

1 XAVIER BECERRA
Attorney General of California
2 MICHAEL P. CAYABAN
Supervising Deputy Attorney General
3 M. ELAINE MECKENSTOCK, SBN 268861
PHILLIP M. HOOS, SBN 288019
4 MICHAEL S. DORSI, State Bar No. 281865
Deputy Attorneys General
5 455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
6 Telephone: (415) 510-3802
Fax: (415) 703-5480
7 E-mail: Michael.Dorsi@doj.ca.gov
*Attorneys for State Defendants*¹

DELFINO, MADDEN, O'MALLEY, COYLE &
KOEHLER LLP
MONICA HANS FOLSOM, SBN 227379
KRISTIN IVANCO, SBN. 294993
500 Capitol Mall, Suite 1550
Sacramento, CA 95814
Telephone: (916) 661-5700
Fax: (916) 661-5701
E-mail: mfolson@delfinomadden.com
kivanco@delfinomadden.com
*Attorneys for WCI, Inc. Defendants*²

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 THE UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 THE STATE OF CALIFORNIA; GAVIN C.
NEWSOM, in his official capacity as
16 Governor of the State of California; THE
CALIFORNIA AIR RESOURCES BOARD;
17 MARY D. NICHOLS, in her official capacity
as Chair of the California Air Resources Board
and as Vice Chair and a board member of the
18 Western Climate Initiative, Inc.; WESTERN
CLIMATE INITIATIVE, INC.; JARED
19 BLUMENFELD, in his official capacity as
Secretary for Environmental Protection and as
20 a board member of the Western Climate
Initiative, Inc.; KIP LIPPER, in his official
21 capacity as a board member of the Western
Climate Initiative, Inc., and RICHARD
22 BLOOM, in his official capacity as a board
member of the Western Climate Initiative, Inc.,
23 Defendants.

2:19-cv-02142-WBS-EFB

**EX PARTE APPLICATION FOR
SCHEDULING ORDER RE: CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

Courtroom: 5
Judge: Honorable William Shubb
Trial Date: Not Set
Action Filed: 10/23/2019

24
25 ¹ The State Defendants are State of California; Gavin C. Newsom, in his official capacity
as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in
26 her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his
official capacity as Secretary for Environmental Protection.

27 ² The WCI, Inc. Defendants are the Western Climate Initiative, Inc. ("WCI, Inc."), Mary
D. Nichols, in her official capacity as Vice Chair and a board member of WCI, Inc., and Jared
28 Blumenfeld, Kip Lipper, and Richard Bloom, in their official capacities as board members of
WCI, Inc.

NOTICE AND EX PARTE APPLICATION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that State Defendants and WCI, Inc. Defendants (collectively “Defendants”) apply ex parte for an order setting a briefing schedule on cross-motions for summary judgment, including re-setting some dates for Plaintiff’s Motion for Summary Judgment (ECF Doc. 12).

On January 29, 2020, Defendants provided notice to Plaintiff that the State Defendants would cross-move for summary judgment concurrently with their opposition to Plaintiff’s Motion for Summary Judgment, as allowed by Eastern District of California Local Rule 230(e). Local Rule 230(e) authorizes “the Court [to] continue the hearing on the original and all related motions so as to give the Parties reasonable opportunity to serve and file oppositions and replies to all pending motions,” but does not establish a procedure for rescheduling.

Under the current schedule, oppositions to Plaintiff’s summary judgment motion (and Defendants’ cross-motions) are due February 10, 2020, and the hearing is set for February 24, 2020. ECF Doc. 19. This two-week period is insufficient to accommodate a reply on the cross-motion(s), triggering a need to, at a minimum, move the hearing date.

The Parties conferred but failed to reach an agreement on the schedule. Defendants seek this scheduling order on an ex parte basis because a noticed motion would not be heard until after the scheduling difficulties come to fruition. Defendants ask that the Court set the following dates:

- February 10, 2020: Defendants to file opposition(s) and cross-motion(s) (unchanged; scheduled per ECF Doc. 19 and E.D. Cal. L.R. 230(e))
- February 17, 2020: Amici supporting Defendants to file briefs
- March 16, 2020: Plaintiff to file its opposition to cross-motion and reply
- April 6, 2020: Defendants to file their reply
- April 20, 2020: Hearing

Defendants seek this order on the grounds that: 1) the present schedule does not accommodate a reply on cross-motion(s); 2) several amici intend to file in support of Defendants and believe that having an opportunity to review Defendants’ filing before completing their own,

1 as provided by the Federal Rules of Appellate Procedure, would allow their briefs to best aid the
2 Court; 3) State Defendants will need three weeks to prepare their reply on their cross-motion(s) in
3 light of the novelty and complexity of some of the issues raised, workload constraints for counsel
4 and clients, internal and client review procedures, and to coordinate with several other groups of
5 Defendants to minimize duplication in briefing; 4) setting a schedule now will allow the Parties to
6 plan and prepare briefing; 5) Plaintiff may need additional time, beyond that provided by the
7 Local Rules, to prepare its opposition and reply, in light of the number of anticipated briefs from
8 Defendants, Defendant-Intervenors, and amici; and, 6) the proposed schedule will afford the
9 Court an additional week to review the filed materials.

