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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

**JOINT STATUS REPORT
AS OF MAY 8, 2018**

Counsel for the parties hereby respectfully provide this Joint Status Report to inform the Court of the status of motions, experts, discovery, and other pending or upcoming matters since the Status Conference on April 12, 2018.

1. MOTIONS

a. **Plaintiffs' Position:** At the April 12, 2018 Status Conference, counsel indicated Defendants would be filing motions on the issues of sovereign immunity and dismissal of the President. Counsel also indicated Defendants would assert by way of motion that the Administrative Procedure Act controls discovery in this case. Plaintiffs have yet to see either drafts of the motions or further legal authority supporting Defendants' position on these issues. In order for the parties to meet and confer on these issues before any motions are filed, Plaintiffs would request the Court order that, on or before May 25, 2018, Defendants provide Plaintiffs with either drafts of the motions or the legal authority supporting Defendants' position on these issues. Plaintiffs have yet to see the motion for judgment on the pleadings or the motion for a protective order. As Plaintiffs stated during the most recent meet and confer on these motions, Plaintiffs will need an extension of time to oppose these motions. Plaintiffs propose that the parties meet and confer on a briefing schedule in connection with the May 10 Status Conference.

b. **Defendants' Position:** Defendants intend to file a motion for judgment on the pleadings and a motion for a protective order prior to the May 10, 2018 status conference. The filing of these motions followed discussion of the proposed motions and their bases by the parties when they met and conferred on April 11, 2018, and further discussion of the motions by the parties and the Court during the April 12, 2018, status conference. Plaintiffs, unsurprisingly, disputed the bases Defendants proffered for these motions when the parties met and conferred on April 11. Because Defendants have already met their obligation to meet and confer on the motions and the Court is fully informed of the Defendants' intention to file the motions,

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Defendants have no obligation to provide Plaintiffs with draft motions. Defendants nonetheless conferred again with Plaintiffs by telephone regarding these motions on May 7, 2018. Because of Defendants' commitment to file the motions in advance of the May 10 status conference, Plaintiffs' proposal for a supplemental opportunity to meet and confer about the motions after the status conference is not necessary.

During the April 12, 2018 Status Conference, Defendants also raised our intention to file a motion for summary judgment to narrow or eliminate issues from the case. Defendants anticipate filing a motion for summary judgment in the coming weeks. Defendants intend to confer with Plaintiffs as to this motion on May 10, 2018.

2. EXPERTS:

Plaintiffs' Position: In General: On a rolling basis, concluding on April 13, 2018, and pursuant to this Court's order at our March 26, 2018 Status Conference, Plaintiffs exchanged all of their expert witness reports (17 reports), except for the expert witness report of James Gustave Speth, and exhibits to two expert reports that will be filed under seal and subject to a protective order as discussed below. In 2017, Plaintiffs exchanged 9 of the 17 expert witness reports. If Plaintiffs previously had provided Defendants with an expert witness report, but that report had been updated, the updated report was served. Plaintiffs served these reports via email and on USB thumb drives containing the reports and all associated exhibits. As research on these issues is constantly being conducted and published, each of these experts reserved the right to amend their reports to the extent other evidence, data, or information becomes available. Given the failure of Defendants to schedule (or even take a position on) various discovery matters, Plaintiffs remain concerned that, absent scheduling orders from this Court, Defendants will delay engaging in discovery in an attempt to derail the trial date of October 29, 2018.

Defendants' Position: In General: Defendants have only recently received 17

expert reports from Plaintiffs and are in the process of reviewing those reports. A threshold focus of that review is whether Plaintiffs' reports comply with the requirements of Rule 26(a)(2)(B), specifically whether the reports provide a *complete* statement of all opinions and the bases and reasons for them, as well as the facts or data the witness considered in forming the opinions. As Defendants conduct their review of the reports and identify what appear to be omissions from the Rule 26(a)(2)(B) standard, Defendants will meet and confer with Plaintiffs to obtain this information.

