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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

FEDERAL DEFENDANTS' MOTION TO CLARIFY APRIL 10, 2017 MINUTE ORDER

Expedited Hearing Requested

INTRODUCTION

On April 7, 2017, the Court held a status conference where the parties discussed the United States' pending motion to certify certain issues in the case for interlocutory appeal as well as the ongoing management of fact and expert discovery. Regarding the latter topic, the Court

emphasized that expert testimony will be the core of this case and that extensive fact discovery is inappropriate and perhaps of little value. *See* April 7 Hearing Transcript at 13-14, 19-21, 25. It therefore instructed the United States to focus on developing the expert side of its case. And when the United States explained that its fast-approaching deadlines to respond to Plaintiffs' massive discovery requests were precluding it from investing more resources in the identification and development of experts, *id* at 28, the Court responded by directing the parties to meet and confer with the goal of narrowing the pending discovery requests, and by tolling the corresponding discovery deadlines in the interim. Specifically, the Court recognized that it would be inefficient to propound answers to demands for production that might later change by agreement of the parties. The Court therefore stated that it would "add time to the deadlines" for pending discovery requests, so that the United States would not "lose any time waiting for a meet and confer." *Id.* at 28-29.

The Court memorialized this ruling in its April 10 minute order (ECF 137), where it stated: "The deadline for production of documents is extended until the parties meet and confer regarding discovery." As worded, however, the minute order appears to toll only those deadlines pertaining to "production of documents." Clarification of the order is necessary because the United States did not understand the parties' discussion during the April 7 status conference to be limited to document requests, and the rationales for tolling the production of documents apply with equal force to the pending Requests for Admission ("RFAs").

The United States has conferred with counsel for Plaintiffs, who indicated that Plaintiffs do not share the United States' understanding and do not believe the Court intended to toll the deadline for the United States to respond to the RFAs. The United States therefore respectfully

moves the Court for an order clarifying that the stay of discovery (pending the meet and confer scheduled for May 4) applies to the RFAs propounded on the United States.

ARGUMENT

At the April 7 status conference, the Court urged the United States to focus on the retention of experts and development of expert testimony. April 7 Tr. at 25 ("I would suggest you prioritize your designation of experts and make that a matter of first priority.") Given the massive breadth of this litigation, that is a large and time-consuming chore. Simultaneously preparing responses (and/or objections) to the RFAs distracts from this task, and in no small way. As the Court is well aware, the United States also has pending motions to certify the case for interlocutory appeal (ECF 120) ("Motion to Certify") and to stay discovery pending such an appeal (ECF 121). The United States has sought a prompt ruling on those motions, and this Court has indicated it will rule in an expedited manner. April 7 Tr. at 6. Depending on that ruling, if the case should proceed, the United States would presume the Court's focus to remain the same—on retaining experts—and not on developing responses to RFAs that implicate policy determinations of a sensitive and complex nature requiring review at high levels of the Executive Branch and in many executive agencies with senior officials. Developing responses to the RFAs will also require consultation with expert witnesses—something the United States has not yet had sufficient opportunity to do. For that reason, the United States will discuss with Plaintiffs' counsel, at the May 4 meet and confer, whether responses to the Requests for Admissions might best be postponed for a longer period of time, until the United States' expert witness team has been assembled and given the opportunity to assist in the preparation of responses.

In any event, because the RFAs—just like the Requests for Production— interfere with what the Court identified on April 7 as the core of the case, the United States understood the

Court's April 7 instructions as applying to both. Because the Court's April 10 Minute Order appeared to be worded more narrowly, however, counsel for the United States contacted counsel for Plaintiffs to see if they shared the United States' understanding of the scope of the April 7 discussion. By letter dated April 13, counsel for the United States expressed its understanding that, on April 7, "[t]he Court … tolled Defendants' existing deadlines to respond to fact discovery pending the meet and confer process." Exhibit A at 2. To ensure there was no misunderstanding, counsel for the United States followed up with an email on April 20 asking whether Plaintiffs' counsel agreed with our understanding of the April 7 conference. It was only after receiving that second communication that Plaintiffs' counsel indicated they did not share this understanding, and instead demanded that the RFAs be answered in advance of the parties' May 4 meet and confer.[1] Exhibit B (April 20 email exchange between Sean Duffy and Julia Olson).