10 This Application is supported by the attached Memorandum of Points and Authorities, the
11 Declaration of Michael S. Dorsi and supporting exhibits, the case file, and any other matter this
12 Court may consider. The named Defendants are jointly moving parties on this Application. The
13 Intervenors do not oppose this Application. Declaration of Michael Dorsi, ¶5. The potential
14 amici support it. *See id.* at ¶6. Only Plaintiff indicated it opposes the proposed schedule. *Id.* at
15 ¶¶4–5, Exs. 1–2.

16
17 Dated: February 3, 2020

Respectfully submitted,

18 XAVIER BECERRA
19 Attorney General of California
20 MICHAEL P. CAYABAN
Supervising Deputy Attorney General

21 /s/ Michael S. Dorsi
22 MICHAEL S. DORSI
23 Deputy Attorney General
Attorneys for State Defendants

24 DELFINO, MADDEN, O'MALLEY, COYLE &
25 KOEWLER LLP

26 /s/ Monica Hans Folsom (as authorized on
February 3, 2020)
27 MONICA HANS FOLSOM
Attorneys for WCI, Inc. Defendants

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The Court will receive the State Defendants’ Cross-Motion for Summary Judgment on
4 February 10, 2020. Absent a revised briefing schedule, Plaintiff’s reply in support of its own
5 Motion for Summary Judgment would be due on February 17, and the hearing would be on
6 February 24. This schedule does not accommodate a reply for Defendants’ on their cross-motion
7 before the February 24 hearing. In addition, the deadline for amici is unclear, and there are good
8 reasons both to make that deadline clear and to provide amici an opportunity to review
9 Defendants’ papers before filing their own. Finally, there is no reason that briefing on complex
10 and potentially consequential issues should be rushed, especially since the linkage between
11 California and Quebec’s programs has been operating for more than six years now and Plaintiff
12 has yet to identify any specific ill-effects from those operations. The Court should hold a single
13 hearing on the cross-motions for partial summary judgment and should set a briefing schedule
14 that allows all participants a reasonable time to present their case. This approach serves the
15 interests of the parties as well as the Court.

16 This Court’s Local Rule 230(e) permits responding parties to cross-move with their
17 opposition papers, and authorizes the Court to adjust the schedule in response. Defendants
18 request that this Court exercise that authority and set the following briefing schedule to resolve
19 the pending Motion for Summary Judgment and Defendants’ anticipated cross-motion(s):

- 20 • February 10, 2020: Defendants to file opposition(s) and cross-motion(s) (unchanged)
- 21 • February 17, 2020: Amici supporting Defendants to file briefs
- 22 • March 16, 2020: Plaintiff to file its opposition to cross-motion and reply
- 23 • April 6, 2020: Defendants to file their reply

24 **BACKGROUND**

25 **A. Plaintiff’s Claims Raise Complex, and in Some Instances Novel, Issues that**
26 **Have Potentially Significant Implications**

27 In this case, plaintiff the United States of America (“Plaintiff”) challenges the California
28 Air Resources Board’s decision to link its cap-and-trade program to a similar program adopted

1 independently by the Canadian province of Quebec.³ The linkage allows businesses regulated
2 under California’s program to use compliance instruments issued by either California or Quebec
3 to satisfy their regulatory obligations. It also allows for coordinated auctions of compliance
4 instruments. The linkage expands the compliance instrument markets, providing increased cost-
5 reduction opportunities for regulated businesses. Plaintiff nonetheless alleges that the linkage
6 between the two programs is unconstitutional. And before any defendant had filed a responsive
7 pleading, Plaintiff moved for summary judgment on two of its four causes of action—claims that
8 the linkage agreement violates the Treaty Clause or the Compact Clause, respectively, of the
9 United States Constitution.

10 Plaintiff’s claim under the Treaty Clause is novel. Plaintiff has not cited, and Defendants
11 have not found, a single decision invalidating a state agreement as an unconstitutional Treaty or
12 even establishing a legal test to decide the question. Plaintiff’s second claim, alleging a violation
13 of the Compact Clause, is less novel but is nonetheless far from commonplace. Indeed, the
14 Supreme Court has never invalidated a state agreement as an unconstitutional Compact and
15 remarked in 1978 that it had not had occasion to address the legal test for such a claim for more
16 than seventy-five years. *See U. S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 471
17 (1978).

18 States frequently enter into agreements and understandings with other States and with
19 foreign governments. State and local governments have entered into thousands of agreements
20 with foreign jurisdictions, including hundreds between states and Canadian provinces. These
21 agreements concern issues ranging from energy and pollution to tourism and transportation.
22 Given the infrequency with which these agreements are challenged and the resulting dearth of
23 case law, this Court’s decision on the Treaty and Compact Clause claims could have implications
24 well beyond the linkage of California’s cap-and-trade program with that of Quebec.

25
26
27
28 ³ Defendants offer this limited background to provide context for Defendants’ grounds for
a scheduling order; extensive background can be found in the Motion to Dismiss (ECF Doc. 25).

1 **B. Defendants Sought Reasonable Scheduling Accommodations and Gave**
2 **Notice of Intent to Cross-Move for Summary Judgment**

3 The United States filed its Complaint on October 23, 2019, and used its amendment of right
4 on November 19, 2019. ECF Docs. 1, 7. The Complaint names multiple Defendants, including
5 the State of California, California Air Resources Board (“CARB”), Western Climate Initiative,
6 Inc. (“WCI, Inc.”), several California officials in their official capacities, and four members of the
7 WCI, Inc. Board. On December 11, 2019, Plaintiff moved for summary judgment on its Treaty
8 Clause and Compact Clause causes of action. ECF Doc. 12. On December 16, 2019, at
9 Defendants’ request, the Court extended the time for Defendants to respond to that motion until
10 February 10, 2020. ECF Doc. 19.

