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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; et al.,

Defendants.

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

JOINT STATUS REPORT
AS OF JUNE 5, 2018

Counsel for the parties hereby respectfully provide this Joint Status Report to inform the Court of the status of discovery, experts, and other pending or upcoming matters since the Status Conference on May 10, 2018.

1. DISCOVERY

a. Generally

Plaintiffs' Position: Plaintiffs are moving forward with propounding discovery. Yet Defendants assert that they will not engage in or respond to **any** discovery because of their pending motions and their intent to file another motion for a protective order. As a threshold matter, the Court denied Defendants' most recent motion to stay discovery (Dkt. No. 212) and, thus, Defendants have an ongoing obligation to provide substantive responses to discovery requests and other pre-trial obligations. In response to Plaintiffs' repeated attempted to meet and confer on outstanding discovery issues, Defendants have taken the position that "**discovery is categorically improper**." (emphasis added) (See May 22, 2018 letter from Marissa A. Piropato attached hereto as **Exhibit 1**.) Ignoring this Court's orders and their obligations under the Federal Rules, Defendants brazenly assert they will not participate in the discovery process **at all** while they pursue "the options for narrowing the case set forth in the Ninth Circuit's opinion denying mandamus." Id. As a result, and contrary to the position they took in 2017 and to the position they communicated to Judge Aiken during telephonic argument on scheduling the Rule 12(c) motion, Defendants have now refused to respond to any discovery or schedule any depositions. Further, Defendants have filed several motions seeking various forms of protective orders.

Defendants' Position: Defendants are following the Ninth Circuit's guidance and filing motions to narrow the issues in this case, including motions for protective orders to protect the

government from improper discovery. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 836, 838 (9th Cir. 2018). As explained in those motions, any discovery is improper. ECF Nos. 195, 196, 215; *see also* April 12, 2018 Tr. 9:2-3 (Defendants' "position throughout has been that discovery is improper."). When a plaintiff brings constitutional claims and seeks declaratory or injunctive relief based on alleged actions or inactions of a federal agency, as Plaintiffs do here, the APA governs, which requires that challenges be devoted to discrete and specifically identified agency action and that judicial review be based on an administrative record. 5 U.S.C. § 706; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light*, 470 U.S. at 743-744 (citation omitted)); *see also Chiayu Chang v. U.S. Citizenship & Immigration Servs*., 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017) (denying motion for discovery outside of the administrative record on plaintiffs' constitutional claims); Fed. R. Civ. P. 26(a)(1)(B)(i) (exempting such actions from pre-trial disclosures). Plaintiffs can offer no good reason why Congress's mandate should be ignored in this case.

Even if the APA's record review requirements did not apply to this case, the discovery that Plaintiffs seek is improper because it impermissibly seeks to override the APA's "comprehensive regulation of procedures" for agency decision-making, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950), and invites the Court to alter those requirements via discovery, which the Supreme Court has long held is impermissible. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 548-48 (1978). Moreover, in this case, Plaintiffs seek, again via discovery, to probe the views of federal agencies on national environmental and energy policy and to require them to make factual and predictive judgments outside the scope of

governing agency procedures, including opportunities for input by the public, not merely Plaintiffs. This is fundamentally incompatible with the constitutional structure.

This fundamental disagreement as to whether discovery is permissible in this case is the subject of objections which are pending before the District Court. Defs.' Objs. to Order Den. Mot. for Protective Order & Stay of Disc., ECF No. 215. Defendants have asked the Court to certify its ruling on the objections for appeal to the extent the Court disagrees with Defendants that discovery is improper. *Id.* at 4. Defendants have also asked this Court to stay discovery pending resolution of those objections. Defs.' Mot. to Stay Disc. Pending Resolution of Objs., ECF No. 216.