Plaintiffs' Position: Protective Order: As discussed at the April 12, 2018 Status Conference, there is confidential information in the exhibits of two expert witness reports. Plaintiffs informed Defendants and the Court that they would not exchange this information until a protective order was entered, and Defendants agreed to this process. On several occasions since 2017, Plaintiffs have provided Defendants with a draft protective order for the confidential information in the expert reports. The parties have met and conferred about protective orders on at least 4 times: May 4, 2017; June 16, 2017; July 12, 2017; and April 11, 2018. In fact, at the last status conference, this Court asked Defendants if they had any objection to the protective order. (30:14; 31:2-3.) Defendants have yet to state any specific objection or agree that a protective order may be entered in this case. A copy of the current version of that draft protective order is attached hereto as **Exhibit 1**. Defendants have yet to either agree with the draft protective order or propose changes. Plaintiffs would request that the Court order the parties to meet and confer immediately after the May 10, 2018 Status Conference to resolve any issues with the protective order so that it may be promptly entered on May 11, 2018. The only reason that the confidential information in the exhibits of two expert witness reports has not yet been exchanged is Defendants' refusal to meet and confer on a protective order. Plaintiffs are concerned that

in a timely manner, when the only reason for such delay is Defendants' refusal to take a position on the proposed protective order such that the issue could be submitted to this Court.

Defendants' Position: Protective Order: Defendants received the draft protective order attached hereto as Exhibit 1 and are prepared to discuss the terms of the draft protective order during the meet and confer scheduled to take place immediately following the May 10, 2018, Status Conference. Because the parties have agreed to confer on May 10, there is no need for the Court to order the parties to confer. Because the parties have not yet conferred, it is premature for Plaintiffs to request that the draft protective order be "entered" by May 11, 2018. If the parties reach an impasse on the terms of a protective order, they can submit their respective positions to the Court.

Plaintiffs' Position: Depositions of Plaintiffs' Experts: Plaintiffs have been attempting to obtain time frames for the depositions of any of their experts that Defendants want to take before Defendants disclose their experts on July 12, 2018. Plaintiffs' experts are working *pro bono* and have extremely busy schedules, so their depositions need to be scheduled well in advance. To the extent Defendants want to take the depositions of any experts disclosed by Plaintiffs before July 12, 2018, Plaintiffs would request the Court order that, on or before May 18, 2018, Defendants identify those experts who Defendants wish to depose and provide a time frame for those depositions. Several of Plaintiffs' experts have extended travel planned during the months of August, September, and October and depositions during that time frame will also need to be scheduled well in advance. Plaintiffs propose to begin calendaring the depositions in May to accommodate the schedules of counsel and the experts. Further, as to documents and information to be produced in connection with the depositions of experts designated by both sides, Plaintiffs have proposed a stipulation. A copy of that proposed stipulation is attached as

Exhibit 2.

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In terms of providing Defendants with information about an expert's report, Plaintiffs provided a complete copy of each expert's report and have been (and are) prepared to provide any additional information requested by Defendants. As counsel and the Court are well aware, new reports, studies, data, and information regarding the issues presented by this case are being released daily. To the extent any of this data or information impacts an expert's report, Plaintiffs are prepared to provide that data or information in advance of an expert's deposition pursuant to the stipulation offered as Exhibit 2.

Defendants' Position: Depositions of Plaintiffs' Experts: Plaintiffs' request that the Court order Defendants to agree to a "time frame" for expert depositions is premature. Defendants are evaluating the seventeen expert reports Plaintiffs served on or shortly before April 13, 2018. Once that review is complete and the parties have met and conferred on elements of each report that were improperly omitted, if any, the parties can begin a discussion of scheduling depositions. If an expert has a limited window of availability, Plaintiffs may, of course, provide available dates for their witnesses at any time. If discovery is not precluded or stayed, Defendants intend to depose each of Plaintiffs' disclosed experts.