11 At the time Defendants sought that extension of time to respond to Plaintiff’s Summary
12 Judgment Motion, they had not had an opportunity to fully review Plaintiff’s Amended
13 Complaint or Motion for Summary Judgment and had not, therefore, decided whether or not to
14 cross move for summary judgment. Defendants conveyed this to both Plaintiff and the Court at
15 that time. *See* Declaration of Michael S. Dorsi (“Dorsi Decl.”), ¶2.

16 In an order issued on January 15, 2020, the Court granted Motions to Intervene by Natural
17 Resources Defense Council, Environmental Defense Fund, and International Emissions Trading
18 Association (collectively “Intervenors”). ECF Doc. 35.

19 On January 29, 2020, State Defendants notified Plaintiff that they intend to cross-move for
20 summary judgment and would need additional time to prepare their reply brief on that motion.
21 Dorsi Decl., ¶3, Ex. 1. Defendants also notified Plaintiff that Defendants expect multiple
22 prospective amici curiae to seek leave to file briefs in support of Defendants and that these
23 prospective amici curiae would like to have a week, as provided by the Federal Rules of
24 Appellate Procedure, to review Defendants’ filings before they must file their own briefs. Given
25 that Plaintiff will likely be responding to several briefs (from Defendants and Defendant-
26 Intervenors, as well as from potential amici), Defendants proposed a schedule allowing additional
27 time for Plaintiff to prepare its opposition and reply. *Id.* The next day, Plaintiff rejected
28 modification to the schedule. *Id.* The following Monday, February 4, 2020, Plaintiff proposed an

1 alternative accommodation, adding only two weeks to the schedule. *Id.* at ¶¶4, Ex. 2. Defendants
2 responded that two weeks would not suffice to address the concerns that justified the exemption.
3 *Id.* Plaintiff then replied that it stands by its initial rejection, opposing any rescheduling,
4 maintaining the February 24, 2020 hearing date. *Id.*

5 LEGAL STANDARD

6 Under Federal Rule of Civil Procedure 6(b)(1)(a), courts “may, for good cause, extend the
7 time” for a party to act, “if a request is made, before the original time or its extension expires.”
8 “‘Good cause’ is a non-rigorous standard that has been construed broadly across procedural and
9 statutory contexts.” *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010).
10 Accordingly, “requests for extensions of time made before the applicable deadline has passed
11 should ‘normally . . . be granted in the absence of bad faith on the part of the party seeking relief
12 or prejudice to the adverse party.’” *Id.* (quoting Charles Alan Wright & Arthur R. Miller, Federal
13 Practice and Procedure § 1165 (3d ed. 2004)). Further, when considering such requests, “courts
14 should be mindful that the rules are to be construed to achieve the just determination of every
15 action.” *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983) (citing Fed. R. Civ. P. 1); *cf. Cool*
16 *Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982) (noting the importance of “a full and fair
17 opportunity to ventilate the issues involved in [a] motion” for summary judgment).

18 Eastern District of California Local Rule 230(e) instructs parties that “counter-motions” and
19 other related motions are due on the date of their opposition, and authorizes judges of this Court,
20 when presented with such motions, to “continue the hearing on the original and all related
21 motions so as to give all parties reasonable opportunity to serve and file oppositions and replies to
22 all pending motions.” Local Rule 230(e) does not set limits on when a party may seek such
23 rescheduling, and suggests that the Court may do so sua sponte.

24 ARGUMENT

25 I. DEFENDANTS’ REQUESTED SCHEDULE PROVIDES ALL PARTICIPANTS WITH 26 SUFFICIENT TIME TO PREPARE THEIR BRIEFS TO BEST AID THE COURT AND PREJUDICES NO ONE

27 Defendants propose the following schedule:

- 28 • February 10, 2020: Defendants to file opposition(s) and cross-motion(s) (unchanged)

- 1 • February 17, 2020: Amici supporting Defendants to file briefs
- 2 • March 16, 2020: Plaintiff to file its opposition to cross-motion and reply
- 3 • April 6, 2020: Defendants to file their reply

4 The first date, Defendants’ response date, is unchanged from this Court’s Order. ECF Doc.
5 19. The cross-motion is due on the same day under Local Rule 230(e).

6 The amici deadline is modeled after Federal Rule of Appellate Procedure 29(a)(6). Because
7 Plaintiff’s motion raises novel constitutional claims concerning implicating literally thousands of
8 agreements, a number of amici curiae intend to file briefs. Although the Federal Rules of Civil
9 Procedure do not address amicus briefs, “[t]he Ninth Circuit has held that [a] district court has
10 broad discretion to appoint amici curiae” *Earth Island Inst. v. Nash*, No. 1:19-cv-01420-
11 DAD-SAB, 2019 WL 6790682, at *1 (E.D. Cal. Dec. 12, 2019) (citing *Hoptowit v. Ray*, 682 F.2d
12 1237, 1260 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472
13 (1995)). The Court should allow one week for amici to review and comment on Defendants’
14 brief. “The 7-day stagger [in Rule 29] was adopted because it is long enough to permit an amicus
15 to review the completed brief of the party being supported and avoid repetitious argument.” Fed.
16 R. App. P. 29(e) advisory committee’s note to 1998 amendment (former subdivision (e) is now
17 subdivision (a)(6)).⁴ And this request, filed only five days after Plaintiff declined to stipulate,
18 comports with Local Rule 144(d), which asks parties to seek extensions of time “as soon as the
19 need for an extension becomes apparent.” Defendants expect several groups of amici to seek
20 leave to file, including other States and experts in foreign relations law, and believe these amici’s
21 briefs will aid the Court.