Notwithstanding these fundamental issues and pending motions, Defendants have no intention of ignoring this Court's orders and their obligations under the Federal Rules as Plaintiffs contend. Defendants will continue to comply with Court orders and discovery deadlines. Defendants, however, will also continue to avail themselves of available forms of redress including, where appropriate, by objecting to discovery requests, seeking protective orders and stays, and seeking appellate review.

b. <u>Status of Discovery Propounded to Date</u>:

Plaintiffs have propounded the following discovery, which has not been withdrawn in response to meeting and conferring:

No.	Date Propounded	Response Due	Party	Title	Status – **Plaintiffs' Position**	Status – **Defendants' Position**
1	1/20/17	5/31/17	EPA	First Set of RFAs to EPA	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	No further action required

					conclusions, and lack of specificity. Plaintiffs will not seek to compel further responses to these RFAs.	
2	2/11/17	After meet and confer process	All Federal Defendants	RFPs to Federal Defendants (documents from NARA)	Federal Defendants have made certain of the NARA documents available and have asked Plaintiffs to coordinate directly with NARA regarding a time to review the documents. Plaintiffs have requested the contact at NARA to communicate with. There are a small number of documents with confidential information. Defendants will send a paralegal to oversee review of those documents during the one day it will take for Plaintiffs to review documents with confidential information, which will be redacted.	Plaintiffs will visit NARA facilities
3	3/7/17	After meet and confer process	All Federal Defendants	Second Set of RFPs to Federal Defendants (documents from NARA)	Federal Defendants have made the NARA documents available and have asked Plaintiffs to coordinate directly with NARA regarding a time to review the documents. Plaintiffs have requested the contact at NARA to communicate with. There are a small number of documents with confidential information. Defendants will send a paralegal to oversee review of those documents during the one day it will take for Plaintiffs to review documents with confidential information, which will be redacted.	Plaintiffs will visit NARA facilities
4	5/4/18	6/4/18	Dep't of Interior	First Set of RFAs to Dep't of the Interior	Pending	Objections and Motion for Protective Order Pending
5	5/4/18	6/4/18	Dep't of Agriculture	First Set of RFAs to Dep't of Agriculture	Pending	Objections and Motion for Protective Order Pending
6	5/4/18	6/4/18	Dep't of Interior	Rule 30(b)(6) Notice of	Plaintiffs await Defendants to propose dates for this	Objections and Motion

				Deposition to the U.S. Dep't of the Interior	deposition, which must be scheduled before June 7, 2018, the date presently noticed.	for Protective Order Pending
7	5/4/18	6/4/18	Dep't of Agriculture	Rule 30(b)(6) Notice of Deposition to the U.S. Dep't of Agriculture	Plaintiffs await Defendants to propose dates for this deposition, which must be scheduled before June 8, 2018, the date presently noticed.	Objections and Motion for Protective Order Pending
8	5/11/18	6/11/18	Dep't of Transportation	Rule 30(b)(6) Notice of Deposition to the U.S. Dep't of Transportation	Plaintiffs await Defendants to propose dates for this deposition, which must be scheduled before June 20, 2018, the date presently noticed.	Objections and Motion for Protective Order Pending
9	5/11/18	6/11/18	Dep't of Transportation	First Set of RFAs to the Department of Transportation	Pending	Objections and Motion for Protective Order Pending
10	6/4/18	7/4/18	Dep't of Energy	First Set of RFAs to the U.S. Dep't of Energy	Pending	Received June 4, 2018; Currently reviewing
11	6/4/18	7/4/18	Dep't of Energy	Rule 30(b)(6) Notice of Deposition to the U.S. Dep't of Energy	Plaintiffs await Defendants to propose dates for this deposition, which must be scheduled before June 28, 2018, the date presently noticed.	Received June 4, 2018; Currently reviewing
12	6/4/18	7/4/18	Dep't of Defense	First Set of RFAs to the U.S. Dep't of Defense	Pending	Received June 4, 2018; Currently reviewing
13	6/4/18	7/4/18	Dep't of Defense	Rule 30(b)(6) Notice of Deposition to the U.S. Dep't of Defense	Plaintiffs await Defendants to propose dates for this deposition, which must be scheduled before June 29, 2018, the date presently noticed.	Received June 4, 2018; Currently reviewing