The United States respectfully requests an order clarifying that this Court intended to toll deadlines for all pending discovery requests—including the RFAs. Such an order would be consistent with the Court's reasoning during the April 7 status conference because the RFAs will be one of the subjects discussed at the May 4 meet and confer, and the contours of those discovery requests may change as a result. Such an order would also be consistent with the Court's reasoning because the United States, if forced to respond to the RFAs by May 8, would need to continue to divert resources toward that task and away from its identification and development of experts.

[1] Even assuming this Court had not intended to toll the deadline for RFAs in its April 10 Minute Order, the United States' deadline to respond to those RFAs would be May 8, 2017—not May 4, as Plaintiffs now suggest. By order entered on March 8 (ECF 123) the Court granted the United States sixty days, from the date of the order, "to submit responses to Plaintiffs' requests for admissions and documents," establishing May 8 as the new deadline.

It is also significant that there are two fully-briefed, pending motions on which the parties critically need immediate rulings, *i.e.*, the Motion to Certify issues for interlocutory appeal (ECF 122) and the Motion to Stay proceedings pending any such appeal (ECF 121). The parties' inability to reach consensus over the contours of discovery in this case—including their disagreement over what the Court intended at the April 7 conference—highlights the need for a prompt resolution of these motions. The United States therefore requests again that the Court expedite its resolution of the Motion to Certify and that it concurrently issue a ruling on the pending Motion to Stay.

For all of the above reasons, the United States respectfully requests that the Court clarify that it intended that the United States' deadline to respond to the pending RFAs be tolled pending the parties' May 4 meet and confer in Oregon.[2]

Dated: April 24, 2017

Respectfully submitted,

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

/s/ Sean C. Duffy
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GUILLERMO A. MONTERO
SEAN C. DUFFY (NY Bar No. 4103131)
MARISSA PIROPATO (MA Bar No. 651630)
U.S. Department of Justice
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[2] Alternatively, the United States requests that its deadline to respond to the pending RFAs be extended by three weeks, until May 31, 2017, to account for the time lost as a result of the parties' conflicting interpretations of the April 10 minute order and this Court's instructions at the April 7 status conference. By detrimentally relying on its good faith interpretation of that minute order and this Court's instructions, the United States has lost valuable time for formulating responses to the RFAs—time that was diverted to the identification of experts—and would need some additional time to get back on track.

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Attorneys for Federal Defendants

Certificate of Service

I hereby certify that April 24, 2017, 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 Federal Defendants

EXHIBIT A

U.S. Department of Justice

April 13, 2017

By Email

Re: *Juliana v. United States of America*; Case No. 15-cv-01517-TC, Meet and Confer on Outstanding Discovery

Dear Counsel:

I write to discuss the parties' forthcoming meet and confer and in response to your letter of April 11, 2017. We agree that the parties should try to resolve all discovery disputes amicably without the need for court intervention to the extent possible. We are amenable to an initial telephone conference to discuss preliminary matters, scheduling and the most fruitful topics of discussion for an in-person meet and confer. We propose that we have such a call either April 14, 2017 at 11 a.m. or early next week depending on the parties' respective availability.

We propose to meet and confer in Portland, Oregon during the week of May 1, 2017. We can secure space in the United States Attorney's Office or meet in the offices of counsel for Intervenor Defendants. Although we are willing to meet in Eugene, we have a strong preference for Portland because it saves us significant travel time and the significant additional expense of flying to Eugene. We also have agency clients in Portland and we will need to meet with them as part of this trip.

We are not available the week of April 24 in Washington, D.C. because one of the trial attorneys will be on work-related travel in San Francisco that entire week, including meeting with experts for this case and attending a hearing in another civil matter. We can discuss the possibility of meeting that week in San Francisco if necessary, but we think a meeting the following week in Portland would be far preferable.