22 Defendants propose allowing Plaintiff five weeks to respond to Defendants’ Cross-
23 Motion—four weeks to respond to amici—to fully ventilate issues raised in multiple briefs.
24 Defendants propose this window to the Court because they believe it is reasonable, proposed it as

25 ⁴While Local Rule 230(e) contemplates the Court continuing hearings after receipt of a
26 cross-motion, it is not required to wait for filing to issue a scheduling order. Waiting until
27 Defendants Cross-Motion is on file will only create scheduling uncertainty for the Parties and
28 their attorneys. A schedule is especially important for amici because there is no rule informing
them of their filing deadline. *See Earth Island*, 2019 WL 6790682, at *1 (applying Federal Rule
of Appellate Procedure 29 in federal district court and concluding that amicus briefs filed within a
week after opposition brief, and one week before hearing, was timely).

1 such to Plaintiff. Plaintiff’s counter-proposal fails to address the concerns that merit extended
2 time—notably time for amici to review Defendants’ briefs to avoid repetition and sufficient time
3 for Defendants to prepare their reply. If Plaintiff requires less time for its own brief, Defendants
4 do not object to shortening Plaintiff’s window but would note that Defendants’ lead counsel is
5 unavailable for a hearing on April 6. *See Dorsi Decl.*, ¶7.

6 State Defendants ask for three weeks for their reply in support of the Cross-Motion.
7 Because this is a complex and consequential case, State Defendants’ attorneys must work
8 collaboratively, with other Defendants and Defendant-Intervenors, to prepare a brief and require
9 time for internal and client-agency review. For these reasons, counsel seek three weeks to
10 prepare their reply brief.

11 Last, in light of the number of briefs and the novelty and potential consequences of some of
12 the issues, Defendants propose that this Court set the hearing two weeks after filing of the last
13 brief. This will allow the Court two weeks with the complete briefing, rather than the one week
14 usually reserved under Local Rule 230(d).

15
16 **II. DEFENDANTS’ MOTION IS MADE IN GOOD FAITH AND PLAINTIFF WILL NOT BE PREJUDICED**

17 This motion easily satisfies the good cause standard described above, and there is no
18 colorable argument that Defendants are acting in bad faith. Defendants are not seeking to extend
19 the February 10 deadline for their opposition or cross-motion. Local Rule 230(e) authorizes
20 scheduling adjustment in response to cross-motions. Defendants only ask that the “rules ... be
21 construed to achieve the just determination of” this action. *See Rodgers*, 722 F.2d at 459 (citing
22 Fed. R. Civ. P. 1).

23 Moreover, there is no need for the rush Plaintiff seeks. Plaintiff has had many years to
24 develop and bring these challenges. Plaintiff alleges that it was 2013 when Quebec and
25 California “entered into the predecessor of the Agreement” Plaintiff challenges. Amended
26 Compl. ¶ 57. Earlier that same year CARB adopted amendments to its cap-and-trade regulation
27 to link with Quebec’s program. *See Cal. Code Regs.*, tit. 17, § 95943(a)(1). That linkage became
28 operational on January 1, 2014. *Id.* Thus, the linkage to which Plaintiff objects had been

1 operating for more than five years when Plaintiff filed its complaint. Plaintiff's complaint
2 contains no factual allegations describing any ill effects from those operations. Notably, when
3 Defendants highlighted the lack of prejudice to Plaintiff in the previous scheduling motions (ECF
4 Docs. 15, 17), Plaintiff's response (ECF Doc. 18) failed to mention prejudice at all. And Plaintiff
5 failed to identify any specific harmful effects—either immediate or long term—that could support
6 a showing of prejudice in response to State Defendants' attempt to meet and confer over its
7 proposed cross-motion schedule. *See Dorsi Decl., Exs. 1–2.* No prejudice will flow to Plaintiff
8 from allowing full and careful briefing of cross-motion(s) for summary judgment.

9 **CONCLUSION**

10 Defendants' decision to cross-move for partial summary judgment will cause an adjustment
11 to the schedule. The Court should address that adjustment now, ensuring predictable and
12 reasonable deadlines that accommodate the interests of multiple participants and the Court.
13 Defendants' proposed schedule achieves those ends, and Defendants respectfully request that the
14 Court adopt it.

