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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Federal Defendants.

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

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION REQUESTING STATUS CONFERENCE

Less than two weeks following the Ninth Circuit's decision on mandamus, while the United States is weighing its options,[1] and before the parties have had an opportunity to meet

[1] Among other things, the United States is still assessing its options for further review of the Ninth Circuit panel's decision. The breadth of Plaintiffs' claims requires the solicitation of views across a range of government agencies and this process is ongoing. Nothing in this submission should be construed as a waiver of the United States' right to pursue that review.

and confer—Plaintiffs have moved for an "immediate status conference to move this case promptly to trial in 2018." Mot. of Pls. Requesting Status Conf. at 2, ECF No. 185. The United States does not oppose an in-person status conference with the Court at an appropriate juncture, but only after the parties have appropriately conferred regarding a long list of discovery issues raised by Plaintiffs. *See* Pls.' Letter of March 8, 2018, ECF No. 186 at 5-7.

But Plaintiffs ask that the Court schedule a telephonic status conference on Friday, March 23, before the parties will have had an opportunity to properly confer on the myriad discovery and trial issues to be placed before the Court. *Id.* at 3. Plaintiffs ask for the agenda to include (1) setting a date for an in-person status conference, (2) developing a discovery schedule, and (3) setting a trial date in 2018. *Id.* The United States is amenable setting a date for an in-person status conference, but believes the remaining items should follow appropriate conferral. In addressing the scheduling of an in-person status conference, the Court should select a date after the parties have met, conferred, and attempted to come to an agreed resolution with respect to a number of discovery-related issues.

Plaintiffs' attempt to address a discovery schedule or trial dates by this Friday (March 23, 2018) fails to recognize that the parties have many open issues to address. Indeed, with respect to some of those issues, the United States is still awaiting materials from Plaintiffs. In their letter of March 8, 2018, Plaintiffs indicate that "they will be serving narrowed RFPs on Defendants" and they "will be serving amended notices for Rule 30(b)(6) depositions on each of the agencies." ECF No. 186 at 6. Plaintiffs have yet to serve these documents and Defendants have thus not had an opportunity to consider them. In addition, Plaintiffs raise a number of additional points for the parties to discuss, such as proposed deadlines for the submission of expert reports and rebuttal reports, *id.* at 5, proposed use of requests for admission to authenticate documents, *id.* at 6, executive and deliberative process privilege, *id.*, scheduling Plaintiffs' depositions, *id.*, a proposed protective order, *id.* at 7, and other issues involving electronically stored information and privilege logs. *Id.* In short, Plaintiffs identify a number of subjects on which the parties will

need to confer. In addition to matters raised in Plaintiffs' motion, Defendants intend to raise a number of additional issues when the parties confer.

The conferral process will necessarily be structured by the scope, clarity, and specificity of the discovery sought. The process will be expedited to the extent Plaintiffs have "narrowed" their discovery requests as they promise in their letter of August 28, 2017 (Ex. 1). The process will be impeded to the extent Plaintiffs' discovery requests remain expansive and unbridled as described in our letter of July 12, 2017. Ex. 2. Regardless, it should be incumbent on the parties to first resolve potential discovery disputes before drawing on judicial resources. By seeking a discovery schedule in the absence of knowing the scope or nature of the discovery sought and by seeking a trial date before the parties have had an opportunity to consider the scope of discovery—Plaintiffs do a disservice to the informal meet-and-confer process, which allows the parties to discuss and identify disputed issues, to tailor discovery appropriately, and to develop a schedule that takes account of the issues they have identified. The Court should deny this request and instead require that the parties first confer, and then provide a joint status report informing the Court of the progress that has been made through the conferral process. A status report can demonstrate where the parties have resolved discovery issues, and identify the issues that require judicial resolution. Such an approach will conserve judicial resources while requiring the parties to make the conferral process meaningful.

At an appropriate point, after the requisite conferral process, the Court and the parties will and should have a status conference. Defendants prefer that the conference take place in person (*i.e.* in court). But Defendants similarly believe that conference should await an appropriate opportunity for the parties to meet and confer.

