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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

Case No.: 6:15-cv-01517-TC

PLAINTIFFS' REPLY IN SUPPORT OF MOTION *IN LIMINE* SEEKING JUDICIAL NOTICE OF FEDERAL GOVERNMENT DOCUMENTS

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INTRODUCTION

Plaintiffs respectfully submit this reply brief in support of Plaintiffs' request that the Court take judicial notice of the federal government documents introduced by Plaintiffs in support of their Response in Opposition to Defendants' Motion for Summary Judgment. This reply brief is supported by the attached Declaration of Andrea K. Rodgers ("Rodgers Decl."). In their response brief, Defendants do not object to the Court taking judicial notice of 286 documents. Those documents are identified in **Exhibit 1** to the Rodgers Declaration, and Plaintiffs and Defendants respectfully request the Court take judicial notice of these documents for the reasons set forth in Plaintiffs' Motion *in Limine*. *See* ECF No. 327 at 2.

After further review of the documents, Plaintiffs wish to withdraw from the Court's consideration 22 documents, which are identified in **Exhibit 2** to the Rodgers Declaration. Plaintiffs have informed Defendants of their intent to withdraw these documents and no objection has been raised. Rodgers Decl. ¶ 4.

In their response brief, Defendants took "no position" on 58 documents. ECF No. 327 at 2. Of these documents, Plaintiffs have withdrawn 14, leaving 44 for the Court's consideration. Rodgers Decl. ¶ 5, Ex. 3. In an attempt to resolve Defendants' objections, Plaintiffs provided Defendants with a spreadsheet containing additional foundational information regarding these documents. Rodgers Decl. ¶ 7; Ex. 3. Defendants have not responded to Plaintiffs' multiple requests to meet and confer to resolve the outstanding objections they may have with these documents. Rodgers Decl. ¶ 7. Because Defendants have provided ***no specific objection*** to the documents that they have taken "no position" on, Plaintiffs request the Court to take judicial notice of these 44 documents, which are identified in **Exhibit 3** to the Rodgers Declaration.

As to the remaining 42 documents, of which 8 have now been withdrawn, Defendants objected on the ground that the documents were "reports, news articles, videos, and scientific articles produced by third parties as well as documents which are purported to be government documents but for which no source is provided, or the source is a third-party website." ECF No. 327 at 2. In an attempt to resolve Defendants' objections, Plaintiffs provided the Defendants with additional information to establish the foundation for each document. Rodgers Decl. ¶¶ 6-7; Ex. 4. These documents are listed in **Exhibit 4** to the Rodgers Declaration. Defendants have not responded to Plaintiffs' three separate requests to meet and confer regarding this issue. *Id.* ¶ 7. As Defendants' objections are unfounded for the reasons set forth below, Plaintiffs now ask the Court to take judicial notice of these documents.

The following table presents the Court with a summary of where the parties stand as to all documents for which the Plaintiffs have sought judicial notice:

Defendants' Position	**Total**	**Withdrawn**	**Remaining**
No objection	286	0	286
No position	58	14	44
Objection	42	8	34
Totals	386	22	364

Table 1. Summary of Motion *in Limine* exhibit status.

ARGUMENT

The documents to which Defendants object fall into the following categories: (1) Official Government Reports and Data; (2) Official Presidential documents; (3) Council on Environmental Quality documents; (4) National Research Council documents; (5) Congressional testimony; and (6) News reports containing public statements of defendants. All of these categories of documents are appropriate subjects for judicial notice. Fed. R. Evid. 201(b).

