

No. 18-73014

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al., Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
Respondent,

and

KELSEY CASCADIA ROSE JULIANA, et al., Real Parties in Interest.

On Petition for a Writ of Mandamus to the United States District Court
for the District of Oregon (No. 6:15-cv-01517-AA)

**JOINT REPORT ON THE STATUS OF
DISCOVERY AND RELEVANT PRETRIAL MATTERS**

JULIA A. OLSON
(OSB No. 062230, CSB No. 192642)
Wild Earth Advocates
1216 Lincoln St.
Eugene, OR 97401
(415) 786-4825

PHILIP L. GREGORY (CSB No. 95217)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957

ANDREA K. RODGERS (OR Bar 041029)
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117
(206) 696-2851

Attorneys for Real Parties in Interest

This Court's Order of November 8, 2018 directed the parties within 15 days to "file a joint report on the status of discovery and any relevant pretrial matters." On November 21, 2018, the district court found that each of the factors set forth in 28 U.S.C. § 1292(b) have been met regarding the district court's "previously mentioned orders" (ECF Nos. 83, 172, 238, and 369), exercised its discretion to immediately certify this case for interlocutory appeal, and stayed this case pending a decision by this Court. ECF No. 444.

In light of the district court's actions, and given that Defendants are today filing a reply brief that suggests holding these mandamus proceedings in abeyance, Defendants believe that a joint report is no longer necessary or appropriate.* Nevertheless, Defendants have agreed to the following as an accurate statement of the status of discovery and other relevant pretrial matters. Plaintiffs believe the status of the case is still pertinent to the issues of mandamus and whether this Court should accept interlocutory appeal given the current posture of the proceedings below.

I. Status of discovery

A. Expert Reports

All expert reports of disclosed experts in this case have been served.

*At the specific request of counsel for Defendants, their names "do not appear on the document."

Pursuant to the district court's order, Plaintiffs served 17 expert reports for their 18 expert witnesses on Defendants on April 13, 2018. ECF No. 189. On August 10, 2018, Plaintiffs served the expert report of James Gustave Speth on Defendants.

Pursuant to the district court's order, Defendants disclosed the identity of their eight expert witnesses to Plaintiffs on July 12, 2018. ECF No. 192. On August 13, 2018, Defendants served their expert reports on Plaintiffs. *Id.*

On September 19, 2018, Plaintiffs served five rebuttal expert reports on Defendants, including two reports by two new rebuttal experts. ECF No. 337. On October 12, 2018, Defendants served a single sur-rebuttal expert report. On November 9, 2018, Defendants served two rebuttal expert reports to the expert report of James Gustave Speth.

B. Depositions

To date, the parties have completed 30 expert depositions: 22 depositions of Plaintiffs' 21 expert witnesses (one was deposed twice) and eight depositions of Defendants' eight expert witnesses. The only remaining expert depositions of disclosed experts are of three of Defendants' experts, one of whom served a sur-rebuttal report and two of whom served rebuttal reports in response to one of Plaintiffs' experts. Thus, all depositions of the parties' disclosed experts have been taken or will be taken if and when the current stay is lifted.

In addition, Defendants have deposed 15 of the 21 Youth Plaintiffs. There remain nine additional depositions as described below:

- Defendants' expert Dr. Jeffrey Sugar, regarding his sur-rebuttal expert report.
- Defendants' expert Dr. James Sweeney, regarding his rebuttal expert report.
- Defendants' expert Dr. David Victor, regarding his rebuttal expert report.
- Plaintiff Nathaniel B.
- Plaintiff Kiran Issac Oommen.
- Plaintiff Sahara V.
- Plaintiff Journey Z.
- Plaintiff Levi D.
- Plaintiff Jaime B.: There are no plans to depose this Plaintiff as Plaintiffs have indicated that this Plaintiff is currently unavailable to testify at trial. If Plaintiffs decide that this Plaintiff will testify at trial, Defendants will notice this Plaintiff's deposition.

As discussed below, Defendants have moved to exclude the following witnesses, identified on October 15, 2018. If the witnesses are not excluded, Defendants will notice their depositions. These witnesses were designated as fact witnesses by Plaintiffs on their Witness List. ECF No. 387. Specifically:

- Plaintiffs' witness Jamescita Peshlakai (mother of Plaintiff Jaime B.) or Mae Peshlakai (grandmother). Plaintiffs have indicated that only one of these witnesses will testify.
- Plaintiffs' witness Sharon Baring, mother of Plaintiff Nathaniel B.
- Plaintiffs' witness Marie Venner, mother of Plaintiff Nick V.

- Plaintiffs' witness Leigh-Ann Draheim, mother of Levi D.
- Plaintiffs' witness Jessica Wentz, Sr. Fellow & Associate Researcher, Sabin Center for Climate (Columbia University).
- Plaintiffs' witness Stephen Seidel, a former employee of the Council on Environmental Quality and of the Environmental Protection Agency.
- Plaintiffs' witness Susan Ying, who worked in aerospace and aeronautical industries.