Defendants' Position: Because Defendants responded to the requests for admission ("RFAs") in row #1 in the table above by filing objections and Plaintiffs have indicated by letter that they "will not move to compel" further responses or answers to those RFAs, there is no need

for the parties to provide the court with any additional information regarding these requests. The items in rows #2-3 seek documents that Plaintiffs wish to retrieve from National Archives and Records Administration ("NARA") facilities and Presidential Libraries. NARA is not a party to this case and Plaintiffs' right to review these documents comes from a statute, not this lawsuit. As such, Plaintiffs' requests to review documents at NARA facilities and Presidential Libraries is not a discovery request and not subject to this Court's jurisdiction. Accordingly, there is no need for the parties to provide the Court with any additional information regarding these requests.

As for the remainder of the discovery requests, Defendants moved for a protective order on all discovery and a stay of all discovery on May 9, 2018. ECF No. 196. The Magistrate Judge denied that motion, ECF No. 212, and Defendants' objections to the Magistrate Judge's order are currently pending before the District Court. ECF No. 215. In his order, the Magistrate Judge suggested that Defendants move for protective orders against "specific discovery request[s]." ECF No. 212 at 3. Following that guidance, on June 4, 2018, Defendants filed a second motion for a protective order as to six specific discovery requests: the RFAs for the Department of the Interior, the Department of Agriculture, and the Department of Transportation (rows #4, 5, and 9) and the deposition notices for those same agencies (rows #6-8). Defendants note that they received the RFAs and 30(b)(6) notices propounded on the Department of Defense and the Department of Energy on June 4, 2018 and have not yet had an opportunity to meaningfully review them.

c. Requests for Admissions:

Plaintiffs' Position: Plaintiffs are utilizing Requests for Admissions ("RFAs") to authenticate documents (FRCP 36(a)(1)(B)) and to seek admissions as to "facts, the

application of law to fact, or opinions about either." FRCP 36(a)(1)(A). As this Court is well aware, the purpose of Rule 36(a) is to expedite trial by establishing certain material facts as true and thus narrowing the range of issues for trial. *Asea, Inc. v. S. Pac. Transp. Co*., 669 F.2d 1242, 1245 (9th Cir. 1981). In the RFAs, Plaintiffs have gone to great lengths to provide Defendants with a citation to the federal source of the factual information so that verification of the truth of the information from the source should not be onerous. Defendants have previously filed with the Court Plaintiffs' Requests for Admissions to Defendants Department of Transportation, Department of Interior and Department of Agriculture. Plaintiffs hereby attach as **Exhibit 2** and **Exhibit 3** Plaintiffs' First Set of Requests for Admissions to Defendants U.S. Department of Defense and U.S. Department of Energy. All of Plaintiffs' RFAs are illustrative of the efforts made by Plaintiffs to make discovery streamlined and efficient for Defendants. Plaintiffs believe this is the most efficient means to narrow the facts in the case and will continue to propound RFAs of this nature. For purposes of expediting the process to come to agreement on the authenticity of documents, Plaintiffs will provide Defendants with a spreadsheet with the following columns:

(1) the citation to the document that Plaintiffs want Defendants to authenticate; (2) the source or author of the document; (3) Defendants' authentication of the document (an admission or denial that the document is what it is claimed to be); (4) if Defendants cannot authenticate the document, the reason why Defendants cannot authenticate the document; (5) as to the website from which the document or statement was taken, that the website was created or kept by a public office as authorized by law; and (6) the document or statement is in fact from a public office authorized to keep such a record. The link to the document on the spreadsheet will have the URL, date, and/or official title on the Web page to show that the information was from the

Defendant's website. Obviously, Plaintiffs are attempting to avoid the expense and hassle of calling a witness to authenticate electronic evidence by having Defendants stipulate to authenticity. During meet and conferral, Defendants previously agreed to this method for authentication. Finally, Plaintiffs are awaiting DOJ counsel to report on discussions with their clients about answering the pending RFAs served on May 4, 2018 and any issues that would benefit from further meet and confer.

