

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

<p>Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>Michael Howe, in his official capacity as Secretary of State of North Dakota,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Case No. 3:22-cv-00022</p> <p style="text-align: center;">REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION IN LIMINE</p>
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INTRODUCTION

Defendant Michael Howe, in his official capacity as Secretary of State of North Dakota (“Defendant” or “Defendant Howe”) submits this memorandum in reply to *Plaintiffs’ Opposition to Defendant’s Motion In Limine* (Doc. 98) and in support of *Defendant’s Motion in Limine* (Doc. 93).

ARGUMENT

I. The Court Should Exclude All Expert Reports, Except When Offered For Non-Hearsay Purposes

Plaintiffs do not deny the expert reports in this case are hearsay, instead arguing the expert reports should be admitted at trial under Federal Rule of Evidence 807, the residual exception to the hearsay rule, which states in relevant part:

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

The hearsay expert reports are not more probative than the live testimony of the expert authors of the reports. The experts can and should explain their opinions to the Court at trial, not rely on their out of court, unsworn, written statements. Further, the parties have agreed they will be able to utilize at trial separate exhibits for the various tables, figures, and images otherwise appearing in the reports during examination and cross examination of the expert witnesses. The experts can fully testify about their opinions in this case, and even rely on the tables, figures, and images originating from their reports as separate exhibits.

Plaintiffs cite an order in *Perez v. Texas*, a Texas Federal District Court case. Doc. 98-2 at pp. 2-3. In that case, the Court found the expert reports would not be pre-admitted or admitted in lieu of live expert testimony but the reports were allowed subject to any further objections in open court if the expert testifies live or by trial deposition and adopts the statements in the report while under oath and subject to cross-examination. The Court in *Perez* did not cite any Eighth Circuit Court of Appeals cases or North Dakota Federal District Court cases in support of its decision. Further the reports were not simply pre-admitted or admitted in lieu of live expert testimony in that case, but only allowed under the parameters set by the Court.

Plaintiffs also argue under Rule 703 that, because this is a bench trial rather than a jury trial, Plaintiffs experts are permitted to testify at trial about otherwise inadmissible underlying facts or data supporting their opinions. Doc. 98. Simply because experts can testify at trial about inadmissible underlying facts and data supporting their opinions, it does not follow that they can admit their own out of court statements (reports) in their entirety. The reports are the entire opinions of the experts, not the facts and data upon which the experts relied in forming their opinions. Rule 703 is not applicable to the issues in this motion.

II. The Court Should Exclude Portions of the Testimony and Expert Report of Dr. Loren Collingwood Relating to Compactness and Voting Age Population, Which Were Formed by Analyzing Unreliable Data Using Dave’s Redistricting App

At his deposition, Dr. Collingwood did not know who created or owns Dave’s Redistricting App, but he assumed it is someone named “Dave.” Doc. 74-1 at pp. 180-81. At his deposition, Dr. Collingwood only “vaguely” remembered reviewing documentation about how Dave’s Redistricting App calculates compactness scores when he first started using the software, but did not recall at his deposition how the calculation is done within Dave’s Redistricting App. *Id.* at p. 181. Dr. Collingwood testified there was a difference in this case between the compactness scores calculated by Defendant Howe’s expert Trey Hood using Maptitude software and the scores calculated by Dr. Collingwood using Dave’s Redistricting App. *Id.* at pp. 74, 181. Dr. Collingwood testified that Maptitude is very reliable when it is used correctly, but it is a difficult program to learn to use, so Dr Collingwood uses Dave’s Redistricting App because it is easier to use. *Id.* at pp. 185-86. Further, with respect to the census voting age population data that Dr. Collingwood obtained from Dave’s Redistricting App, in the past in another state Dr. Collingwood compared the data in Dave’s Redistricting App with the regular redistricting file available from the census to make sure it was the same. *Id.* at p. 182. However, Dr. Collingwood admitted at his deposition he did not do such a comparison in the present case. *Id.* He relied entirely on Dave’s Redistricting App to ensure the data was accurate. *Id.*

Now, after the close of expert discovery and shortly before trial, Plaintiffs for the first time disclosed significant new evidence relating to Dave’s Redistricting App, including a Declaration of Dave G. Bradlee (Doc. 98-3), the creator of Dave’s Redistricting App discussing his creation of the app, and a Declaration of Dr. Loren Collingwood (Doc. 98-4), discussing new analysis he has performed to check the reliability of Dave’s Redistricting App. Collingwood’s

declaration has various attached Maptitude reports of new analysis conducted by him, which was never disclosed in discovery and is not contained within his expert reports in this case. Defendant's motion is based on the expert opinions and evidence produced during discovery, and which Defendant's counsel deposed Plaintiff's experts about at length. Plaintiffs should not be permitted to bolster the bases of their expert opinions after the close of expert discovery, and in affidavits submitted without any opportunity to Defendant to test the claims made therein. The Court should grant Defendant's motion for the reasons discussed in Defendant's initial memorandum.

