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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Eugene Division

UNITED STATES OF AMERICA,	)	NO. **CR 10-60066-HO**
	)	
Plaintiff,	)	**DEFENDANTS' MOTION**
	)	***IN LIMINE* TO EXCLUDE**
v.	)	**EXPERT OPINION**
	)	**TESTIMONY**
STEVEN DWIGHT HAMMOND, and	)	
DWIGHT LINCOLN HAMMOND, JR.,	)	**REQUEST FOR PRETRIAL**
	)	**EVIDENTIARY HEARING**
Defendants.	)	
	)	

Pursuant to Federal Rules of Evidence [FRE] 104 and 702 and the Criminal Procedure 12.1 and the Fifth and Sixth Amendments to the United States Constitution, defendant Steven Dwight Hammond, by and through his attorneys Lawrence H. Matasar and Lawrence Matasar, P.C., and defendant Dwight Lincoln Hammond, Jr., by and through his attorneys Marc D. Blackman and Ransom Blackman LLP, move to exclude expert opinion testimony by the following persons, whom the government has listed as potential witnesses:

(a) Joe Flores, identified in discovery as a "human tracker;"

(b) Daniel Gonzalez, an Oregon State Wildlife Habitat Biologist;

(c) Janice Madden, identified in discovery a Fire Cause Investigator;

(d) John Megan, identified in discovery a Fire Cause Investigator;

(e) Fred McDonald, a BLM Range Conservation Supervisor;

(f) Chuck Miller, identified in discovery as an Oregon Department of Forestry Fire Investigator;

(g) Steven F. Morefield, a BLM Deputy Fire Management Officer;

(h) Marvin L. Plenert, a former United States Dept. of the Interior Regional Director;

(i) Jeffrey Rose, identified in discovery as a Fire Ecologist; and

(j) John Bird, identified in discovery as a Fire Investigator.

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In support of this motion, the Court is respectfully referred to the Points and Authorities below.

Defendants request a pretrial evidentiary hearing on this motion.

Defendants reserve the right to file a supplemental memorandum in support of this motion following the pretrial evidentiary hearing.

Dated this 17th day of January, 2012.

Respectfully submitted,

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POINTS AND AUTHORITIES

A. Factual Setting

Defendants are charged in a 19-count indictment with conspiracy, arson, and operating an aircraft in violation of Federal Aviation Administration regulations. Many of the overt acts of the conspiracy count and each of the substantive arson counts accuse the defendants of willfully and maliciously damaging and destroying rangeland in the Steens

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Mountain area of Eastern Oregon by means of fire. The indictment references eight separate fire complexes over a 24-year period, from August, 1982 to August, 2006.

Discovery and the witness list filed by the government on or about July 20, 2011 [CR 33] indicates that the government intends to elicit testimony from each of the persons listed above under FRE 702. It appears that the majority of these persons will be asked to express opinions about the "origin" and/or "cause" of one or more of the eight fire complexes referenced in the indictment. It appears that another will be asked to express an opinion about footprints and a path of travel the government is expected to contend are related to a number of brush fires within the perimeter of the 2006 Grandad Fire.

Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) and its progeny require the government to demonstrate, pretrial, that proposed expert testimony meets their criteria for admissibility. The discussion that follows summarizes the conditions precedent to admissibility and applies those principles to the expert opinion testimony the government appears to plan to offer during trial. Defendants believe that the evidence presented during the hearing on this motion will demonstrate that little, if any, of the government's proposed expert testimony is admissible.

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B. Conditions Precedent to the Admissibility of Expert Opinion Evidence

1. Burden of Proof

"The party presenting the expert must demonstrate that the expert's findings are based on sound principles and that they are capable of [some objective,] independent validation." *Many Cultures, One Message v. Clements*, 2011 WL 5515515, 16 (W.D. Wash. 2011), *quoting Henricksen v. ConocoPhillips Co.*, 605 F. Supp.2d 1142 at 1154 (E.D. Wash. 2009), which in turn cited *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) ["*Daubert II*"].[1]

2. Preliminary Showing of Admissibility

Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) ["*Daubert I*"] and *Dukes v. Wal–Mart, Inc.,* 509 F.3d 1168 (9th Cir. 2007), this demonstration must first be made to the trial judge, who serves "the role of gatekeeper in determining whether to admit or exclude expert evidence." *Dukes v. Wal–Mart, Inc.,* 509 F.3d at 1179.

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[1] A number of recent district court opinions have thoroughly and thoughtfully addressed admissibility of expert testimony under *Daubert* and its progeny. This memorandum quotes excerpts from these decisions not as authority binding on this Court, but as concise summaries the state of the law.