Rule 30(b)(6) Depositions: Pursuant to Federal Rule of Civil Procedure 30(b)(6), Plaintiffs served deposition notices on the Departments of Agriculture (May 4, 2018), Interior (May 4, 2018), Transportation (May 11, 2018), Defense (June 4, 2018), and Energy (June 4, 2018). The parties agreed to hold these depositions in abeyance while they pursued interrogatories. Plaintiffs no longer intend to pursue their pending Rule 30(b)(6) depositions.

C. Interrogatories

Both Plaintiffs and Defendants have served interrogatories, and both parties have responded to the interrogatories. Both parties have also indicated an intent to provide supplemental responses to certain interrogatories.

As discussed below, Plaintiffs have moved to compel responses to the interrogatories that Plaintiffs served on Defendants. Both the motion and the response have been filed in the district court.

D. Requests for Admission

Plaintiffs served Requests for Admission (“RFAs”) on the Departments of Agriculture (May 4, 2018), Interior (May 4, 2018), Transportation (May 11, 2018), Defense (June 4, 2018), and Energy (June 4, 2018). The parties agreed to hold the RFAs in abeyance until the district court decides Plaintiffs’ motions for judicial notice, which are listed below. Plaintiffs do not intend to pursue their pending RFAs.

E. Protective Orders

Defendants have sought two protective orders in this case. ECF Nos. 196, 217. Defendants’ first motion for a protective order, which sought to preclude all discovery in this action, was filed on May 9, 2018; that motion was denied by the district court. ECF Nos. 212, 300.

Defendants’ second motion for a protective order, which sought relief from Rule 30(b)(6) depositions and RFAs, was filed on June 4, 2018 and held in abeyance by the district court upon agreement of the parties. ECF No. 249. Plaintiffs will not pursue their pending Rule 30(b)(6) depositions or their pending RFAs, and as such, Defendants’ second motion for a protective order is moot.

To avoid protracted discovery and to simplify authentication of government records, and based upon guidance from the district court, Plaintiffs moved for judicial notice of publicly available documents, largely including documents generated by Defendants. ECF Nos. 254, 340, 380. Defendants have also filed a

motion seeking judicial notice of 456 Congressional Hearing Reports comprising over 80,000 pages of material. ECF No. 375. Plaintiffs did not oppose this motion. The parties agreed to substitute contention interrogatories in lieu of Rule 30(b)(6) depositions. ECF No. 389, ¶¶ 6-7.

Other than what has been described above, no further discovery is anticipated by the parties.

II. Status of pretrial motion practice

A. Pending motions

The following 14 motions are either fully briefed and pending a decision by the district court or are currently being briefed by the parties.

- On June 4, 2018, Defendants filed a Motion for Protective Order seeking relief from Plaintiffs' Requests for Admission (RFAs) and Rule 30(b)(6) depositions. ECF No. 217. On June 27, 2018, the district court ordered that this motion should be held in abeyance "until the Court decides Plaintiffs' motions to seek judicial notice of the documents referenced in Requests for Admissions and to give the parties the opportunity to reach agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions." ECF No. 249. Plaintiffs no longer intend to pursue Rule 30(b)(6) depositions or RFAs.
- On August 24, 2018, Plaintiffs filed a Second Motion *in Limine* seeking judicial notice of 609 documents, together with a supporting declaration. ECF Nos. 340, 341. Defendants filed a response on September 28, 2018. ECF No. 357. Plaintiffs filed a reply on October 12, 2018. ECF No. 366.
- On October 15, 2018, Defendants filed a Motion *in Limine* to exclude the testimony of six of Plaintiffs' scientific experts. ECF No. 371. Plaintiffs filed an opposition and a declaration in support on November 2, 2018. ECF Nos. 409, 410. On November 15, 2018, Defendants filed a motion seeking an extension of time until November 23, 2018 to respond. ECF No. 434.