15
16 Dated: February 3, 2020

Respectfully submitted,

17 XAVIER BECERRA
18 Attorney General of California
19 MICHAEL P. CAYABAN
Supervising Deputy Attorney General

20 /s/ Michael S. Dorsi
21 MICHAEL S. DORSI
22 Deputy Attorney General
Attorneys for State Defendants

23 DELFINO, MADDEN, O'MALLEY, COYLE &
24 KOEWLER LLP

25 /s/ Monica Hans Folsom (as authorized on
February 3, 2020)
26 MONICA HANS FOLSOM
Attorneys for WCI, Inc. Defendants

27 OK2019105727

1 XAVIER BECERRA
Attorney General of California
2 MICHAEL P. CAYABAN
Supervising Deputy Attorney General
3 M. ELAINE MECKENSTOCK, SBN 268861
PHILLIP M. HOOS, SBN 288019
4 MICHAEL S. DORSI, State Bar No. 281865
Deputy Attorneys General
5 455 Golden Gate Avenue, Suite 11000
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6 Telephone: (415) 510-3802
Fax: (415) 703-5480
7 E-mail: Michael.Dorsi@doj.ca.gov
*Attorneys for State Defendants*¹

DELFINO, MADDEN, O'MALLEY, COYLE &
KOEHLER LLP
MONICA HANS FOLSOM, SBN 227379
KRISTIN IVANCO, SBN. 294993
500 Capitol Mall, Suite 1550
Sacramento, CA 95814
Telephone: (916) 661-5700
Fax: (916) 661-5701
E-mail: mfolson@delfinomadden.com
kivanco@delfinomadden.com
*Attorneys for WCI, Inc. Defendants*²

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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 THE UNITED STATES OF AMERICA,
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14 Plaintiff,
15 v.
16 THE STATE OF CALIFORNIA; GAVIN C.
NEWSOM, in his official capacity as
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18 MARY D. NICHOLS, in her official capacity
as Chair of the California Air Resources Board
and as Vice Chair and a board member of the
19 Western Climate Initiative, Inc.; WESTERN
CLIMATE INITIATIVE, INC.; JARED
20 BLUMENFELD, in his official capacity as
Secretary for Environmental Protection and as
a board member of the Western Climate
21 Initiative, Inc.; KIP LIPPER, in his official
capacity as a board member of the Western
22 Climate Initiative, Inc., and RICHARD
BLOOM, in his official capacity as a board
23 member of the Western Climate Initiative, Inc.,
24 Defendants.

2:19-cv-02142-WBS-EFB

**DECLARATION OF MICHAEL S.
DORSI IN SUPPORT OF DEFENDANTS'
EX PARTE APPLICATION FOR
SCHEDULING ORDER RE: CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

Courtroom: 5
Judge: Honorable William Shubb

Trial Date: Not Set
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25 ¹ The State Defendants are State of California; Gavin C. Newsom, in his official capacity
as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in
26 her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his
official capacity as Secretary for Environmental Protection.

27 ² The WCI, Inc. Defendants are the Western Climate Initiative, Inc. ("WCI, Inc."), Mary
D. Nichols, in her official capacity as Vice Chair and a board member of WCI, Inc., and Jared
28 Blumenfeld, Kip Lipper, and Richard Bloom, in their official capacities as board members of
WCI, Inc.

1 I, Michael S. Dorsi, hereby declare:

2 1. I am a Deputy Attorney General for the California Department of Justice and an
3 active member of the State Bar of California. I am counsel for the State Defendants in this case.
4 All of the statements contained herein are based on my own personal knowledge and if called to
5 testify I could and would competently testify thereto.

6 2. Defendants previously sought and obtained an extension of time to respond to
7 Plaintiff's Motion for Summary Judgment (ECF Doc. 12). When seeking that extension,
8 Defendants counsel informed Plaintiff's counsel and the Court that Defendants' attorneys had not
9 yet had a sufficient opportunity to consider the moving papers and evidence, and decide whether
10 to cross-move for summary judgment. *See* Motion to Take Plaintiff's Motion for Summary
11 Judgment Off Calendar (ECF Doc. 15), pp. 1:27–2:2, Declaration of M. Elaine Meckenstock in
12 Support of Motion to Take Plaintiff's Motion for Summary Judgment Off Calendar and in
13 Support of Application to Shorten Time (ECF Doc. 15-1), ¶22, Ex Parte Application to Shorten
14 Time on Scheduling Motion and Extend Time to Respond to Motion for Summary Judgment
15 (ECF Doc. 17), pp. 4:26–27, 5:12. Not yet knowing whether they would cross-move for
16 summary judgment, Defendants did not ask the Court to address scheduling for a cross-motion for
17 summary judgment, and the Court's Order in response to those motions (ECF Doc. 19) does not
18 do so.

19 3. On Wednesday, January 29, 2020, Elaine Meckenstock of the California Department
20 of Justice, counsel for the State Defendants, emailed Paul Salamanca of the United States
21 Department of Justice, counsel for Plaintiff the United States of America, concerning a briefing
22 schedule. Meckenstock notified Salamanca that the State Defendants plan to file a cross-motion
23 for summary judgment and that potential amici curiae plan to file briefs in support of Defendants.
24 Meckenstock proposed a briefing schedule to address both concerns. On Thursday, January 30,
25 2020, Paul Salamanca responded by email, rejecting the scheduling proposal. On Monday,
26 February 3, 2020, I followed up seeking to confirm whether Plaintiff would oppose this
27 Application. A true and correct copy of this email exchange between Meckenstock, Salamanca,
28 and myself is attached to this Declaration as **Exhibit 1**.