III. The Court Should Exclude Portions of the Testimony and Expert Report of Dr. Weston McCool Relating to His Opinion That Systemic Disparities Hinder the Ability of Native American Tribal Members to Participate Effectively in the North Dakota Political Process

Plaintiffs argue Dr. Weston McCool properly concluded that systemic disparities hinder North Dakota Native Americans' ability to participate effectively in the political process. Doc. 98 at pp. 13-14. They claim the burden is on Defendants to deny a causal link. However, even the quote from the Eighth Circuit Court of Appeals relied on by Plaintiffs establishes Dr. Weston McCool's conclusion is improper. As cited by Plaintiffs, the Eighth Circuit Court of Appeals quoted the Senate Report, stating:

[d]isproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, **and where the level of black participation in politics is depressed**, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

Whitfield v. Democratic Party of State of Ark., 890 F.2d 1423, 1431 (8th Cir. 1989) (quoting S.Rep. No. 417 at 29 n. 114, 1982 U.S.Code Cong. & Admin.News at 207). Dr. Weston McCool opined about systemic disparities relating to Native Americans in factors such as education, employment, income, and health, but offered no opinion that the level of Native American

participation in politics in North Dakota is depressed, nor did he cite to any source for such a claim. Plaintiffs claim Dr. Weston McCool can infer a causal connection, but Dr. McCool has no opinion or knowledge about the existence or nonexistence of one side of the connection (depressed level of political participation). Dr. Weston McCool's conclusion that "systemic disparities hinder the ability of AIAN tribal members to participate effectively in the North Dakota political process" is a mere assertion, unsupported by any facts or data at all, as he has no knowledge of any alleged inability of Native Americans to participate effectively in the North Dakota political process.

IV. The Court Should Exclude Portions of the Testimony and Expert Report of Dr. Weston McCool Relating to his Opinion That Native Americans Have Less Access to Healthcare Due to the Cost, Which Was Formed Based on Unreliable Kaiser Family Foundation Data

Plaintiffs argue the Kaiser Family Foundation is ("KFF") generally a reputable organization relied on by various entities. Doc. 98 at pp. 14-16. However, as noted in Defendant's initial memorandum, KFF compiles data, but Plaintiffs' expert Dr. Weston McCool does not know where KFF obtained its data relied on in this case, nor does Plaintiff provide that information in its response memorandum. It could be anything from a door-to-door survey, to phone surveys, to reliance on some external source. It is entirely unknown. All that is known is that KFF compiled data from publicly available sources, which information alone is insufficient to establish reliability. Doc. 95-1 at pp. 45-49.

Additionally, Plaintiffs argue based on *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) that the Court may consider evidence of statewide discrimination, even if it is not localized to the Reservations at issue. Doc. 98 at p. 17. However, Dr. Weston McCool does opine on health issues locally specifically in each of the impacted counties, providing specific percentages of health insurance coverage for Native Americans compared to Whites in Rollette,

Benson, and Ramsey Counties. Expert Report of Dr. Weston McCool (Doc. 65-21) at pp. 7-8, 10, 12-13. These counties are addressed separately in the report and as to each county. *Id.* Dr. Weston McCool then tries to show that Indian Health Service programs are not making up for disparate access to health insurance coverage among Native Americans and Whites, relying on the statewide data from KFF at issue in this motion. *Id.* It is Plaintiffs' expert who is attempting to prove a local effect, relying only on statewide data. The data is not reliable and Dr. Weston McCool's opinions based on it should be excluded.

V. **The Court Should Exclude Portions of the Testimony of Lonna Jackson Street Except Regarding the Injury the Spirit Lake Tribe and Its Members Have Allegedly Suffered by the State's Use of a Redistricting Plan That Allegedly Dilutes Their Vote**

Plaintiffs argue Chairperson Lonna Jackson Street ("Street") should be allowed to testify regarding the subjects identified in Plaintiffs' supplemental disclosures because the subjects allegedly fall within the broader category of information Plaintiff's previously disclosed with respect to former Chairperson Yankton. Doc. 98 at pp. 17-18. However, Defendants disagree the subjects fall within the broader category. Compare "The injury the Spirit Lake Tribe and its members have suffered by the State's use of a redistricting plan that dilutes their vote" disclosed for Yankton with "has information regarding the Tribe, its voters and local election conditions, and the needs and interests of the Tribe and Tribal residents with respect to the state legislature", disclosed for Street. The relatively narrow subject of the alleged injury suffered by Spirit Lake Tribe as a result of redistricting is not the same subject as information about the Tribe generally, its voters and local election conditions generally, and the needs of the Tribe and its residence in relation to the North Dakota Legislative Assembly. Plaintiffs would not have changed the description of the subjects if they did not intend different subjects and testimony. Further, since Plaintiff's intend to call both Yankton and Street (Doc. 98 at p. 18), it is clear Plaintiffs do not

intend for them to both offer the same duplicative testimony. Plaintiffs are attempting to introduce new categories of subjects not previously disclosed for any witnesses.

CONCLUSION

For the foregoing reasons and the reasons discussed in *Memorandum In Support Of Defendants' Motion In Limine* (Doc. 94), Defendant Howe respectfully requests the Court exercise its discretion to exclude from trial as inadmissible: 1) all expert reports, except when offered for non-hearsay purposes, 2) the portions of the testimony and expert report of Dr. Loren Collingwood relating to compactness and voting age population, which were formed by analyzing unreliable data using the unreliable software Dave's Redistricting App, 3) the portions of the testimony and expert report of Dr. Weston McCool relating to his opinion that systemic disparities hinder the ability of Native American tribal members to participate effectively in the North Dakota political process, as the opinion is a mere assumption, unsupported by any facts or data at all, 4) the portions of the testimony and expert report of Dr. Weston McCool relating to his opinion that Native Americans have less access to healthcare due to the cost, which was formed based on unreliable Kaiser Family Foundation data, and 5) the testimony of Lonna Jackson Street, except regarding the injury the Spirit Lake Tribe and its members have allegedly suffered by the State's use of a redistricting plan that allegedly dilutes their vote, consistent with initial disclosures.

Dated this 30th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE** was on the 30th day of May, 2023 filed electronically with the Clerk of Court through ECF:

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