1. Official Government Reports and Data

Defendants' objections as to Exhibits 19, 20 and 129[1] are nonsensical as these are documents created by the Defendants in the usual course of business. Defendants have not objected to documents of similar authenticity. *Compare* Ex. 20 (Department of Energy report objected to for inadequate foundation) *with* Ex. 14 (Department of Energy report with no objection). Similarly, Exhibits 249, 250, 251, and 305–11 contain government statistical information created and maintained by the Defendants in the usual course of business. Inexplicably, Defendants do not object to the Department of Interior's annual report *Public Land Statistics* for years 1996 (no position; Ex. 252) and 2001–2015 (no objection; Exs. 234–248), yet claim years 1997–1999 (Exs. 249–251) have inadequate foundation. Equally puzzling is the government's objection to sources from the U.S. Army Corps of Engineers' Waterborne Commerce Statistics Center (Exs. 305–311). Federal government documents prepared by the Defendants are official government reports and data, and thus rely on sources of information the accuracy of which cannot reasonably be questioned by the agencies that produced them. Fed. R. Evid. 201(b)(2); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Comm'y v.*

[1] Exhibits 19 and 129 are duplicates.

California, 547 F.3d 962, 968 n.4 (9th Cir. 2008) (allowing judicial notice of "undisputed matters of public record.").

2. Official Presidential Documents

Pursuant to Federal Rule of Evidence 201, a "court can take judicial notice of '[o]fficial acts of legislative, executive, and judicial departments of the United States[.]'" *Vasserman v. Henry Mayo Newhall Mem'l Hosp.*, 65 F. Supp. 3d 932, 942 (C.D. Cal. 2014). It is proper for a court to take judicial notice of "true and correct copies of documents reflecting official acts of the executive branch of the United States[.]" *Hague v. Wells Fargo Bank, N.A.*, No. C11-02366 TEH, 2011 WL 3360026, at *1 n.2 (N.D. Cal. Aug. 2, 2011). Although there is limited precedent regarding taking judicial notice of presidential documents, in a case challenging a ban on homosexuals in the military, a court took judicial notice of the "widely praised and accepted final report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic." *Steffan v. Cheney*, 780 F. Supp. 1, 15 (D.D.C. 1991). This Court similarly has the authority to take judicial notice of the official presidential documents submitted in Plaintiffs' Motion *in Limine*, which include official, publicly available White House documents and correspondence (Exs. 2, 4, 11, 28, 29, 314); reports of presidential advisory committees (Ex. 1); and presidential remarks (Exs. 9, 32 110, 377, 378). All of these documents constitute "official acts of the executive branch," the authenticity of which cannot be denied and which are appropriate for judicial notice. *See Hague*, 2011 WL 3360026, at *1 n.2.

3. Council on Environmental Quality Documents

The Council on Environmental Quality ("CEQ") was established under the National Environmental Policy Act ("NEPA") to provide guidance on and interpretation of regulations

implemented under the Act.[2] Additionally, the CEQ "reviews and approves Federal agency NEPA procedures, approves alternative arrangements for compliance with NEPA for emergencies, helps to resolve disputes between Federal agencies and with other governmental entities and members of the public, and oversees Federal agency implementation of the environmental impact assessment process[.]"[3] In their First Amended Complaint, the Plaintiffs named the CEQ Director as a Defendant in this case. ECF No. 7.

Although there is no specific precedent for taking judicial notice of documents and reports prepared by the CEQ, the Ninth Circuit has clearly stated that courts "may take judicial notice of records and reports of administrative bodies," which the CEQ clearly is. *Interstate Nat. Gas Co. v. S. California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (citing *Greeson v. Imperial Irr. Dist.*, 59 F.2d 529 (9th Cir. 1932)). A court may also "take judicial notice of matters of public record, such as agency orders and regulations." *Craig v. Lowe*, No. C-95-3006 MMC, 1996 WL 116822, at *2 (N.D. Cal. Mar. 7, 1996), *aff'd*, 108 F.3d 1384 (9th Cir. 1997). The CEQ documents submitted by Plaintiffs, all publicly available and hosted on the official CEQ website,[4] cover the agency's Eighth Annual Report from 1977 (Ex. 6); the Eleventh Annual Report from 1980 (Ex. 7); and the Thirteenth Annual Report from 1982 (Ex. 18). As described in each of these reports, they were prepared by CEQ and submitted by the President to Congress as part of CEQ's administrative duties required by 42 U.S.C. § 4341. Ex. 6 at v; Ex. 7 at v; Ex. 18 at v. Notably, Defendants have not objected to this Court taking judicial notice of other CEQ