1 4. Almost simultaneous to my email to Paul Salamanca, Salamanca sent an email to
2 Meckenstock, copied to me and other counsel, offering a briefing schedule that would add two
3 weeks, setting hearing on March 9. Meckenstock responded, explaining why a two-week
4 extension would be insufficient to address our concerns. Salamanca responded that absent an
5 agreement to a hearing on March 9, he would stand by his previous position and insist on the
6 February 24, 2020 hearing date. A true and correct copy of this email exchange between
7 Salamanca and Meckenstock is attached to this Declaration as **Exhibit 2**.

8 5. To comply with Judge Shubb’s instructions concerning ex parte applications and
9 temporary restraining orders in civil cases, I contacted all parties to determine whether they
10 would oppose this Application. All named defendants—the State Defendants and the WCI, Inc.
11 Defendants—are joint moving parties and support the Application. Counsel for Intervenors
12 Natural Resources Defense Council, Environmental Defense Fund, and International Emissions
13 Trading Association indicated that they would not oppose this Application. As noted above,
14 counsel for Plaintiff indicated that they would oppose the proposed schedule.

15 6. My office has been in contact with potential amici curiae who may file briefs in
16 support of Defendants. My office disclosed that we intend to seek modification to the schedule,
17 and no amici indicated any opposition to our proposed schedule. Several amici stated that, in
18 order to minimize the duplication of arguments, they would prefer filing their briefs after they
19 have had an opportunity to review the opposition and cross-motion filed by Defendants on
20 February 10.

21 7. I have reviewed the schedules of attorneys at the California Department of Justice
22 working on this case. Elaine Meckenstock, the lead deputy attorney general, who plans to present
23 oral arguments, is unavailable on April 6, 2020. She will be traveling and may have limited
24 access to phone and email from April 3 through 7. Also, I will be traveling, and may have limited
25 access to phone and email, from April 3 through 6.

1 I declare that the forgoing statements are true and correct under penalty of perjury.

2 Executed on this day, the 3rd of February 2020, in San Francisco, California

3

4

/s/ Michael S. Dorsi _____

5

MICHAEL S. DORSI

Deputy Attorney General

Attorneys for State Defendants

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Exhibit 1

Michael S Dorsi

From: Michael S Dorsi
Sent: Monday, February 3, 2020 7:54 AM
To: Salamanca, Paul (ENRD)
Cc: Mike Cayaban; Phillip M. Hoos; Elaine Meckenstock; Barnett, Steven (ENRD); McVeigh, Peter (ENRD); Smith, Justin (ENRD); 'Monica H. Folsom'; Kristin N. Ivanco; 'Nicholas van Aelstyn'; Matthew D. Zinn (zinn@smwlaw.com)
Subject: Re: Two scheduling proposals re: US v. CA

Paul:

We plan to file an ex parte application asking the Court to set a briefing schedule for cross-motions for summary judgment, including adjustment to the schedule on Plaintiff's Motion for Summary Judgment. We will ask for the schedule Elaine proposed in her email last Wednesday (below), which keeps our opposition filing date on February 10 but reschedules later dates.

Judge Shubb requires that moving parties on ex parte applications consult with other parties and inform the Court whether any party plans to file an opposition. Can you please let me know if Plaintiff will oppose this application?

Thanks,

Michael Dorsi

From: Elaine Meckenstock
Sent: Thursday, January 30, 2020 4:28 PM
To: Salamanca, Paul (ENRD); Barnett, Steven (ENRD); McVeigh, Peter (ENRD); Smith, Justin (ENRD); 'Monica H. Folsom'; 'Nicholas van Aelstyn'; Matthew D. Zinn (zinn@smwlaw.com)
Cc: Mike Cayaban; Phillip M. Hoos; Michael S Dorsi
Subject: RE: Two scheduling proposals re: US v. CA

Dear Paul,
At the moment, we are planning to cross-move on the same causes of action that the United States moved on.
Best,
Elaine

From: Salamanca, Paul (ENRD) <Paul.Salamanca@usdoj.gov>
Sent: Thursday, January 30, 2020 10:14 AM
To: Elaine Meckenstock <Elaine.Meckenstock@doj.ca.gov>; Barnett, Steven (ENRD) <Steven.Barnett@usdoj.gov>; McVeigh, Peter (ENRD) <Peter.McVeigh@usdoj.gov>; Smith, Justin (ENRD) <Justin.Smith@usdoj.gov>; 'Monica H. Folsom' <mfolsom@delfinomadden.com>; 'Nicholas van Aelstyn' <NvanAelstyn@sheppardmullin.com>; Matthew D. Zinn (zinn@smwlaw.com) <zinn@smwlaw.com>
Cc: Mike Cayaban <Mike.Cayaban@doj.ca.gov>; Phillip M. Hoos <PhillipM.Hoos@doj.ca.gov>; Michael S Dorsi <Michael.Dorsi@doj.ca.gov>
Subject: RE: Two scheduling proposals re: US v. CA

Apart from our previous message, which we stand by, would you be willing to tell us the basic grounds for your contemplated cross-motion for summary judgment?

Thank you for your attention to this message.

