings of others.* It is often very difficult to know when Rhodes was citing his estimates or Christie's measurements. He isn't clear when he is referencing measurements or estimates in most of his report. All of the measurements used in his expert report (whether collected by him or Christie or Green) have the same problem of lack of independence noted in the Rhodes and Green (in process) report. There is no indication that samples were collected with a randomized sampling technique. Consequently, *all of the data presented have some degree of bias. Most of the report is based on visual observations with all of the biases and inaccuracies common to visual observations collected without scientific sampling design.* In no way can this report be considered a reliable scientific report. *I do not believe that the Expert Report submitted by Mr. Rhodes is credible* based on the numerous errors and inconsistencies in following proper scientific procedure.

Ex. 5, ¶ 32 (emphasis added). For the reasons stated above, all testimony and opinions related to Rhodes' research should be immediately stricken.

ii. Rhodes' observations and resulting conclusions from 2006 and 2007 should also be stricken.

Setting aside Rhodes' deficient 1999 In Process Report, his other so-called data from 2006 and 2007 is also inadmissible. According to Rhodes, the "data that [he] collected in '06 and '07 [was] averaged as a mean." *See* Ex. 2, Rhodes Depo pg. 92. This average is then presented to this Court in Figures 1 and 2 as proof of bank stability damage from livestock grazing in Eastern Oregon streams. *See e.g.*, Rhodes Exp. Rpt., ¶ ¶ 44-50, 58. In his Expert Reports, Rhodes relies heavily on this so-called data from 2006 and 2007; s*ee e.g.*, Rhodes Exp. Rpt. ¶ ¶ 41-50, 58-60; *see also* Rhodes Exp. Rpt. Figure 1, pg. 16 and Figure 2, pg. 18. For example, Rhodes relies on this data to support the propositions that:

- "streams I examined in the allotment that had been grazed by livestock had bank alteration that was consistently *well in excess of 20%*." Rhodes Exp. Rpt., ¶ 41 (emphasis added).

- "The *results of my measurements* of bank instability and bank alteration … from 2006 to 2007…demonstrate that bank alteration contributes significantly to bank alteration." Rhodes Exp. Rpt., pg. 16, Figure 1 (emphasis added).

- "The data in Figure 2 clearly demonstrate that although this reach of Murderers Creek had been significantly degraded by grazing in 1999 with high levels of bank instability, rest from grazing has allowed the stream to rapidly recover with respect to bank stability." Rhodes Exp. Rpt., pg. 46 (emphasis added).

It is unclear to Intervenors exactly how Rhodes can conceivably rely on his so-called data from 2006 and 2007 or Figures 1 and 2 as proof of anything when he did not actually collect data during those years. Rather, he made visual observations and visual estimates in 2007 only.

Q: So "my observations," you didn't take any data during the October 2007 visit to the Malheur National Forest, did you?

MR. BECKER: Objection; ambiguous.

BY MS. FOSTER: (Continuing)

Q: Go ahead and answer.

A: On those two allotments I don't think I did collect data, but I'm not in perfect recall on that. I know I did on some streams in other allotments, but I think I primarily relied on visual estimates and did not collect quantitative data.

Ex. 2, Rhodes Depo., pg. 44. When asked specifically whether Rhodes' peers would accept his scientific opinions and conclusions based on visual observations only, Rhodes claims that his so-called "visual observations" were actually "visual estimates." Presumably, it is Rhodes' and Plaintiffs' belief that visual estimates are sufficient to meet the tests of *Daubert.*

Q: So I'm asking you, in your field of hydrology, is it your position that your peers, your field will accept scientific opinions and conclusions based on visual observations only?

A: Visual estimates.

Q: Here you state "My observations" – this is Paragraph 96 [of Rhodes Exp. Rpt.] – "My observations during my October 2007 field evaluations." So at least in this report you're talking about observations, not estimates.

A: I'm pretty sure I talked about both in the report. My recollection could be incorrect.