- On October 15, 2018, Defendants filed a Motion *in Limine* to strike the rebuttal report and exclude the testimony of Dr. Akilah Jefferson. ECF No. 372. Plaintiffs filed an opposition and a supporting declaration on November 2, 2018. ECF Nos. 407, 408. Defendants filed a reply on November 16, 2018. ECF No. 436.
- On October 15, 2018, Defendants filed a Request for Judicial Notice of 446 Congressional hearing reports. ECF No. 375. On November 2, 2018, Plaintiffs filed a response indicating they do not oppose the motion. ECF No. 406. Defendants do not intend to file a reply.
- On October 15, 2018, Defendants filed a Motion *in Limine* to exclude the expert testimony of Plaintiffs' expert Professor Catherine Smith. ECF No. 379. Plaintiffs filed an opposition and a supporting declaration on November 6, 2018. ECF Nos. 421, 422. Defendants filed their reply on November 20, 2018. ECF No. 442.
- On October 15, 2018, Plaintiffs filed a Third Motion *in Limine* seeking judicial notice of 452 documents. ECF No. 380. Defendants filed a response on November 13, 2018. ECF No. 431. But for the stay, Plaintiffs' reply would have been due November 27, 2018.
- On October 17, 2018, Plaintiffs filed a Motion to Compel Responses to Interrogatories. ECF No. 388. On November 15, 2018, Defendants filed an opposition. ECF No. 433. Unless otherwise directed by the court, no reply is permitted under the Local Rules. LR 26-3(c).
- On October 18, 2018, Defendants filed a Motion to Strike Plaintiffs' proposed pretrial order. ECF No. 395. Plaintiffs filed a response on November 2, 2018. ECF No. 409. Defendants filed a reply on November 16, 2018. ECF No. 438.
- On October 19, 2018, Defendants filed a Motion to Strike Plaintiffs' Trial Exhibit List or, in the alternative, Objections to Plaintiffs' Trial Exhibit List. ECF No. 397. Plaintiffs filed an opposition on November 2, 2018. ECF No. 411. Defendants filed a reply on November 16, 2018. ECF No. 435.

- On November 2, 2018, Plaintiffs filed a Motion for Reconsideration of the district court's Opinion and Order on Plaintiffs' First Motion in Limine seeking judicial notice of 364 documents. ECF No. 415. Defendants filed a response on November 16, 2018. ECF No. 437. But for the stay, Plaintiffs' reply would have been due November 30, 2018.
- On November 5, 2018, Defendants filed a Motion to Reconsider the district court's denial of Defendants' previous requests to certify for Interlocutory Review its orders on Defendants' motions to dismiss and for judgment on the pleadings and summary judgment. ECF No. 418. Plaintiffs filed an opposition on November 9, 2018. ECF No. 428. Defendants filed a reply on November 14, 2018. ECF No. 432.
- On November 5, 2018, Defendants filed a Motion to Stay this litigation in the district court pending the district court's resolution of Defendants' Motion to Reconsider its denial of previous requests to certify its orders for interlocutory review or resolution of Defendants' Petition for Mandamus filed in the Ninth Circuit. ECF No. 419. Plaintiffs filed an opposition on November 9, 2018. ECF No. 429. But for the stay, Defendants' reply would have been due November 23.
- On November 20, 2018, Defendants filed a Motion to Exclude the testimony of seven witnesses identified by Plaintiffs in their Witness List filed on October 15, 2018, ECF No. 382, in accordance with the schedule set by the district court. ECF No. 440. But for the stay, Plaintiffs' response would have been due December 4, 2018.

B. Anticipated motions

Plaintiffs intend to file a motion for judicial notice of facts within approximately 20 authenticated government documents listed on Plaintiffs' Exhibit List.

III. Other relevant pretrial matters

On October 15, 2018, pursuant to the district court's order (ECF No. 343), the parties filed their witness lists (ECF Nos. 373, 382), trial memoranda (ECF Nos. 378,

384), and motions *in limine* (ECF Nos. 371, 372, 379, 380). On October 15, 2018, Plaintiffs filed a proposed pretrial order (ECF No. 383), which Defendants moved to strike on October 18, 2018 (ECF No. 395). On October 19, 2018, the parties filed their trial exhibit lists (ECF Nos. 396, 402) and their respective objections and motion to strike exhibits. (ECF Nos. 397, 400).

If and when the stay (ECF No. 444) is lifted, the parties will meet and confer with each other regarding objections to exhibit lists. ECF Nos. 400, 401, 423, 424. In addition, the parties have continued to narrow the exhibits intended to be presented at trial.

In response to the temporary stay ordered by the Supreme Court, the District Court vacated the pretrial conference set for October 23, 2018 and the trial date set for October 29, 2018. ECF Nos. 403, 404. On November 21, 2018, and pursuant to its Order certifying this case for interlocutory appeal, ECF No. 444, the District Court stayed consideration of pending motions in this case. ECF No. 445. Further, the district court denied Defendants' Motion for Reconsideration (ECF No. 418) and Motion for Stay (ECF No. 419) as moot. *Id.*

Dated: November 23, 2018.

/s/ Philip L. Gregory
PHILIP L. GREGORY (CSB No. 95217)
pgregory@gregorylawgroup.com
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

JULIA A. OLSON
Wild Earth Advocates

ANDREA K. RODGERS
Law Offices of Andrea K. Rodgers
Attorneys for Real Parties in Interest

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 23, 2018.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted this 23rd day of November, 2018.

/s/ Philip L. Gregory
PHILIP L. GREGORY