Paul

From: Salamanca, Paul (ENRD)

Sent: Thursday, January 30, 2020 10:57 AM

To: 'Elaine Meckenstock' <Elaine.Meckenstock@doj.ca.gov>; Barnett, Steven (ENRD) <SBarnett@ENRD.USDOJ.GOV>; McVeigh, Peter (ENRD) <PMcVeigh@ENRD.USDOJ.GOV>; Smith, Justin (ENRD) <JSmith2@ENRD.USDOJ.GOV>; 'Monica H. Folsom' <mfolsom@delfinomadden.com>; 'Nicholas van Aelstyn' <NvanAelstyn@sheppardmullin.com>; Matthew D. Zinn (zinn@smwlaw.com) <zinn@smwlaw.com>

Cc: Mike Cayaban <Mike.Cayaban@doj.ca.gov>; Phillip M. Hoos <PhillipM.Hoos@doj.ca.gov>; Michael S Dorsi <Michael.Dorsi@doj.ca.gov>

Subject: RE: Two scheduling proposals re: US v. CA

Dear Elaine,

Thank you for your message of yesterday morning.

As you know, we are eager for dispositive motions to be heard and resolved as quickly as possible in this matter. We believe the issues here are important, purely legal in nature, and ripe for review at the scheduled time.

As you also know, we tried more than once to establish a global schedule on dispositive motions with you. This began with our first phone call, on November 7, and continued thereafter. You did not agree, however, forcing us to move for summary judgment on December 11. Not long after that, but consistent with your unwillingness to agree on a global schedule, you took actions that, if successful, would have caused substantial—and we believe unnecessary—delay, asking that our motion be taken off calendar or moved to June. As you know, the Court did not accommodate these requests.

You now ask that the current schedule, as set by the Court on December 16, be upset to accommodate a cross-motion for summary judgment that appears to have been foreseeable to you in December. We cannot see the grounds to agree to this request.

If your contemplated motion is related to our motion, why did you not bring it up in December? Also, why could you not simply file it on February 10, as required by Local Rule 230(e), and notice it in the ordinary manner?

If, on the other hand, your contemplated motion is not related to our motion, why would you want to upset the current schedule to accommodate it?

You also ask that the schedule be upset to accommodate anticipated amici. But we do not see how their presence would materially serve the Court (instead of adding to the Court's workload), especially given that *three* different entities have already intervened as defendants.

We also note that potential amici have known about this case since October. EDF and NRDC were able to move to intervene as early as December 23, and IETA was able to do so on January 6. We are therefore unable to see why the entities you envision were not able to make themselves known to the Court before now. In fact, we note that, even now, they have not made themselves known to the Court. We therefore cannot agree to this request.

Very truly yours,

Paul

From: Elaine Meckenstock <Elaine.Meckenstock@doj.ca.gov>

Sent: Wednesday, January 29, 2020 10:14 AM

To: Salamanca, Paul (ENRD) <PSalamanca@ENRD.USDOJ.GOV>; Barnett, Steven (ENRD) <SBarnett@ENRD.USDOJ.GOV>; McVeigh, Peter (ENRD) <PMcVeigh@ENRD.USDOJ.GOV>; Smith, Justin (ENRD) <JSmith2@ENRD.USDOJ.GOV>; 'Monica H. Folsom' <mfolson@delfinomadden.com>; 'Nicholas van Aelstyn' <NvanAelstyn@sheppardmullin.com>; Matthew D. Zinn (zinn@smwlaw.com) <zinn@smwlaw.com>

Cc: Mike Cayaban <Mike.Cayaban@doj.ca.gov>; Phillip M. Hoos <PhillipM.Hoos@doj.ca.gov>; Michael S Dorsi <Michael.Dorsi@doj.ca.gov>

Subject: Two scheduling proposals re: US v. CA

Dear Paul,

I hope this email finds you well. State Defendants write with two scheduling proposals regarding 1) the March 2 status conference and its associated deadlines and 2) the remainder of briefing and the hearing on the MSJ.

On the first issue, we think it does not make sense to have the status conference until the pending motions are resolved, given that both motions present potentially dispositive issues as to either parties or claims. Accordingly, we propose to ask to have the March 2 conference taken off calendar. We also propose that, once the motions are decided, the conference be re-set for the first available conference Monday that is at least four weeks out from decision on the motions. (The four weeks is intended to provide time for the parties to meet and confer and submit the various documents that must be submitted before the conference.)

On the second issue, the remainder of MSJ briefing and hearing, we are proposing the schedule below. Please note that we are not seeking to change the date our opposition is due. Rather, we are seeking to establish a reasonable timeframe for everything that comes after that filing, including later briefing and consideration of the briefs by the Court. This proposal is being driven by a several factors:

- 1) we plan to file a cross-motion for summary judgment, so the current hearing date will not work as it does not accommodate a reply for us;
- 2) we anticipate several amici briefs supporting Defendants, and the amici would like to have a short gap in time between Defendants' filings and their own, akin to what is provided by the Federal Rules of Appellate Procedure (FRAP)—we believe this is reasonable and would allow their briefs to better aid the court, including by being less duplicative of ours;
- 3) we anticipate the need for 3 weeks for our reply brief, given the novelty of the issues the US has raised, our internal/client review processes, and the need to coordinate with multiple groups of separately represented Defendants;
- 4) we thought the United States might want some additional time for its opposition/reply brief, given that you will likely be responding to a sizable number of briefs, between the separately represented Defendants and the potential amici; and
- 5) given the number of briefs, and the novelty of the issues, we think the court would likely want more than one week to review the briefs before the hearing.