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3. Conditions Precedent to Admissibility

a. Qualifications of "Expert"

Under *Daubert I*, the initial condition precedent to admissibility is a showing that that the proffered witness is an "expert." As described in *Henricksen*:

> ..."Federal Rule of Evidence 702 commands the primary focus for courts evaluating the admissibility of expert testimony." *Cooper v. Brown,* 510 F.3d 870, 942 (9th Cir. 2007). That Rule provides in part that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue," an expert "may testify thereto." Fed.R.Evid. 702. Before a witness may come "before the jury cloaked with the mantle of an expert[ ]" under Rule 702, the Ninth Circuit has cautioned that "care must be taken to assure that a proffered witness truly qualifies as an expert, and that such testimony meets the requirements of [that] Rule[.]" *Jinro America Inc. v. Secure Investments, Inc.,* 266 F.3d 993, 1004 (9th Cir. 2001). Thus, as a threshold matter, in accordance with Rule 702 the court must determine whether the proffered witness is "qualified as an expert by knowledge, skill, experience, training, or education[.]" Fed.R.Evid. 702.

b. Relevance and Reliability of Proffered Testimony

In the event the Court makes the "preliminary" determination under FRE 104(a) that a witness qualifies as an expert, the proponent of the testimony must then demonstrate that "(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." FRE 702. As interpreted by the *Daubert* Court, this requires a two-part inquiry; to be admissible, the proffered expert opinion testimony must be "not only relevant, but reliable." *Daubert,* 509 U.S. at 589, 113 S. Ct. 2786.

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i. The Reliability Prong

To satisfy the reliability prong, the proponent of the proffered testimony must demonstrate that the proposed expert testimony involves a legitimate field of expertise. As described in *Henricksen*, this determination involves a number of factors, including but not limited to:

> (1) whether the theory can be and has been tested; (2) whether it has been subjected to peer review; (3) the known or potential rate of error; and (4) whether the theory or methodology employed is generally accepted in the relevant scientific community. [*Daubert v. Merrell Dow Pharms., Inc*.] at 593-94. *Henricksen v. ConocoPhillips Co.*, 605 F. Supp.2d at 1154.

Even if the proponent demonstrates that the testimony involves a legitimate field of expertise, expert testimony may still be excluded if it is connected to the underlying data "only by the ipse dixit of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed.2d 508 (1997). Rather, as explained in *Flagstone Development, LLC v. Joyner*, 2011 WL 5040663, 2-3 (D. Mont. 2011):

> The Supreme Court, the Ninth Circuit, and this Court have all ruled that admissible expert testimony does not include unsupported speculation and subjective belief. *See Guidroz–Brault v. Missouri Pac. R. Co.,* 254 F.3d 825, 829 (9th Cir. 2001), *citing Daubert* at 590; *see also, Claar v. Burlington Northern R.R. Co.,* 29 F.3d 499, 502 (9th Cir. 1994) (affirming exclusion of experts' opinion testimony because experts failed to demonstrate conclusions were based upon anything more than "subjective beliefs and unsupported speculation"); *United States v. W.R. Grace,* 455 F.Supp.2d 1181, 1187 (D. Mont. 2006). It is well-settled that an expert's testimony should be excluded where it is based on subjective belief or unsupported speculation which amounts to no more than a bald conclusion (sometimes called an "*ipse dixit* " opinion) or guesswork. *See General Electric,* 522 U.S. at 146 (holding that trial court may properly exclude *ipse dixit* opinions).

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> Additionally, an expert's opinion must be excluded if that expert is merely "parroting" some other person's opinion rather than formulating his own. *See e.g., Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.,* 285 F.3d 609, 612-614 (7th Cir. 2002) (expert not allowed to be "mouthpiece" of another person); *Villagomes v. Lab. Corp. of Am.,* 2010 WL 4628085 (D. Nev. Nov. 8, 2010) (expert witness cannot simply parrot opinions of non-testifying experts).

The expert's testimony must also be shown to account for all factors employed by the methodology generally accepted in the relevant scientific community. Under the case law summarized in *Many Cultures, One Message v. Clements,* 2011 WL 5515515, 16 (W.D. Wash. 2011), the Court may exclude such testimony:

> if it determines "that there is simply too great an analytical gap between the data and the opinion proffered." [*Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed.2d 508 (1997)]. "The trial court's gate-keeping function requires more than simply taking the expert's word for it." *Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1319 (9th Cir. 1995) (" *Daubert II* "). In addition, "any step that renders [the expert's] analysis unreliable...renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *In re Silicone Gel Breast Implants Products Liability Litigation*, 318 F. Supp.2d 879, 890 (D.C. Cal. 2004). Something doesn't become scientific knowledge just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were derived by the scientific method be deemed conclusive. *Daubert II,* at 1315-16. "[T]he expert's bald assurance of validity is not enough. Rather, the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology." *Id.* at 1316. *Henricksen v. ConocoPhillips Co.,* 605 F. Supp.2d at 1154.