Defendants' Position: Defendants believe that any discovery, including the RFAs that Plaintiffs have propounded, is improper. The RFAs are the subject of three pending motions: Defendants' objections to the Magistrate Judge's May 25, 2018 order denying Defendants' motion for a protective order and stay (ECF No. 215), a motion for a stay pending resolution of the objections (ECF No. 216), and a motion for a protective order objecting specifically to the three sets of RFAs served on the Departments of the Interior, Agriculture, and Transportation. In their objections, Defendants also request that, to the extent the District Court agrees with the Magistrate Judge's resolution of the motion for a stay and protective order, it certify its order for interlocutory review. Defendants note that they received the RFAs propounded on the Department of Defense and the Department of Energy on June 4, 2018 and have not yet had an opportunity to meaningfully review them.

d. Rule 30(b)(6) Depositions:

Plaintiffs' Position: Plaintiffs have served Notices of Deposition pursuant to Rule 30(b) (6) as to Defendants Department of Agriculture (USDA), Department of Interior (DOI), Department of Transportation (DOT), Department of Defense (DOD), and Department of Energy (DOE). Defendants are now taking the position that they will not produce a witness under Rule 30(b)(6) for any Defendant. This position is contrary to that taken by Defendants

in prior meet and confer sessions and during proceedings in court. After the parties met and conferred in May, Plaintiffs stated they were willing to break down one or more of the four Subject Areas into contention interrogatories once the parties were able to reach agreement that each side may exceed the 25 interrogatory limit imposed by the Federal Rules for interrogatories. Defendants originally agreed with this procedure. (*See* May 21, 2018 letter from Marissa A. Piropato attached hereto as **Exhibit 4** on this issue.) While Plaintiffs were waiting for the decision by Defendants to produce a witness for the remaining Subject Areas and confer with Plaintiffs on a date for the deposition of that witness for DOI, DOT, and USDA, Defendants have changed their position and now state they will, instead, moving for a protective order and will not produce any witness on any topic.

Defendants' Position: The 30(b)(6) deposition notices are the subject of three pending motions: Defendants' objections to the Magistrate Judge's May 25, 2018 order denying Defendants' motion for a protective order and stay (ECF No. 215), a motion for a stay pending resolution of the objections (ECF No. 216), and a motion seeking a protective order specifically with respect to the 30(b)(6) depositions served on the Departments of the Interior, Agriculture, and Transportation. Nonetheless, and without waiving this position, the United States has continued to meet and confer with Plaintiffs and has pointed out defects in Plaintiffs' deposition notices that would render them objectionable even if they were permissible. Unless and until the Court puts a halt to Plaintiffs' impermissible discovery demands, the United States remains willing to continue to meet and confer with Plaintiffs and assist them in refining their Rule 30(b)(6) deposition notices. Defendants note that they received the 30(b)(6) notices for the Department of Defense and the Department of Energy on June 4, 2018 and have not yet had an opportunity to meaningfully review them.

e. Depositions of Plaintiffs:

Plaintiffs' Position: As agreed at the May Status Conference, to the extent Defendants wish to depose any Plaintiffs, those depositions will be during their summer vacations (June-August). Based on that agreement, the parties reached a scheduling agreement on May 11 that the Youth Plaintiffs would make themselves available for their depositions in Eugene during the following 3 weeks: June 3-9; July 15-21; and August 5-11. Counsel made it clear that some Plaintiffs have limited availability and may only be available during one of these weeks. Defendants have now reneged on their agreement, stating that they are not going to take depositions of Plaintiffs in June while Defendants supposedly "pursue[] the options set forth in the Ninth Circuit's opinion denying mandamus." *See* **Exhibit 1**. On May 18, Plaintiffs responded in detail on this issue. A copy of that response is attached hereto as **Exhibit 5**.