> Q: Is that what you did here, sir? Are your observations—are your conclusions and your opinions based merely on your observations or visual estimates?
>
> MR. BECKER: Objection; vague and ambiguous.
>
> A: With respect to bank alteration, I did not measure bank alteration, so it was based on observations and estimates.

Ex. 2, Rhodes Depo, pgs. 49-50. Not surprisingly, Rhodes did not inform this Court that his detailed and dramatic graphs indicating bank instability are entirely based on visual "guesstimates". Such an admission would invalidate his entire opinion and call into question the validity of ONDA's case.

> "Visual estimates do not have the rigor of random, independent measurements. It can be highly biased by the observers. Visual observations lack the scientific rigor of random, independent measurements."

See Ex. 5, ¶¶ 31-32; *see also* Ex. 2, pgs. 46-49. In summary, Rhodes' 1999 research has no statistical significance and was not based on unbiased data. Further, the 2006 and 2007 visual observations and/or estimates of Rhodes are unreliable. The Rhodes information does not come near to passing the *Daubert* and *Kumho* tests and all resulting opinions and/or conclusions should be stricken from this record.

iii. All testimony relying on Christie's data should also be stricken.

In addition to the poor methodology and the statistical insignificance of Rhodes' data and opinions, Rhodes' testimony is also inadmissible because any remaining data is not based on personal, unbiased or firsthand knowledge. Rhodes has admitted that to the extent that this Court determines that Christie's data was neither consistent, nor reliable nor unbiased, Rhodes' opinions set forth in his Expert Reports would be based only on his visual observations.

> Q: So my question is, hypothetically if it was determined or if it was shown that Mr. Christie's data was neither consistent nor reliable nor unbiased, would the opinions in your report, your expert report then be based on your visual observations and visual estimates only?
>
> MR. BECKER: Objection; argumentative and calls for speculation.
>
> You can answer.

A: Yeah, my opinion that bank alteration was more than 20 percent, which is certainly not the only opinion in that report, would then be based on my visual estimates. Ex. 2, pgs. 129-130.

As is described in more detail below, Christie is clearly biased against ranchers or in his own words, "neo-feudal lords." As the data obtained by Christie also fails to meet the scientific requirements of independence and randomness, and since Christie is clearly biased, all testimony relying on Christie's data should also be stricken from the record on which this Court relies.

2. Christie's testimony should be excluded in its entirety.

First, with regard to the random and independent requirements set forth above, Rhodes admits that Christie's data is neither independent nor random.

Q: How about in 2007? Do you know whether or not the 2007 data points collected by Christopher Christie are likely not independent?

A: I think I had mentioned there's questions about whether measurements are independent whenever they're taken longitudinally along a stream.

Q: So is the answer that Christopher Christie's data is also likely not independent?

A: Any stream data that's collected along a stream, there's questions about whether or not it would be independent. It may well not be independent. It may be pseudo-replicated.

MS. FOSTER: Can you repeat the question, please.

(Reporter read back as requested.)

BY MS. FOSTER: (Continuing)

Q: I'm not talking about any other data. I'm talking about Christopher Christie's data.

MR. BECKER: Objection; vague.

A: It was taken along a stream length, so there's a potential that it was not independent.

BY MS. FOSTER: (Continuing)

Q: So it's likely not independent, correct?

A: Yeah, you would probably do a test for independence and autocorrelation if you really wanted to nail it down.

BY MS. FOSTER: (Continuing)

Q: Did you do any test for independence and autocorrelation for the 2007 data collected by Christopher Christie?

A: No, I did not. Ex. 2, Rhodes Depo., pgs. 91-92.

As Rhodes agrees that Christie's data is not independent or random, it does not meet the requirements set forth for scientific data and all opinions related to such data should be stricken.

In addition, since Intervenors last motion to strike the testimony of Christie (Dkt Nos. 223, 224), Christie has been deposed. *See* Ex. 1. At that deposition, Christie admitted that he is biased towards ranchers and their operations. In other words, there can be no question that Christie's data relating to grazing of cattle on the Malheur National Forest is biased and therefore should be stricken. During his deposition on August 18, 2009, Christie admitted to writing a blog about Baker County and topics that interested him.