[2] *Council on Environmental Quality*, The White House, https://www.whitehouse.gov/ceq/ (last visited Aug. 1, 2018).
[3] *Id.*
[4] *Annual Environmental Quality Reports,* CEQ, https://ceq.doe.gov/ceq-reports/annual_environmental_quality_reports.html (last visited Aug. 2, 2018).

documents. *See, e.g.*, Exs. 25, 26. This Court may properly take judicial notice of "reports by administrative bodies," *Interstate Nat. Gas Co.*, 209 F.2d at 385, such as those submitted that were prepared by the CEQ.

4. National Research Council Documents

The National Research Council was formed as an arm of the National Academy of Sciences during the First World War with a purpose

> to bring into cooperation government, educational, industrial, and other research organizations with the object of encouraging the investigation of natural phenomena, and increased use of scientific research in the development of American industries, the employment of scientific methods in strengthening the national defense, and such other applications of science as will promote the national security and welfare.[5]

Courts have taken judicial notice of National Research Council documents in several cases. For example, in *United States v. W.R. Grace*, the Ninth Circuit took judicial notice of a National Research Council report and expressed that they "have discretion to take judicial notice under Rule 201 of the existence and content of published articles." 504 F.3d 745, 766 (9th Cir. 2007). In another case, the court took judicial notice of reports by a committee established by the National Research Council to study the effects of radiation exposure. *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 782 F. Supp. 1392, 1398 (N.D. Cal. 1992), *rev'd on other grounds*, 994 F.2d 583 (9th Cir. 1992). Much of the committee's work had been corroborated by experts from both parties, so the Court took "judicial notice of [the committee's report] and considered the discourses contained in the [committee's] reports entered into evidence or judicially noticed in

[5] *The Organization of the National Research Council*, National Academy of Sciences, http://www.nasonline.org/about-nas/history/archives/milestones-in-NAS-history/organization-of-the-nrc.html (last visited Aug. 1, 2018).

th[e] case." *Id.* Courts have also taken judicial notice of reports from the overarching National Academy of Sciences. *See, e.g.*, *Greenberg v. Target Corp.*, No. 17-CV-01862-RS, 2017 WL 9853748, at *1 (N.D. Cal. Aug. 28, 2017) (taking judicial notice of the contents of a National Academy of Sciences report).

Defendants took "no position" on two of the submitted National Research Council reports (Exs. 3, 5), and objected to one (Ex. 13). Two of these reports (Exs. 5, 13) are housed on the website of the National Academies Press, the official publisher of works by the National Academy of Sciences and other national research bodies.[6] For reasons unknown, Plaintiffs could not locate the third on the National Academies Press website but have provided Defendants with copy of the report which was obtained from The Internet Archive maintained by a 501(c)(3) non-profit organization. Ex. 3; Rodgers Decl. ¶ 8. "District courts have routinely taken judicial notice of content from The Internet Archive pursuant to [Fed. R. Evid. 201(b)]." *Under A Foot Plant, Co. v. Exterior Design, Inc.*, No. 6:14-CV-01371-AA, 2015 WL 1401697, at *2 (D. Or. Mar. 24, 2015) (Aiken, J.); *Dzinesquare, Inc. v. Armano Luxury Alloys, Inc.*, No. CV1401918JVSJCGX, 2014 WL 12597154, at *3 (C.D. Cal. Dec. 22, 2014) (taking judicial notice of exhibits from "the Internet Archive, which is a 'website that provides access to a digital library of Internet sites.'"); *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *1 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016) (taking "judicial notice of the Internet Archive (http://archive.org) version of 23andMe's website as of November 20, 2013, the full version of the website archived right before the FDA warning letter of November 22, 2013."). All of these National Research Council reports were the result of public-private partnerships and included

[6] *See About the National Academies Press*, The Nat'l Academies Press, https://www.nap.edu/content/about-the-national-academies-press (last visited Aug. 2, 2018).

substantial input from federal officials. *See, e.g.*, Ex. 3 at iii (listing agency representatives and liaisons); Ex. 5 at iii (listing federal agency liaisons); Ex. 13 at v (same). These reports have the assurance of accuracy required under Federal Rule of Evidence 201(b)(2) and recognized in the Ninth Circuit. It is appropriate for the Court to take judicial notice of documents from the National Research Council.