Dated: March 19, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division

/s/ Sean C. Duffy
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Certificate of Service

I hereby certify that on March 19, 2018, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

/s/ Sean C. Duffy
Sean C. Duffy

Attorney for Defendants

EXHIBIT 1

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August 28, 2017

VIA EMAIL

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Re: *Juliana v. United States*, 6:15-cv-01517-TC, Discovery Status

Dear Sean and Frank,

After Intervenor Defendants withdrew from the case, the issues for discovery and trial have been substantially narrowed. I wanted to update you on Plaintiffs' position as to the status of discovery and additional methods we are implementing to further narrow discovery as a result of our meet and confer process to date.

1. **RFAs to EOP and EPA:** With regard to Plaintiffs' First Set of Requests for Admission ("RFAs") served on the Executive Office of the President ("EOP") and the Environmental Protection Agency ("EPA"), we will not move to compel further responses to the RFAs from the EOP. Regarding the EPA's objections to the same RFAs, we will seek to obtain the type of information we are seeking through the Rule 30(b)(6) deposition with the EPA and, therefore, we will not move to compel answers to the RFAs from the EPA at this time.

2. **RFPs to NARA:** With regards to the two Requests for Production ("RFPs") for NARA documents, we received your letter of July 20, 2017, which sets forth the NARA documents that Federal Defendants will produce. Plaintiffs are prepared to go to the presidential libraries to retrieve copies of those documents, as we previously discussed. With regards to the documents you indicated that Federal Defendants will not produce, Plaintiffs will not move to compel the production of those documents.

3. **Wayne Tracker RFPs:** With regards to the "Wayne Tracker" RFPs served on Federal Defendants on March 17, 2017, Plaintiffs withdraw those RFPs in light of Intervenor Defendants' withdrawal from the case.

LAW OFFICES
COTCHETT, PITRE & MCCARTHY, LLP

4. **RFPs to the EOP:** With regards to the RFP served on the EOP and the President on May 19, 2017, Plaintiffs withdraw that RFP.

5. **USDA, DOD, and State RFPs:** With regards to the outstanding RFPs to the United States Department of Agriculture, the Department of Defense, and the Department of State, based on what we have learned from the meet and confer process and our informal discovery, Plaintiffs have further narrowed those RFPs as part of the ongoing meet and confer process. We have also eliminated all requests pertaining to communications and documents between the agencies and the President. The amended RFPs will replace the previously served RFPs from June 19, 2017. We have done our best to narrow our requests without the benefit of having the information on relevant custodians and information on when records went electronic for different agencies and the search mechanisms used by agency. Once we have that information we can meet and confer on ways to further narrow the requests by custodian and searchability of databases. We are confident that through the meet and confer process we can continue to work with you, and the agencies, to better enable quick production of the narrow range of documents we are seeking.

6. **Depositions:** As you know, we have completed the depositions of Mark Eakin and Michael Kuperberg. We have also noticed Rule 30(b)(6) depositions for the Department of Commerce, Department of Defense, Department of Energy, Department of Interior, Department of Transportation, Environmental Protection Agency, Department of State, and the Department of Agriculture. Plaintiffs will not notice any depositions for the secretary or administrator of any defendant agencies or the President.

I believe that covers all outstanding discovery. Please contact me with any questions or comments.

Regards,

Philip L Gregory (PD)

Philip L. Gregory

cc: **Julia A. Olson**
Daniel Galpern

EXHIBIT 2

United States Department of Justice

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July 12, 2017

Via Email

Julia A. Olson (juliaolson@gmail.com)
Philip L. Gregory (pgregory@cpmlegal.com)
Daniel M. Galpern (Dan.Galpern@gmail.com)

Re: *Juliana v. United States*, No. 6:15-cv-1517-TC (D. Or.)

Counsel:

This letter responds to points raised in (1) Plaintiffs' letter of June 27, (2) matters discussed during the parties' telephonic meet and confer on June 30, and (3) Plaintiffs' letter of July 5. As we have stated all along, including in our mandamus petition now pending before the Ninth Circuit, Defendants believe all proceedings, including discovery, should be stayed in this improper case.