Defendants' decision not to take depositions of the Youth Plaintiffs during the week of June 3 because Defendants believe "discovery is categorically improper," a position Plaintiffs note violates existing scheduling orders issued in this case, does not alter the fact that certain Plaintiffs may no longer be available for depositions later in the summer. Based on Defendants' recent refusal to confirm *any* dates for depositions of *any* of the 21 Youth Plaintiffs, Plaintiffs will take no further steps on the deposition issue until Defendants timely notice those depositions. If one or more of the 21 Youth Plaintiffs are no longer available during their summer vacations, then Plaintiffs will move for a protective order. Plaintiffs would request the Court order that, on or before June 14, 2018, Defendants provide Plaintiffs with the identities of any Plaintiffs who Defendants wish to depose and that the parties agree to dates and locations for those depositions by June 21, 2018, or the Court should deem Defendants have waived their right

to take Plaintiffs' depositions.

Defendants' Position: Defendants' "position throughout has been that discovery is improper." April 12, 2018 Hearing Tr. 9:2-3. Nonetheless, unless and until this Court or another court enters a stay or dismisses this case, the United States will continue to meet and confer with Plaintiffs as to discovery and deadlines. Defendants have, in the past, indicated that they would take depositions of each of the Plaintiffs in this case. Defendants no longer intend to take Plaintiffs' depositions while they pursue the options set forth in the Ninth Circuit's opinion denying mandamus. *See United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 836, 838 (9th Cir. 2018). If that planned course changes, Defendants will work with Plaintiffs to schedule depositions at a time that is feasible for both parties. Finally, while we are mindful of witnesses' schedules and remain willing to work cooperatively with Plaintiffs on matters of scheduling, we note that the party who wants to depose a witness ordinarily first propounds a notice stating the time and place of the deposition and the parties then cooperate to work out a mutually-agreeable date and location. One party cannot unilaterally dictate the deposition schedule.

f. NARA Documents: Counsel have been exchanging emails on the status of Plaintiffs' review of the NARA documents responsive to the pending requests forproduction. Defendants provided a NARA spreadsheet that categorizes the EPA records housed in NARA's College Park facilities, and Plaintiffs are working to examine those records. The plan both sides agreed on for reviewing the NARA documents responsive to Plaintiffs' pending requests for production is as follows: (a) Plaintiffs will review all the non-confidential NARA documents at NARA's College Park facility; (b) on the agreed upon date, as to any materials deemed confidential (such as personal information), Defendants will send a paralegal to review and

redact any information from a document before Plaintiffs review the document, with Plaintiffs then reviewing the redacted document to see if Plaintiffs want the document copied; and (c) if Plaintiffs want the document copied, the redacted document will be copied and the parties will meet and confer, if necessary, about the redaction(s). Plaintiffs have asked Defendants to provide the information for the contact person at NARA.

2. EXPERTS:

a. Service of Reports:

Plaintiffs' Position: Effective April 13, 2018, Plaintiffs served all of their expert witness reports (17 reports), except for: (a) the expert witness report of James Gustave Speth, and (b) exhibits to two expert reports that will be filed under seal and subject to a protective order as discussed below. As research on the issues presented by this litigation 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.