5. Congressional Testimony

Courts regularly take judicial notice of congressional testimony and this Court should do so here. Generally, courts take judicial notice of testimony before Congress because "the court is bound to take notice of public facts and . . . reports of Commissions made to Congress, and proceedings thereon . . . ." *Greeson v. Imperial Irr. Dist.*, 59 F.2d 529, 531 (9th Cir. 1932) (citing *The Appollon*, 22 U.S. (9 Wheat.) 362, 6 L. Ed. 111 (1824)).

In *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, for example, the Northern District of California took judicial notice of four hearings before the House of Representatives related to copyrights and intellectual property. 307 F. Supp. 2d 1085, 1107 (N.D. Cal. 2004). The Ninth Circuit has taken judicial notice of "contentions raised by the Post Office at congressional hearings." *United States v. Choate*, 576 F.2d 165, 207–08 (9th Cir. 1978). Other district courts within the Ninth Circuit have taken notice of a plethora of testimony before Congress in many different situations. *See, e.g.*, *Oregon State Bar Prof'l Liab. Fund v. U.S. Dep't of Health & Human Servs.*, No. 03:10-CV-1392-HZ, 2012 WL 1071127, at *3 (D. Or. Mar. 29, 2012) (taking notice of Government Accountability Office testimony to Congress); *Anschutz Corp. v. Merrill Lynch & Co. Inc.*, 785 F. Supp. 2d 799, 834 (N.D. Cal. 2011) (taking judicial notice of the existence of congressional testimony, but not the veracity of the testimony). Congressional

testimony has been recognized as reliable by many courts in the Ninth Circuit, and this Court should do the same here. *See* Fed. Rule of Evidence 201(b).

The congressional testimony for which Plaintiffs seek judicial notice is contained in official records published by the Government Printing Office. Exs. 17, 107, 326. The particular testimony submitted by Plaintiffs contain statements made by government officials, under oath, before Congress. Ex. 17 (NASA official); Ex. 107 (Under Secretary of Department of Energy); Ex. 326 (members of congressionally-appointed committee). Congressional testimony has been, and should continue to be, subject to judicial notice by this Court.

6. News Reports Containing Public Statements of Defendants

In line with Federal Rule of Evidence 201(b)(1)'s allowance of judicial notice for facts "generally known within the trial court's territorial jurisdiction," the Ninth Circuit has held that courts may take judicial notice that a fact is generally known to the public if it is widespread in that region's news media. *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458–59 (9th Cir. 1995). "Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (citation omitted); *see, e.g.*, *United States v. Pickard*, 100 F. Supp. 3d 981, 989 (E.D. Cal. 2015) ("The court takes judicial notice of the fact that the U.S. Surgeon General, during a televised interview on 'CBS This Morning' on February 4, 2015, made a statement about marijuana's efficacy for some medical conditions and symptoms."). Courts have even taken judicial notice of the veracity of statements made in news reports beyond simply acknowledging that the statement was made. *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1209 (N.D. Cal. 2017) ("I take judicial notice of Attorney General [Jeff] Sessions' statements in his op-ed as the veracity of these

statements 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. § 201 (b)(2)."). The news reports submitted by Plaintiffs include videos and direct quotations of government officials such as Defendant Secretary of Energy Rick Perry speaking in his official capacity (Exs. 100, 108). This Court should take judicial notice of statements made by Defendants publicized broadly in news media under Federal Rule of Evidence 201(b)(1).

CONCLUSION

For these reasons, Plaintiffs respectfully request this Court take judicial notice of the documents described in **Exhibits 1, 3, and 4** to the Rodgers Declaration filed herewith.

DATED this 3rd day of August, 2018.

Respectfully submitted,
s/ Andrea K. Rodgers
Andrea K. Rodgers (OR Bar 041029)