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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. THOMAS M. COFFIN, JUDGE PRESIDING

KELSEY CASCADIA, ROSE JULIANA, et)
al.,)

Plaintiffs,)

v.)

UNITED STATES OF AMERICA, et al.,)

Defendants.)

No. 6:15-cv-01517-TC

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

TUESDAY, FEBRUARY 7, 2017

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1 PROCEEDINGS

2 TUESDAY, FEBRUARY 7, 2017

3 THE CLERK: Now is the time set for Civil Case
4 No. 15-1517, Juliana, et al. versus United States of
5 America, et al., for a Rule 16 conference.

6 THE COURT: Well, who wants to be heard first?

7 MS. OLSON: Your Honor, this is Julia Olson for
8 the plaintiffs, and I'd like to begin.

9 Just to start, I think we all are aware that time
10 is really the enemy of these plaintiffs right now, and the
11 status quo is the enemy of the plaintiffs.

12 So short of preliminary injunctive relief, our
13 best hope is moving this case to trial by this fall. And we
14 believe that that is still possible after reviewing the
15 status reports that were submitted by both sets of
16 defendants in the case.

17 And so I would like to just walk through how we
18 think we can do this and the steps we think are important to
19 get us there.

20 So, first of all, we would request respectfully
21 that the court set monthly status conferences so that we
22 could call in perhaps the first Wednesday of each month to
23 update the court and deal with any discovery issues that are
24 arising, and I believe that the federal defendants, in their
25 status report, also requested that the court take an active

1 role in the discovery aspect of this case.

2 THE COURT: Well, I can certainly accommodate you
3 in that.

4 MS. OLSON: Great.

5 THE COURT: Okay.

6 MS. OLSON: Secondly, we have carefully reviewed
7 the answers of both sets of defendants, and we quickly
8 thereafter propounded a set of requests for admissions to
9 the federal defendants in an attempt to further narrow the
10 scope of the documents that we will need to seek from the
11 defendants, and we believe that certain --

12 THE COURT: Did you folks, by the way, get
13 together yesterday?

14 MS. OLSON: We spoke on Friday after exchanging
15 the status reports --

16 THE COURT: Okay.

17 MS. OLSON: -- and had another meet and confer,
18 yes, Your Honor.

19 THE COURT: Okay.

20 MS. OLSON: And the primary issue here, from our
21 perspective, is that counsel for defendants are concerned,
22 largely in part because of our litigation hold letter, that
23 we will be seeking documents to the full breadth of that
24 letter, when in fact that letter was merely consistent with
25 Rule 26 and Local Rule 26-1 of this court, which requires

1 the defendants to preserve all documents that could be
2 relevant to this case, which is a broad amount of documents,
3 including ESI.

4 However, our request for production documents is
5 going to be much narrower than that. But it has been their
6 obligation since August of 2015 to protect ESI and other
7 relevant documents, and we haven't yet heard what steps they
8 have taken to do that, particularly in light of the fact
9 that we have heard through different reports that the new
10 administration is in fact removing some information, at
11 least from the public realm. So we would still like to hear
12 their response to our litigation hold letter.

13 So our proposal related to documents is that by
14 next --

15 THE COURT: I believe you asked the court to
16 basically adopt your litigation hold letter and make that an
17 order of the court. Am I correct in that?

18 MS. OLSON: Yes, Your Honor.

19 THE COURT: And does the government have any
20 objection to that?

21 MR. DUFFY: We do, Your Honor. Just as an initial
22 matter, I wanted to introduce Marissa Piropato, my colleague
23 at the Department of Justice. She is new to the case and
24 has yet to enter an appearance, but I think she could also
25 speak to some of the issues and, with your permission, would

1 ask that she be permitted to speak as well today.

2 THE COURT: Oh, certainly.

3 MS. PIROPATO: Thank you, Your Honor.

4 MR. DUFFY: Specifically with the litigation hold
5 request, our view is ordinarily that the litigation hold
6 request should cover the types of documents that a plaintiff
7 is going to be seeking in the case. We have circulated
8 that --

9 THE COURT: They are just asking you, if I
10 understand it correctly, not to destroy any evidence, any of
11 this material that you take down from the website but to
12 preserve it and archive it.

13 MR. DUFFY: Right. And --

14 THE COURT: Do you have an objection to doing
15 that?

16 MR. DUFFY: Our objection is it's -- the
17 litigation hold, the way these operate, in speaking with a
18 number of my colleagues and agency staff who have been
19 through this a few times, is that it's not just a matter of,
20 okay, don't toss this important document out.