Q: (BY MS. FOSTER:) Mr. Christie, we're looking at a PDF document that has been marked as Exhibit 5. Could you state, if you know, what this document is?

A: Well, it appears to be copies from the blog that I periodically write.

Q: Okay. So you personally have a blog?

A: That's correct.

Ex. 1, Christie Depo, pgs. 87-88.

According to Christie, his blog like all blogs is about "bias." *See eg*, Ex. 1, Christie depo, pg. 97. Intervenors agree that at least with regard to the blog written by Christie, his biases against ranchers is glaringly obvious. In his blog, Christie talks of ranchers with distain. For example:

- Christie refers to ranchers as being part of the "shoot, shovel, and shut-up crowd." Ex. 6, Christie blog, pg. 436 of 533.
- He talks about ranchers and others as being hysterical about wolves. Ex. 6, pg. 38 of 533.
- Christie states that "ranchers will just have to start acting like the rest of us by bearing the expense of protecting their animals, and if they put them on public lands where wolves are present, they should expect some uncompensated losses." Ex. 6, pgs. 38-39.

- According to Christie, he has explained the "relationship between ranching and the persecution, and extirpation or near extirpation, of native predators, including the wolf." Ex. 6, pg. 39 of 539.

- Christie also states that "it is clear from these attitudes that the American people are expected to sacrifice their public ecosystems, and all the species there-in, (not to mention their tax dollars flowing to the USDA predator control for efforts, Forest Service, and Bureau of Land Management) to the economic interest of ranchers." Ex. 6, pg. 42 of 533.

- Christie also refers to ranchers and producers as "neo-feudal lords." In reference to an article in the Baker City Herald, Christie states "you may have noticed all of the concern, adulation and general gratuitous genuflection given to a neo-feudal lords, the agricultural aristocracy, or "producers" as they like to be called." Ex. 6, pg. 445 of 533.

- Christie further states that the term producer suggests that "the rest of us, who engage in some form of labor or another, just don't produce much." *Id.*

- Christie also blogs about "producers" and complains about the deference paid to them. "The deference paid to agriculture, the so-called 'producers' can be explained by the fact that they own large tracks of land which have brought them a good deal of economic and political power (not unlike the merchants on Main Street). In addition, they and others have fed myths that portray ranchers and farmers as a more noble and deserving human being, regardless of how they obtained their land and wealth." Ex. 6, pg. 449 of 533.

- Finally, in discussing how ranchers receive far too much in subsidies, Christie states "relief for the serfs I wonder if the Herald and our government entities would be willing to show some concern for county residents who also face emergency or disaster situations. Their problems, as indicates of ranchers may be due to their own irresponsible behavior, or the events beyond their control." Ex. 6, Pg. 545 of 533.

These blog excerpts combined with the deposition testimony provided to this Court and Intervenors motion to strike (Docket Nos. 223-224), clearly outlines Christie's biases and leads one to question the legitimacy of any of Christie's data.

CONCLUSION

For the above stated reasons, Rhodes, and Christie's "expert" testimony should be excluded in its entirety. In the alternative and without waiving the above, Intervenors respectfully request that the Court exclude all or parts of the testimony regarding the legitimacy of the data collected by both Rhodes and Christie, the meaning or conclusions to be drawn from

such data, the effect of grazing on the stream beds of the Malheur National Forest and the "rate of recovery" of these same stream beds.

DATED this 12th day of March, 2010.

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP

/s/ Anne D. Foster

Elizabeth E. Howard, OSB No. 012951
E-Mail: ehoward@dunncarney.com
Anne D. Foster, OSB No. 993152
E-Mail: afoster@dunncarney.com
Kate L. Moore, OSB No. 04334
E-Mail: kmoore@dunncarney.com
Dominic M. Carollo, OSB No. 093057
E-Mail: dcarollo@dunncarney.com

Attorneys for Intervenors-Defendants