Plaintiffs' inclusion of their Exhibit 2 in this status report is also inappropriate because there has been no opportunity to confer on Exhibit 2. Plaintiffs only transmitted their Exhibit 2 to Defendants shortly before the filing of this Joint Status Report. An initial review of Exhibit 2 raises concerns, over which the parties should confer before presenting this issue to the Court. For example, Plaintiffs propose to have their experts provide the "final written report" that contains their experts' opinions, as well as "[t]he specific underlying facts or data considered by the expert[s] in forming [their] opinions" and "[a]ny exhibits to be used as a summary of or support for the [experts'] opinions" a mere ten days before the deposition. Under this Court's prior scheduling order and Rule 26(a)(2)(B), however, this information should have been

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provided by April 13. If Plaintiffs are now suggesting that the seventeen reports previously served by April 13 were somehow provisional, the parties will need to meet and confer and, possibly, seek an adjustment of the trial schedule in this case. If the reports provided by April 13 are not provisional, then the language set forth in Plaintiffs' Exhibit 2 is superfluous. Moreover, given the highly technical nature of the reports, ten days is insufficient time to allow Defendants to review the opinions, bases, facts, and data relating to the "final opinions" before deposing Plaintiffs' experts. In any event, the parties need to meet and confer further on Plaintiffs' Exhibit 2 to determine whether it is necessary and, if so, how it should be modified before the parties seek the Court's intervention.

Plaintiffs' Position: Information from Plaintiffs' Experts: During the parties' meet and confer session on April 11, 2018, counsel for Defendants stated they would review Plaintiffs' expert reports to determine what, if any, additional information Defendants needed from Plaintiffs' experts based on a review of their reports. As Plaintiffs want to provide Defendants with this information as promptly as possible, and certainly in advance of an expert's deposition, Plaintiffs would request the Court order that, on or before May 25, 2018, Defendants state what, if any, additional information Defendants need from Plaintiffs' experts based on a review of their reports.

Defendants' Position: Information from Plaintiffs' Experts: Defendants are reviewing the seventeen expert reports Plaintiffs served on or shortly before April 13. Just the seventeen reports, excluding exhibits, consist of some 500 pages. Defendants are aware of the fast-approaching trial date and accompanying deadlines. Setting additional deadlines on top of those already set is unnecessary. Defendants are adequately incentivized under the current hastened trial schedule to move forward at an appropriate pace. Indeed, the October 29 trial date is already prejudicial given the breadth and number of expert witnesses Plaintiffs have disclosed.

Plaintiffs' proposal that the Court impose additional deadlines on an even shorter timeframe that might be construed as forcing Defendants into a waiver of rights to challenge the sufficiency of Plaintiffs' expert disclosures under Rule 26(a)(2)(B) would amplify that prejudice.

Plaintiffs' Position: Disclosure of Defendants' Experts: To reiterate Plaintiffs' prior request and to promptly prepare for expert discovery, Plaintiffs would request that Defendants provide Plaintiffs with the identities and subject areas of Defendants' experts on a rolling basis as they are retained and, in any event, prior to July 12, 2018, the date set for the exchange of Defendants' rebuttal expert witness names and topic areas.

Defendants' Position: Disclosure of Defendants' Experts: The Court ordered Defendants to disclose the identity of their experts and the general subject-matter of those experts' opinions by July 12, 2018. The prejudice Defendants already face is manifest in the breadth and volume of Plaintiffs' proffered expert testimony on the one hand and the July 12 deadline on the other. Curtailing that July 12 deadline to provide "rolling basis" disclosures incorrectly presumes that Defendants already have finalized their proffered expert case and amplifies the prejudice to Defendants' ability to defend themselves in this lawsuit. Indeed, a significant portion of Plaintiffs' expert testimony was not disclosed until *after* the Ninth Circuit's denial of Defendants' mandamus petition. Defendants are still evaluating how to best respond to that testimony and identifying the appropriate rebuttal candidates. There is no need for Court intervention on this issue at this time.