ii. The Relevance Prong

Finally, assuming the proponent demonstrates all of the above, expert testimony is nonetheless inadmissible unless it is shown to be relevant. To be relevant, the proffered:

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> ...expert testimony..."must logically advance a material aspect of the [proponent] party's case," and "must be 'tied to the facts'" of that case. *Cooper,* 510 F.3d at 942 (*citing Daubert II,* 43 F.3d at 1315, and *quoting Kumho Tire Co.,* 526 U.S. at 150); *see also Henricksen,* 605 F.Supp.2d at 1154 ("The relevance prong under *Daubert* means that the evidence will assist the trier of fact to understand or determine a fact in issue."). As for reliability, "Rule 702 demands that expert testimony relate to scientific, technical or other specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs." *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997). *Many Cultures, One Message v. Clements*, 2011 WL 5515515, 18.

C. The Government Cannot Meet the Conditions Precedent for the Admissibility of Expert Opinion Evidence Proposed by the Government in this Case

Under FRE 702, only a person who is "qualified...by knowledge, skill, experience, training, or education may testify in the form of an opinion." Defendants believe that the government will be unable to establish at the hearing on this motion that many of the persons listed above meet this basic criterion. They also believe that even for those who may, it will be unable to demonstrate that their proposed testimony is based on sufficient facts or data, the product of reliable principles and methods, or that they reliably applied the principles and methods to the facts of the case.

Defendants reserve the right to file a supplemental memorandum in support of this motion following the evidentiary hearing. At this point and based solely on discovery, they believe the government's proposed expert witnesses do not qualify as experts or have not reliably applied principles and methods in forming their opinions in the following particulars:

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1. Testimony about Footprints and a Path of Travel Does Not Meet the Conditions Precedent to the Admissibility of Expert Opinion Evidence

In *United States v. Hernandez-Bautista*, 159 F. Supp.2d 410, 414 (W.D. Tex. 2001), affirmed on appeal, *United States v. Hernandez-Bautista*, 293 F.3d 845, 855 (5th Cir. 2002), the trial court correctly found [in granting a post-verdict motion for Judgment of Acquittal under Fed. R. Cr. P. 29] that human tracker testimony was not a permissible subject of expert testimony:

> Finally, the Government put on evidence that the Border Patrol agents found footprints leading away from Defendant Hernandez–Bautista's truck, that similar footprints were found around the bags of marijuana, and that these footprints were similar to the tread pattern on the soles of the shoes of some of the five Defendants. The footprint testimony was the focus of much debate. This Court instructed the jury that the Border Patrol tracker was not an expert witness and could say nothing more than that there were footprints near the truck, footprints near the marijuana, and that those footprints were similar to ones that could have been left by the Defendants' shoes.....
>
> It is the opinion of this Court that, despite all its instructions to the contrary, the jury must have based its verdict on a consideration of evidence that was not properly before it. Specifically, the jury must have had a surer belief in the similarity of the footprints than the evidence would permit. It is the further opinion of this Court that the totality of the evidence in the case, especially the footprint testimony, gives equal circumstantial support to a theory of guilt and a theory of innocence of the crime of possession of marijuana with intent to distribute. To put it another way, what was essentially presented by the Government was proof of proximity. Yet, proof of proximity is not proof of guilt. Accordingly, pursuant to Rule 29 and applicable Fifth Circuit precedent, this Court granted the Defendants' Motion for Judgment of Acquittal. *United States v. Hernandez-Bautista*, 159 F. Supp.2d at 414.

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2. The "Cause" and "Origin" Opinion Testimony is Not Based upon Sufficient facts or data nor the Product of Principles and Methods Recognized as Reliable in the Relevant Scientific Community

Defendants acknowledge that "cause" and "origin" evidence regarding a fire may be a permissible subject of expert testimony. *See, e.g. United States v. Lundy*, 809 F.2d 392 (7th Cir. 1987). However, defendants anticipate showing during the hearing on this motion that when investigating and purporting to determine the cause and origin of the fires, the persons the government intends to call as "cause" and "origin" experts failed to gather necessary facts and data and failed to follow principles and methods recognized as Reliable in the Relevant scientific community, to wit: *NFPA 921: Guide for Fire and Explosion Investigations* (2004 ed.), a widely recognized authority on the subject. *See, e.g., Shuck v. CNH Am., LLC,* 498 F.3d 868, 875 n. 3 (8th Cir. 2007); *Bryte v. Am. Household, Inc.,* 429 F.3d 469, 478 (4th Cir. 2005); *Thompson v. Whirlpool Corp*., 2008 WL 2063549, 4 (9th Cir. 2008).

Dated this 17th day of January, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE EXPERT OPINION TESTIMONY; REQUEST FOR PRETRIAL EVIDENTIARY HEARING on the following attorney:

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by electronic file notice of a true copy on the 17th day of January, 2012.

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