I. *Efforts to respond to the requests for production by July 31, 2017*

In our letter of June 23, Defendants explained that it is important that fact discovery be completed sufficiently in advance of Defendants' October 13, 2017, expert report deadline so that Defendants' experts have the opportunity to review and accommodate those facts in their analyses and resulting reports. To that end, Defendants proposed that the production of documents in response to Plaintiffs' requests for production be completed by July 31, 2017. To meet that deadline, Defendants provided a list of documents that the Departments of State, Defense, and Agriculture identified and indicated they would endeavor to produce within this time-frame. The Departments' efforts to identify documents in addition to those listed in our June 23 letter is still ongoing. In their letter of June 27, Plaintiffs indicate that they are amenable to Defendants completing production by July 31, but ignore the necessary limitation in scope that the July 31 deadline incorporates. As Defendants and the Magistrate Judge have advised Plaintiffs repeatedly, there is tension between expansive and unbridled discovery and a February 2018 trial. And as the Court has recognized, it would be impossible to accommodate both a speedy trial and expansive discovery. The Court's setting of a February 5, 2018, trial date manifests its intention to limit discovery and underscores Magistrate Coffin's repeated observation that trial in this case will focus on expert opinion and analyses, which will not

require sweeping fact discovery. Plaintiffs have not yet made sufficient efforts to limit the scope of discovery in line with the trial date set by the Court with respect to either their requests for production of documents or their noticed Rule 30(b)(6) topics.

Plaintiffs claim in their June 27 letter that they are not interested in the production of publicly-available records. But Plaintiffs' requests for production do not exclude publicly-available records. Defendants note that agency policy decisions and actions are memorialized in public records. If Plaintiffs seek to establish what actions agencies are taking and how the U.S. government has described climate change and its effects over time, the vast amount of information included in the public record will reflect those actions and understandings.

In the June 27 letter, Plaintiffs contend that the "focus" of their document discovery is "documents and electronically-stored information ("ESI") sent to or from upper level employees and politically appointed individuals that are not publicly available." There are four problems with this contention. First, the requests that Plaintiffs propounded recite no such focus. Instead, those requests instruct the agencies to include documents from "all current and former principles, employees, agents, attorneys, consultants, secretaries, coordinators, advisers, and other representatives" of agencies. Second, even with this newly-minted refinement, Plaintiffs fail to provide meaningful guidance as to who constitutes an "upper level employee" for the purpose of their requests. Third, Plaintiffs fail to tether an exploration of communications between political appointees and "upper level employees" to a specific factual assertion in the Complaint. Fourth, Plaintiffs ignore the practical reality that the document requests, even as narrowed, remain incompatible with a February 2018 trial date. Responding to the requests as narrowed will consist of conducting a search for communications between political appointees and "upper level employees," gathering those communications, reviewing such communications for privilege, preparing logs of such communications, resolving any motion practice concerning the applicability of various privileges and protections from disclosure, and producing the records (if the objections to production are overruled). It is unrealistic to assume that this process could be completed by our current December 4, 2017 deadline for pre-trial memoranda.

Defendants have made a good faith effort to produce documents responsive to Plaintiffs requests for production while abiding by the Court's timeline for trial. While Defendants are ready to engage and negotiate a resolution to the parties' discovery efforts, it is Plaintiffs who have to proffer a specific plan for production that focuses on disputed factual issues and that allows Defendants to estimate a timeline for completion, so that the parties can evaluate whether Plaintiffs' specific plan can be accomplished in keeping with the Court's trial schedule.

II. *Rule 30(b)(6) Depositions on Eight Federal Agency Defendants*

As we discussed in the June 30 meet-and-confer, the overbreadth of Plaintiffs' requests for production are mirrored in Plaintiffs' noticed Rule 30(b)(6) deposition topics. We appreciate Plaintiffs' willingness to re-evaluate their Rule 30(b)(6) notices, in light of the parties' June 30 discussion. For their part, Defendants focused on Topic 11 of the Rule 30(b)(6) notice served on the Department of Energy, which topic was a focus of the parties June 30 discussions. The Department of Energy confirms that discounting analyses are used as a part of virtually every economic analysis in connection with an enormous number of decisions across every component of DOE. Preparing a witness to discuss all such instances of discounting is simply not viable. Given the breath of this topic, as we suggested during our meet and confer, the parties should explore whether stipulations are a more efficient way of conducting discovery into discounting.