Defendants' Position: Defendants are reviewing the 17 expert reports from Plaintiffs. Defendants have identified, as a threshold issue that the reports generally do not comply with the requirements of Rule 26(a)(2)(B) insofar as the reports do not provide a complete statement of all opinions and the bases and reasons for them, as well as the facts or data the witnesses considered in forming the opinions. Defendants will meet and confer with Plaintiffs to obtain this information. A second issue that Defendants have identified is that several of the reports do not address any material issues that are disputed in this case and are therefore unnecessary for trial. Moreover, judicial resolution of the pending dispositive motions may result in dismissal or eliminate the basis or need for all or much of the expert testimony on matters contained within the reports Plaintiffs have provided. *See* Mot. for J. on the Pleadings, ECF No. 195; Mot. for

Summ. J., ECF No. 207.

b. Protective Order:

Plaintiffs' Position: As discussed at the April 12 and May 10 Status Conferences, 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, Plaintiffs have provided Defendants with a draft protective order for the confidential information in the expert reports. A copy of that draft protective order is again attached hereto as **Exhibit 6**. Despite stating at the April Status Conference that this is an issue "we should resolve quickly," Defendants have not yet agreed to stipulate to the draft protective order. On June 4, 2018, Defendants finally provided Plaintiffs with proposed changes, which Plaintiffs will review and meet and confer on at the June 5 meeting. If the parties cannot come to agreement before the June 6, 2018 Status Conference, Plaintiffs would request that the Court enter the protective order attached hereto as **Exhibit 6**.

Defendants' Position: Defendants provided Plaintiffs with a revised version of the draft protective order on June 4, 2018 and requested that the parties meet and confer on June 5, with the aim of filing a joint stipulation that same day. Defendants oppose Plaintiffs' suggestion that the Court simply enter Plaintiffs' preferred form of protective order at the June 6 status conference if the parties do not reach an agreement before then. If the parties are at an impasse, the proper means of resolving their differences in the protective order is a noticed motion that is briefed.

c. Depositions of Plaintiffs' Experts:

Plaintiffs' Position: Plaintiffs have been attempting to obtain dates for depositions of

any of their experts. Plaintiffs' experts are working *pro bono* and have extremely busy schedules, including extended travel planned during the months of July, August, and September, so their depositions need to be scheduled well in advance. Plaintiffs have provided the dates of availability for deposition of Plaintiffs' experts. 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 June 6, 2018, Defendants identify those experts who Defendants wish to depose and provide a time frame for those depositions. Defendants have yet to offer to schedule any expert depositions. Plaintiffs' position is that, if Defendants continue to delay in scheduling depositions of Plaintiffs' experts and ignore those experts' limited availability to sit for deposition over the next four months, Defendants' right to take such depositions should be waived.

Further, as to documents and information to be produced in connection with the depositions of experts designated by both sides, Plaintiffs proposed a stipulation in advance of the May status conference. A copy of that proposed stipulation is attached as **Exhibit 7**. While Defendants promised a redline of that proposed stipulation, Defendants have yet to send that redline to Plaintiffs.

Defendants' Position: On May 29, 2018, Plaintiffs provided a list of dates of availability for 12 of their 19 proposed expert witnesses. As indicated above, many of the experts have submitted reports that do not comply with the requirements of Rule 26(a)(2)(B). Defendants are preparing lists of deficiencies that, if discovery is permitted to proceed, they will submit to Plaintiffs so that the experts can provide Defendants with the information they will need well before deposing the experts. Also, as indicated above, many of the experts do not provide expert testimony on disputed issues. Defendants believe that with the narrowing

of issues that is contemplated in their dispositive motions and by the Ninth Circuit, the need for testimony of many or all of Plaintiffs' experts will be eliminated. Nonetheless, Defendants are reviewing the expert reports and the schedules Plaintiffs have provided and, if discovery is permitted to proceed, Defendants will schedule depositions of those experts at a time and place consistent with the information Plaintiffs have provided.

d. Information from Plaintiffs' Experts:

Plaintiffs' Position: During the parties' meet and confer session on April 11, 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. In connection with the May Status Conference, Plaintiffs again requested the spreadsheet identifying information Defendants believe is missing from Plaintiffs' expert reports. On May 21, Defendants stated the list would be provided "as soon as practicable on a rolling basis." While the expert reports were served over seven weeks ago, Defendants have yet to provide any feedback on this issue. Due to Defendants' delay, it will be impracticable for Plaintiffs to provide this information before July 12. As Plaintiffs want to provide Defendants with this information as promptly as possible, and certainly in advance of an expert's deposition, Plaintiffs request the Court order that, on or before June 14, 2018, Defendants state what, if any, additional information Defendants need from Plaintiffs' experts based on a review of their reports.

