

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)	Cr. No. 6:10-60066-HO
)	
Plaintiff,)	ORDER
)	
v.)	
)	
STEVEN DWIGHT HAMMOND, DWIGHT)	
LINCOLN HAMMOND, JR.,)	
)	
Defendants.)	
_____)	

The government charges defendants Steven Hammond and Dwight Hammond, Jr., with conspiracy to commit arson, several counts of arson and depredation of government property by fire over a 20+ year period, in opposition to BLM methods. In addition, defendant Dwight Hammond is charged with several counts of operation of an aircraft without a current medical certificate and operation of an aircraft within a restricted area, as well as threatening to

assault a federal officer.¹ Defendants are also charged with tampering with a witness. Essentially, defendants are alleged to have ignited numerous grassland fires between 1982 and 2006 to benefit their cattle ranching operation.

On January 17, 2012, defendants filed a motion to exclude expert opinion testimony. At the time, defendants generally challenged

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

¹Two of the threat charges are against both defendants.

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

The government, after the defendant's motion was filed, submitted a list of its experts. The government list consisted of 12 "traditional" expert witnesses regarding fire cause, tracking, depredation, and lightning data; and 14 fact witnesses who may offer limited expert opinions on air observations, fire behavior and sources, costs of fire suppression and investigation, damages, fire suppression and safety, and FAA regulations. The government subsequently moved to dismiss some the counts. The case now focuses on four fires. Additionally, the government moved to strike certain overt acts and essentially eliminate about 17 years from the conspiracy charge. Accordingly, the anticipated expert testimony focused in on Gary White, Carrie Bilbao, John bird, Lance Okeson, Charley Martin, Joe Bates, Jeffrey Rose, Daniel Gonzalez, and Jonathan Manski. Defendants no longer challenge the qualifications of the depredation experts (Rose, Gonzalez, and Manski)² and those experts will be permitted to offer expert testimony at trial.

Defendants assert that the government cannot meet the conditions precedent for admissibility of expert opinion evidence. Defendants challenge anticipated testimony about foot prints and path of travel in addition to testimony about cause and origin

²Jonathan Manski will testify as a fact witness predominately, but is expected to offer an opinion on the costs related to fire suppression and investigation.

regarding the fires. The only specific arguments offered, in writing, are that human tracker testimony is not a permissible subject of expert testimony and that cause and origin experts failed to gather necessary facts and data and failed to follow reliable principles and methods, i.e., NFPA 921 Guide for Fire Explosion Investigations.

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.

Fed. R. Ev. 702.

This court must assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993). The court's task is to ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Id. at 597.

Although Daubert listed specific factors³ for assessing scientific testimony, the test for reliability is a flexible one

³The Court listed criteria such as testability, publication, peer review, and general acceptance.

and not all factors necessarily apply to all experts in every case. Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010).

When considering the applicability of Daubert criteria to the particular case before the court, the inquiry must be flexible. Peer reviewed scientific literature may be unavailable because the issue may be too particular, new, or of insufficiently broad interest, to be in the literature. [footnote omitted] Lack of certainty is not, for a qualified expert, the same thing as guesswork. [footnote omitted] "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." [footnote omitted] "[T]he factors identified in Daubert may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." [footnote omitted] Reliable expert testimony need only be relevant, and need not establish every element that the plaintiff must prove, in order to be admissible. [footnote omitted].

Id. at 565.

"Daubert's general holding--setting forth the trial judge's general 'gatekeeping' obligation--applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).

There can be little reasonable argument that the government's proposed experts are qualified in their respective fields of expertise. The hearing conducted over the course of two days focused on the cause and origin experts. The arson investigators primarily rely on training and firefighting experience, particularly wildland firefighting and investigation. Many have

published or taught. The origin and cause experts need not rely only on NFPA 921 Guide for Fire Explosion Investigations because it is not the only reliable method on which investigators rely. NFPA 921 is better suited to structure or equipment fire issues, and the Wildfire Origin & Cause Determination Handbook is a better suited to the subject in this case and is nonetheless consistent with NFPA 921.

It should come as no surprise that an astute defense attorney will avail himself of the opportunity to get a preview of the government's case against his client via a Daubert hearing, should the chancellor's heel abide. It presents a prime opportunity to go fishing. To the extent that the hearings did focus on challenging expert reliability and the principles and methods utilized at arriving at conclusions, the court is satisfied that the proposed testimony, for the most part, rests on a reliable foundation and is relevant to the charges against defendants.