III. *Efforts to Respond to the RFPs to NARA*

NARA confirms that President George W. Bush invoked the protections of Section 2204 of the Presidential Records Act as to the documents Plaintiffs seek within the George W. Bush Presidential library. Such documents will accordingly not be produced in response to Plaintiffs' requests. There are other records that Plaintiffs can request directly from the appropriate Presidential library. And there are records that are not publicly available because the records contain personally-identifiable information, but that could be made available for inspection upon Plaintiffs' execution of a suitable protective order. A proposed form of protective order that would allow review of records shielded solely because of personally-identifiable information is attached. Finally, there are other records that are protected from disclosure because they are classified. Those records will not be produced. We will provide a list of the records that can currently be inspected and those that can be inspected after entry of a suitable protective order.

IV. *Requests for Admission on EOP and EPA*

Plaintiffs requested that Defendants agree to provide separate responses to the requests for admission that Plaintiffs initially propounded jointly on the Executive Office of the President ("EOP") and the Environmental Protection Agency ("EPA"). We are amenable to this request and attach separate responses from the EOP and EPA.

V. *Plaintiffs' Depositions of Fact Witnesses*

We have spoken with agency personnel and can offer the dates of July 20 and July 21 for Plaintiffs to depose Dr. Kuperberg and Dr. Eakin, at our offices, 601 D Street NW, Washington D.C.

VI. *Plaintiffs' Expert Reports*

During the May 18 status conference, when queried by the Court, Plaintiffs represented that they would endeavor to have most of their 11 expert reports ready in July 2017. ECF No. 164 at 13. Noting that "obviously [Plaintiffs] want as early a trial date as [they] can get," the Court asked Plaintiffs to produce expert reports by July 1 to the extent they can, which Plaintiffs agreed to. *Id.* at 17. During the June 18 status conference, Plaintiffs indicated that they were prepared to serve a majority of their 11 expert reports – and specifically "six or seven and up to eight or nine of those reports … by July 5th." ECF No. 179 at 18. This was the most current information that the parties provided to the Court when it scheduled trial to begin on February 5, 2018. Plaintiffs subsequently identified two additional experts.

Plaintiffs' July 5 letter deviates from the schedule Plaintiffs represented to the Court two weeks earlier. On July 5, Plaintiffs served only one expert report – that of Dr. Ove Hoegh-Guldberg – and provided a schedule for serving the remaining reports as follows: four during the week of July 10 – 15; two by July 20; and five by July 31. To date, Plaintiffs have served just two of their projected thirteen expert reports.

Plaintiffs' revised deadlines for submitting most reports in late July rather than early July, as well as the increased number of reports (13 rather than 11), makes it increasingly difficult for Defendants to meet with prospective candidates and explore the scope of any rebuttal opinion testimony in time for Defendants' disclosure deadlines. This threatens to push back the entire trial schedule.

VII. *Depositions of Named Plaintiffs*

Defendants will work to schedule the depositions of the named Plaintiffs after we have had a meaningful opportunity to review the expert reports of Drs. Frumkin and Van Susteren. If those reports are not served until July 31, as set forth in Plaintiffs' revised deadlines, and we are unable to examine them with our experts until August, then it is unlikely that Defendants will be in a position to depose the named Plaintiffs by September 4 as Plaintiffs prefer.

* * *

Considerable work lies ahead to prepare this case for trial. Defendants continue to believe that the parties' efforts are best served by focusing on expert work, rather than depositions and records that are not pertinent to the disputed issues in the upcoming trial.

Sincerely,

/s/ Sean C. Duffy
Sean C. Duffy
Trial Attorney
U.S. Department of Justice

CC: Frank J. Singer
Peter Dykema

Attachments: EOP Resp. to First Set of RFAs
EPA Resp. to First Set of RFAs
Proposed Form of Protective Order