With all that in mind, we propose the following:

- Feb 10 – Defendants' oppositions and cross-motions due (as currently scheduled)
- Feb 17 – Amici supporting Defendants (one week gap as would be provided by FRAP)
- March 16 – Plaintiff's opposition and reply (5 weeks from Defendants' filings and 4 weeks from amici's filings)

- April 6 – Our reply (3 weeks after Plaintiff's filing)
- April 20 – hearing (giving the court 2 weeks, rather than 1, from the close of briefing)

Please note that this schedule assumes there will not be amici or intervenors on Plaintiff's side, at least for these cross-motions for summary judgment. If you are aware of any plans for amici or intervenors to file on Plaintiff's side, please let us know immediately, as that would very likely change the proposed schedule.

Please provide Plaintiff's position on both proposals by COB tomorrow, **January 30, 2020**, so that we may determine whether we need to pursue this or similar relief from the Court. We would, of course, prefer to resolve these scheduling issues amongst the parties, and, to that end, please let us know if a phone call to discuss would be of benefit.

Best,
Elaine

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Exhibit 2

Michael S Dorsi

From: Salamanca, Paul (ENRD) <Paul.Salamanca@usdoj.gov>
Sent: Monday, February 3, 2020 9:05 AM
To: Elaine Meckenstock
Cc: Barnett, Steven (ENRD); McVeigh, Peter (ENRD); Smith, Justin (ENRD); Monica H. Folsom; Nicholas van Aelstyn; Matthew D. Zinn (zinn@smwlaw.com); Mike Cayaban; Phillip M. Hoos; Michael S Dorsi
Subject: Re: schedule

Dear Elaine,

We cannot agree to this and therefore stand by our answer of January 30. Our proposal to consolidate the hearing on MSJs to March 9 stands, subject of course to your cross-motion being related to ours, which you have indicated to be the case. If not, we reserve the right to oppose consolidation and maintain the current Feb. 24 date for our motion.

Thank you,

Paul

Sent from my iPhone

> On Feb 3, 2020, at 11:36 AM, Elaine Meckenstock <Elaine.Meckenstock@doj.ca.gov> wrote:

>

> Dear Paul,

>

> We cannot agree to this proposal because it does not accommodate the interests we described last week when we proposed a schedule for your consideration--namely, a gap between our filing and that of supporting amici to allow them to present briefs that will best aid the Court, three weeks to prepare and file our reply, and additional time for the Court to review a sizable number of briefs. If you can propose a schedule that would accommodate those interests, and your own, we would be very open to such a proposal. One additional factor of which you should be aware is that I have a planned vacation in April that means I am unavailable for Judge Shubb's April 6, 2020 motion calendar, so that date is not one we can agree to for a hearing.

>

> Absent a proposal from you that accommodates the interests described here and in my email of last week, we plan to ask the Court to adopt the schedule provided by email to you last week, as indicated in Mike Dorsi's email of this morning which I believe crossed with yours.

>

> Best,

> Elaine

>

> -----Original Message-----

> From: Salamanca, Paul (ENRD) [mailto:Paul.Salamanca@usdoj.gov]

> Sent: Monday, February 03, 2020 7:57 AM

> To: Elaine Meckenstock <Elaine.Meckenstock@doj.ca.gov>

> Cc: Barnett, Steven (ENRD) <Steven.Barnett@usdoj.gov>; McVeigh, Peter (ENRD) <Peter.McVeigh@usdoj.gov>; Smith, Justin (ENRD) <Justin.Smith@usdoj.gov>; Monica H. Folsom <mfolsom@delfinomadden.com>; Nicholas van Aelstyn <NvanAelstyn@sheppardmullin.com>; Matthew D. Zinn (zinn@smwlaw.com) <zinn@smwlaw.com>; Mike Cayaban <Mike.Cayaban@doj.ca.gov>; Phillip M. Hoos <PhillipM.Hoos@doj.ca.gov>; Michael S Dorsi <Michael.Dorsi@doj.ca.gov>

> Subject: schedule

>

> Dear Elaine,

>

> You have indicated an intention to cross-move for summary judgment on the Treaty and Compact Clauses next Monday, February 10. As you know, the common practice with respect to such related motions is to set a consolidated hearing two weeks after the original hearing date, which would be Monday, March 9. If you would be amenable to agreeing to that now, we would be amenable to a stipulation to that effect. Please let us know if that is something you could agree to.

>

> Thank you for your attention to this message.

>

> Paul

>

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc.,

Defendants.

2:19-cv-02142-WBS-EFB

**[PROPOSED] SCHEDULING ORDER
RE: CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

Courtroom: 5
Judge: Hon. William B. Shubb

Trial Date: Not Set
Action Filed: 10/23/2019

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[PROPOSED] ORDER

On February 3, 2020, Defendants applied ex parte for a scheduling order addressing cross-motions for summary judgment and timing for briefs of amici curiae. Having considered the papers, the court finds oral argument unnecessary and hereby GRANTS Defendants' application upon their showing of good cause. The following schedule is adopted:

- February 10, 2020: Defendants to file opposition(s) and cross-motion(s) (unchanged; scheduled per ECF Doc. 19 and E.D. Cal. L.R. 230(e))
- February 17, 2020: Amici supporting Defendants to file briefs
- March 16, 2020: Plaintiff to file its opposition to cross-motion and reply
- April 6, 2020: Defendants to file their reply
- April 20, 2020: Hearing

IT IS SO ORDERED.

Dated: February __, 2020

Hon. William B. Shubb
United States District Judge
Eastern District of California

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