The defense did attempt to demonstrate failure to consider necessary data or follow recommended methodologies. In general, the proposed experts relied on the Wildfire Origin & Cause Determination Handbook methodologies; used relevant data, typically relied upon in fire cause and origin investigations, either personally gathered or from other investigators on site; and reliably applied the data to form a conclusion. While other experts (presumably defendants' experts) may differ on which data

is more pertinent or which subset of methodologies should be utilized, these are issues more appropriately directed to the weight of the proposed opinions rather than their admissibility.

1. Gary White

Gary White will testify regarding ignition 10 of the Granddad fire and opine that a person or persons ignited the available forest fuels and then left the area taking the portable ignition source with them. Although defendants challenged a "failure" to use handbook recommendations such as use of tripod for taking pictures and a golf tee for scale when taking photos of footprints, the court is satisfied that the methodology used is sufficiently reliable and based on sufficient underlying data. In addition, the testimony is relevant to the arson charges.

2. Carrie Bilbao

Carrie Bilbao will testify regarding ignitions 8 and 9. She will testify that ignition 8 was intentionally caused by one person with a portable ignition source. She will testify the same with respect to ignition 9. Defendants again point to data holes such as the spread of the entire Granddad fire, failure to follow every suggestion in the handbook, etc. In essence, defendant's set-up a difference of opinion as to cause vis-a-vis spotting. Again, the

court is satisfied as to methodology and application, underlying data, and relevance.

3. John Bird

John Bird will testify as to most of the ignitions, ruling out many causes to arrive at a conclusion that the fires were intentionally set with a portable source. Defendants took issue with the lack of personal interviews conducted by Bird as improper application of the methods of FI-210 of the Wildfire Origin & Cause Determination Handbook, but the court is satisfied with the use of local jurisdiction authorities to conduct interviews. Defendant challenges lack of use of other recommendations such as the use of casting of footprints, etc., and other issues such as follow-up on the source of radio tags. Again, the court is satisfied with the data relied upon and the methodologies utilized in arriving at relevant conclusions.

4. Charley Martin

Charley Martin will testify regarding site conditions of the Granddad fire on August 22, and 23 of 2006 and will model spotting distances expected and other fire behaviors. The court does have concerns about reliability given the "rush" job to prepare the report and significant workload of other reports at the time. However, these are issues of weight rather than admissibility.

5. Lance Okeson

Lance Okeson is primarily a fact witness, but will offer an opinion regarding fire behavior, ignition sources, and fire safety. The court is satisfied that his training and experience and the data upon which he relied provide for acceptable expert opinion testimony to the extent he will offer expert opinions beyond observation testimony.

6. Joe Bates

Joe Bates is an air tactical group supervisor with experience in air support in fighting wildfires. He will primarily testify as a fact witness, but will offer opinion testimony as to cause and fire behavior. In this instance, the court is not satisfied as to this witness' qualification to opine that the fires were human caused. Bates specifically testified at the hearing that he was "99.9" percent sure that the fire starts were not natural and were human caused. Bates significant experience in firefighting is lacking in terms of observation of human cause fires. Indeed, Bates testified that he had not seen fires that looked like this before.⁴ However, Bates may testify that, in his opinion, the

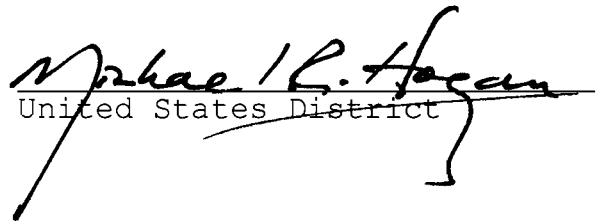
⁴Moreover, the court is concerned that Bates opinion is clouded by Okeson's statement to him that he had apprehended or caught someone in the act of lighting a fire. Bates testified that the statement "closed the loop for him ... it just made sense that the fires were person caused."

small fires were "fairly unique" given the lack of open flame of the Granddad fire and the distance from the main fire.

CONCLUSION

Defendants' motion in limine (#59) to exclude expert testimony is granted in part and denied in part as noted above.

DATED this 6th day of March, 2012.


United States District