Finally, during the parties' meet and confer session on May 10, Defendants asked Plaintiffs to Bates stamp and produce all documents relied upon by Plaintiffs' experts in their expert reports. Plaintiffs have agreed to do this and will produce the requested documents on a rolling basis.

Defendants' Position: Defendants are compiling a list of deficiencies in terms of information that Plaintiffs were required to, but did not, provide in their expert reports. If discovery is permitted to proceed, Defendants will provide this to the Plaintiffs when it is complete. Defendants did not agree to provide this list on a "rolling basis" as Plaintiffs' indicate. In the meantime, Plaintiffs should provide the information they failed to include with their expert reports as promptly as possible.

e. Disclosure of Defendants' Experts:

Plaintiffs' Position: 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: Defendants are required to identify experts by July 12, 2018. ECF No. 192. Though they have never moved to amend this deadline, Plaintiffs have repeatedly asked the Court to require Defendants to identify experts on a rolling basis prior to the July 12 deadline. During the March 26 status conference, Plaintiffs asked that Court to require Defendants to provide expert reports on a "rolling basis." March 26, 2018 Tr. 8:25-9:1 ("And what we propose is that they at least disclose and begin serving expert reports on a rolling basis."). They complained a second time of this issue during the April 12, 2018 status conference. April 12, 2018 Tr. 24:2-3 ("defendant's don't want to tell us who their experts are on a rolling basis"); *id.* 25:14-15 ("they need to get their expert reports done more quickly."). During that conference, Defendants explained why they prefer to identify experts and produce expert reports at one time, rather than on the rolling basis that Plaintiffs would prefer: "when you

have a number of experts, you need to coordinate what they are saying so that they are not overlapping. . ." *Id.* at 25:18-20; *see id.* at 26:4-7 ("we don't do rolling reports. We try to do it in an organized manner. That's just the way it's normally done. It works. I don't see any reason why we should depart from that here."). The Court did not require that reports be produced on a rolling basis.

Undeterred, Plaintiffs repeated their request that experts be identified on a rolling basis before the May 10 status conference. J. Status Report as of May 8, 2018 at 8, ECF No. 194 ("Plaintiffs would request that Defendants provide Plaintiffs with the identities and subject areas of Defendants' expert on a rolling basis). At that hearing, the Court did not amend its order.

Evidently unsatisfied with Defendants' approach and this Court's prior order, Plaintiffs again ask the Court to require Defendants to provide Plaintiffs with the identity of experts on a rolling basis before July 12. Yet they offer no new or additional reasons for the Court to require this, and none exist. For the reasons already explained, Defendants will identify their experts on or before July 12, but cannot agree to identify their experts on a rolling basis.

3. MOTIONS

a. Motion for Judgment on the Pleadings:

Defendants have filed a Motion for Judgment on the Pleadings under Rule 12(c) set for hearing on July 18, 2018.

b. Motion for Summary Judgment:

Plaintiffs' Position: Defendants filed a Motion for Summary Judgment. Plaintiffs understand that Judge Aiken's calendar is open for oral argument on the Motion for Summary Judgment during the week of October 22, 2018. Plaintiffs have met and conferred with Defendants on this issue and were unable to reach agreement on a briefing schedule. Plaintiffs

intend to move for an extension as to briefing under Rule 56(d), as Plaintiffs will need time to take discovery to respond to Defendants' Motion for Summary Judgment.