For the meet and confer to be effective, we need the opportunity to discuss the proposed topics of the conference with each of our clients beforehand. Twelve agencies or executive components are sued in this matter; they have different concerns regarding discovery, and they are subject to different requests propounded by Plaintiffs. We must, therefore, consult with them individually. We have shared your April 11, 2017 letter with each of our clients and it will be among the things we discuss with them before our in-person conference. But it bears emphasis that if Plaintiffs send us a letter after business hours, we cannot plausibly have a meaningful conference with Plaintiffs approximately 24 hours later. Our clients have mission-critical work to perform and we often cannot get a response from them on a discovery-related inquiry immediately. Moreover, many of Plaintiffs' requests implicate several components within an agency, further complicating and delaying any response we may give. By way of example, we have discussions planned this week and likely next week concerning Plaintiffs' March 31 Requests for Production.

NARA RECORDS

While we have not yet opposed Plaintiffs' Requests for Production concerning documents in Presidential libraries and at NARA, there are nonetheless significant burdens associated with their production. We have contacted EPA to determine whether your offer to visit the NARA library will facilitate the production of the 388 boxes of documents previously referenced in the Joint Status Report. For example, there may be space limits on outside entities visiting NARA facilities that are not placed on federal employees that may undercut the expected time-saving of your proposal. We will be prepared to discuss this further on the week of May 1.

DEPOSITIONS

We are disappointed to learn that Plaintiffs are not reconsidering their demand to depose Cabinet-level Secretaries and other high level government officials. The case law is quite clear that such depositions are extraordinary and rarely appropriate. Although we can discuss this further at the in-person meet and confer, we note the subject Secretaries have been in office for mere months and we are skeptical that they possess unique personal knowledge as to the government's historic awareness of climate change so as to warrant a deposition. Plaintiffs have also indicated they intend to take 30(b)(6) depositions on each agency or executive component named in the Complaint. We believe that this should enable Plaintiffs to probe adequately the official position of the respective agency or executive component without unnecessarily burdening an agency head.

We will continue to work with you on 30(b)(6) depositions, and we appreciate your identification of general topics for those depositions in your April 11 Letter. As previously noted, however, we cannot meaningfully discuss scheduling those depositions until we have the actual notices in hand to share with our clients. For some agencies, we will need to have multiple designees but this will largely be dictated by the noticed topics. Needless to say, we cannot meaningfully discuss dates until we know which witnesses will be designated. Finally, we hope Plaintiffs reconsider noticing a 30(b)(6) designee from the Executive Office of the President. As discussed in Motion seeking certification for interlocutory appeal, a deposition on the Executive Office of the President is improper. ECF No. 139 at 17 n.7.

THE STATUS OF ONGOING DISCOVERY

The Court has indicated that the case will focus on expert testimony and has instructed Federal Defendants to focus on obtaining experts. To that end, and as reflected in the April 10 Minute Order, the Court directed the parties to meet and confer in an attempt to narrow the scope of Plaintiffs' discovery requests. The Court also tolled Defendants' existing deadlines to respond to fact discovery pending the meet and confer process.

As discussed above, we propose that this conference occur the first week in May. We believe, however, to fully carry out the Court's direction to narrow the scope of fact discovery—and for the United States to focus on expert discovery in the near term—the deadline to respond to all outstanding discovery should be stayed until the parties work together to narrow the scope

of those requests. Specifically, we suggest that the parties (1) meet and confer in person; (2) narrow all outstanding fact discovery, including Requests for Production and Admission; and (3) prepare a schedule or proposal that sets forth responsive deadlines for the outstanding Requests for Production and Admission, as narrowed. In other words, the due date for outstanding document and other discovery requests would be stayed until the completion of the meet and conferral process and a revised schedule is proposed to the Court. Please let me know if you are amenable to this proposal, which would allow the parties to focus their efforts in the manner articulated by the Court during the April 7 Status Conference.

We look forward to discussing these matters with you further at our in-person conference. In the interim, please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ *Marissa Piropato*
Marissa Piropato
Senior Trial Attorney

cc: All counsel of record

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