3. **DISCOVERY**

Status of Discovery Propounded to Date and Plaintiffs' Position in General: Plaintiffs believe that discovery is entirely proper in this case. Plaintiffs have been working to narrowly tailor discovery requests to meet their burden to establish standing, an issue contested by Defendants. For example, Plaintiffs have served Requests for Admissions on Defendants

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Department of Agriculture and Department of Interior, attached hereto as **Exhibit 3** and **Exhibit 4**, respectively. As the Court can see, each admission is based on information from the website of a Defendant. Plaintiffs have gone so far as to cite the specific reference from which the admission is taken. Plaintiffs have propounded the following discovery, which has not been withdrawn in response to meeting and conferring:

DATE PROPOUNDED	DATE RESPONSES DUE	PARTY OR PARTIES	TITLE	STATUS
1/20/2017	5/31/2017	EPA	First Set of Requests for Admission to the Environmental Protection Agency	On July 12, 2017, EPA responded providing objections regarding their requested stay of litigation, deliberative process and other privileges, calls for legal conclusions, vague and ambiguous, calls for expert conclusions, and lack of specificity. Plaintiffs will not seek to compel further responses to these RFAs.
2/21/2017	After meet and confer process	All Federal Defendants	Requests for Production of Documents to Federal Defendants (documents from NARA)	Federal Defendants have made certain of the NARA documents available and others will become available pursuant to a protective order. To discuss at May 10, 2018 meet and confer.
3/7/2017	After meet and confer process	All Federal Defendants	Second Set of Requests for Production of Documents to Federal Defendants (documents from NARA)	Federal Defendants have made certain of the NARA documents available and others will become available pursuant to a protective order. To discuss at May 10, 2018 meet and confer.
5/4/18	6/4/18	Department of Interior	First Set of Requests for Admission to the U.S. Department of the Interior	Pending; to discuss at May 10, 2018 meet and confer
5/4/18	6/4/18	Department of Agriculture	First Set of Requests for Admission to the U.S. Department of Agriculture	Pending; to discuss at May 10, 2018 meet and confer
5/4/18	To discuss timing at May 10, 2018 meet and confer	Department of Interior	Rule 30(b)(6) Notice of Deposition to the U.S. Department of the Interior	Pending; to discuss at May 10, 2018 meet and confer
5/4/18	To discuss timing at May 10, 2018 meet and confer	Department of Agriculture	Rule 30(b)(6) Notice of Deposition to the U.S. Department of Agriculture	Pending; to discuss at May 10, 2018 meet and confer

Defendants' Position: In General: Because the Administrative Procedure Act (“APA”) governs this case, discovery is improper. In addition, even if this Court disagrees that the APA governs the disposition of Plaintiffs’ claims, Defendants stand by their prior submission that discovery should be held in abeyance while Defendants decide whether to seek further review of the Ninth Circuit’s order denying mandamus and while this Court considers Defendants’ forthcoming motions for judgment on the pleadings, for a protective order, and for summary judgment.

Plaintiffs' Position: Depositions of Plaintiffs: As discussed at the April 12, 2018 Status Conference, to the extent Defendants wish to depose any Plaintiffs, those depositions will be during their summer vacations (June-August). Plaintiffs would like to get time frames for their depositions so they may schedule the balance of their summer vacations for summer school, internships, etc. Plaintiffs would request the Court order that, on or before May 18, 2018, Defendants provide Plaintiffs with the identities of any Plaintiffs who Defendants wish to depose and that the parties agree to dates for those depositions by May 25, 2018.

Defendants Position: Depositions of Plaintiffs: If depositions of Plaintiffs prove necessary, Defendants have already agreed to cooperate with Plaintiffs so that these depositions can occur during the deponents’ summer vacations. Plaintiffs can, of course, identify windows of time when their witnesses are available for deposition over the upcoming months. At this time, there is no need for the Court to order Defendants to identify the Plaintiffs that Defendants wish to depose nor to set a deadline for the parties to agree to dates for those depositions.