Defendants' Position: Consistent with the Ninth Circuit's direction, Defendants moved "for summary judgment on the claims" on May 22, 2018. *See United States v. U.S. Dist. Court for Dist. of Or.*, 884 F. 3d at 836. Plaintiffs' response is due June 12 and Defendants' reply is due 14 days later, *i.e.* June 26. This Court has stated that "no one is denying you the opportunity to file a motion for summary judgment. It's just a matter of timing of when they are going to be heard." April 12, 2018 Hearing Tr. 19:22-24. However, because the Court has set trial for October 29, 2018, the timing of a ruling on that motion is of the essence. As Defendants have indicated, to be useful in narrowing the issues or disposing of this case in the way that the Ninth Circuit contemplated, a ruling from the Court will need to come before discovery proceeds and well before trial. *Id.* at 19:1-7. Oral argument on dispositive motions one week (or even two months) before trial would severely prejudice Defendants in this case and would effectively prevent Defendants from preparing to mount a vigorous defense on any issues that might survive past a summary judgment ruling.

The legal issues in the summary judgment brief are familiar to the parties and the Court, and there are no genuine issues of material fact. The parties should be able to brief these issues in a manner that is consistent with the local rules. And, if they do, both the motion for summary judgment and the motion for judgement on the pleadings will be fully briefed by the end of June and ripe for oral argument on July 18, when the Court will hear argument on the motion for judgment on the pleadings. Under that schedule, Defendants would request that the Court issue a judgment before the end of the month of August.

c. Defendants' Motion to Stay Discovery Pending Resolution of Objections:

Defendants filed a Motion to Stay Discovery Pending Resolution of Objections (ECF 216) to this Court's denial of their first Motion for Protective Order and Stay of Discovery (ECF 196 and ECF 212). Judge Aiken has requested Plaintiffs file their opposition to Defendants' Motion for a Stay by June 7, 2018, which Plaintiffs will do.

d. Defendants' Motion for Protective Order:

Plaintiffs' Position: Late on June 4, 2018, Defendants filed a Motion for Protective Order (ECF 217) over the entirety of three sets of Plaintiffs' Requests for Admissions and 30(b)(6) Deposition Notices to USDA, DOI, DOT on the day the responses were due. The parties had previously met and conferred regarding the RFAs and the Deposition Notices in order to narrow subject areas for deposition and to discuss the process and form of admitting the facts from government documents set forth in the RFAs. While Defendants originally intended to identify a 30(b)(6) witness for deposition and substantively respond to at least some RFAs, they have changed their position to now argue all of the discovery is improper and subject to protective order. Plaintiffs will oppose the motion, but in light of Defendants' position that the Court can take judicial notice of facts in Table 1 of Defendants' Motion for Protective Order, Plaintiffs request that the Court provide direction regarding the best process for judicially noticing facts in advance of trial.

Defendants' Position: Defendants filed a second motion for protective order on June 4, 2018 for RFAs and 30(b)(6) notices served on the Departments of the Interior, Agriculture, and Transportation. ECF No. 217. Defendants filed this motion in accordance with the Magistrate Judge's instruction in his order denying Defendants' motion for a general protective order on all discovery that Defendants move for a protective order on specific discovery requests. ECF No. 212 at 3.

4. FURTHER APPELLATE PROCEEDINGS

On June 1, 2018, the Supreme Court granted Defendants' application for a 30-day extension to file a petition or motion with the Supreme Court up to July 5, 2018.

5. FURTHER STATUS CONFERENCES:

Judge Aiken has scheduled oral argument for 2:00 p.m. on July 18, 2018. Plaintiffs propose the parties meet and confer on then-existing discovery and pre-trial matters and have a Status Conference before Judge Coffin on July 17 if that date is available.

Respectfully submitted this 5th day of June, 2018.

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ATTESTATION OF FILING

I, Julia A. Olson, 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.

Julia A. Olson
JULIA A. OLSON

Attorney for Plaintiffs