Plaintiffs' Position: NARA Documents: Counsel have been exchanging emails on the status of Plaintiffs’ review of the NARA documents responsive to the pending requests for production. Defendants provided a NARA spreadsheet that categorizes the EPA
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records housed in NARA's College Park facilities, and Plaintiffs are working to examine those records. However, Defendants have taken the position that some records will require a protective order before they can be examined. Plaintiffs have requested that Defendants agree to a protective order in order for the records to be produced and have proposed changes to the protective order received from Defendants. A copy of that draft protective order is attached hereto as **Exhibit 5**. As discussed above concerning the draft protective order attached as Exhibit 1, Defendants have yet to either agree with the draft protective order or propose changes. Plaintiffs would request that the Court order the parties to meet and confer immediately after the May 10, 2018 Status Conference to resolve any issues with the protective order so that it may be promptly entered and the NARA records produced.

Defendants' Position: NARA Documents: Plaintiffs' access to documents housed in NARA facilities is determined by statute and therefore is not, properly construed, a discovery request as to any Defendant in this lawsuit. Nonetheless we have coordinated with NARA to facilitate Plaintiffs' immediate access to a substantial amount of the records that Plaintiffs seek to review. NARA advises that the documents subject to protection can be reviewed in under a day and we are working with NARA to allow review without the need for a protective order. Defendants agree that the parties should discuss this issue during the May 10, 2018 meet and confer and are endeavoring to have a NARA representative available telephonically.

4. FURTHER APPELLATE PROCEEDINGS

a. **Plaintiffs' Position:** The deadline for seeking *en banc* review of the Ninth Circuit's March 7, 2018 decision has passed. As Defendants chose not to seek *en banc* review, Plaintiffs have asked whether Defendants have made a decision on whether to file a petition or motion with the Supreme Court or whether Defendants have any time frame for that

decision. Defendants have not responded with any information.

b. **Defendants' Position:** Defendants have repeatedly informed Plaintiffs that the Solicitor General makes decisions on whether to seek appellate review of decisions adverse to the government in the federal district courts and courts of appeals, including whether Defendants seek further review of the Ninth Circuit's denial of Defendants' mandamus petition. The deadline for filing a petition for a writ of certiorari with respect to the Ninth Circuit's March 7, 2018 decision is June 5, 2018, which may be extended by application.

5. **FURTHER STATUS CONFERENCES:**

a. **Plaintiffs' Position:** Counsel for Plaintiffs had hoped that a monthly status conference would keep the parties on track. Since the April 12, 2018 Status Conference, counsel for Plaintiffs have been attempting to communicate with counsel for Defendants on the issues set forth above. Except on the NARA issues, counsel for Defendants did not respond at all to any communication until May 7. As counsel for the parties have much to do to properly prepare for trial on October 29, 2018, Plaintiffs believe it would be best if the parties had weekly calls with the Court and an in-person status conference once a month. That way, Plaintiffs would not have to face weeks of silence in the face of resolving important scheduling and discovery issues.

b. **Defendants' Position:** To the extent that it assists the Court, Defendants agree to have monthly in-person status conferences. Defendants also agree to meet and confer with Plaintiffs in-person during such visits, as we did on April 11, 2018 and will do on May 10, 2018. Defendants are, of course, available by telephone to discuss matters with Plaintiffs during other times. Defendants agree that there is much work to be done if an October 29 trial date is to be realized. Adding weekly telephonic status conferences to that substantial amount of work will not, in Defendants' estimation, move that work along more expeditiously. Instead,

Defendants fear that such frequent checking-in will distract from more substantive preparation

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and could undercut meaningful conferral efforts by not allowing sufficient time for the parties to confer before raising issues with the court. Accordingly, Defendants do not believe that weekly calls with the Court are prudent.

Dated: May 8, 2018

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ATTESTATION OF FILING

I hereby attest, pursuant to District of Oregon, Local Rule 11(d), that consent to the filing of this document has been obtained from each signatory hereto.

/s/ Sean C. Duffy

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