21 They have already got policies in place and in the
22 record that, of course, affects this, too.

23 But a litigation hold stops the ordinary processes
24 by which things are archived, e-mails destroyed, tapes are
25 written over.

1 It's actually a very onerous process for the
2 agencies to redo their recordkeeping practices. And so what
3 we would hope is -- and plaintiffs keep promising it but
4 they have yet to deliver it -- is to give us a sense as to
5 what exactly it is that they are going to be looking for in
6 this litigation, given the answer and how that's narrowed
7 the issues.

8 MS. PIROPATO: And, Your Honor, if I may clarify,
9 there are two separate issues here. One is the websites and
10 the retention of public information on the websites. And
11 the second is the litigation hold letter that was propounded
12 on January 24th, 2017, which is so broad in its scope that
13 it's staggering.

14 So those are two very different things, and I just
15 want to make clear what they were talking about because, as
16 my colleague was saying, the agencies involved, we have
17 talked to every single one of them, are retaining
18 information on those public websites.

19 Now, the litigation hold letter is a very
20 different issue.

21 THE COURT: And how so?

22 MS. PIROPATO: The litigation hold letter is
23 staggering in its breadth. It asks the agencies to retain
24 every document related to climate change, every document
25 related to navigable waters, every document related to

1 public lands, navigable air space, without any
2 qualifications or limitations.

3 So to give the agencies direction about what it
4 means is incredibly difficult because some agencies, like
5 the Council on Environmental Quality, said, if we read this
6 letter, it's every document except internal human resource
7 documents in our possession since 1969.

8 The Department of Transportation told us we would
9 have to send this letter to every single employee of the
10 Federal Aviation Administration, which is over 30,000
11 people.

12 So that's why we are talking about two very
13 different things. And I just want to make sure that we are
14 all on the same page when we discuss the websites versus the
15 litigation hold request letter that we received.

16 And I can give you other examples. I am happy to
17 do it. But the basic bottom line is the agency said we
18 don't even know how to respond to this, it's so broad. I
19 mean, if you are a public land manager and they want every
20 document related to public land, that's everything they do.

21 THE COURT: Well, I think they are saying this is
22 not a demand for production. It's a demand that you not
23 delete or erase or purge anything that is in the
24 government's possession that relates to climate change.

25 MS. PIROPATO: And there's regulations that deal

1 with that under the Federal Records Act. I think that
2 that's what my colleague is referring to.

3 MR. DUFFY: And, Your Honor, what I was -- what I
4 am learning from the agency is it is a learning process for
5 us as well and they all have different policies.

6 Some of them use different e-mail systems, some
7 have legacy e-mail systems, and the ones who have been
8 through this, for example, and just to give one example, the
9 *Deepwater Horizon* litigation, which was also a very massive
10 litigation, had told -- the way they have described it to me
11 is a litigation hold is not prohibiting -- is not just
12 prohibiting them from doing an act such as tossing something
13 in the recycling bin or deleting an e-mail.

14 A litigation hold also forces them to cease all of
15 the passive activities, these passive processes that are
16 automatic.

17 And so now it's -- they have to re -- they have to
18 redo their records policy for purposes of a litigation. And
19 the way they have described it to me, it sounds like it's a
20 very onerous process.

21 And so when the plaintiffs have volunteered to
22 define what they are going to request documentwise,
23 particularly in light of the admissions we have in the
24 answer, that, to us, provides -- at least gives us some hope
25 that we can give the agencies reasonable guidance that they

1 can then follow through on.

2 But at the moment, they are flailing. They don't
3 know what to do.

4 THE COURT: Well, it seems to me that this is
5 something that would be very productive if you folks met and
6 conferred about.

7 MS. PIROPATO: We agree with that, Your Honor.

8 MS. OLSON: For plaintiffs, I think we don't
9 understand specifically what's onerous about preserving the
10 documents. We are not requiring you to organize or produce
11 the totality of the documents identified in the litigation
12 hold.

13 And so perhaps we could get more specific about
14 what additional tasks are required to preserve the
15 information.

16 MS. PIROPATO: I think we need to start from
17 ground zero, which is this: What is the universe of
18 documents we are talking about in the first instance?

19 THE COURT: Okay.

20 MS. PIROPATO: That is the problem.

21 MR. VOLPE: Your Honor, if I might, this is Frank
22 Volpe on behalf of the intervenor-defendants. We agree with
23 the government that this is an onerous and voluminous and
24 way-out-of-scope litigation hold.

25 One of the problems, from our perspective, is --

1 and we'll have more to say about fact discovery -- but one
2 of the problems is the plaintiffs are asking both the
3 intervenor-defendants to preserve but also the member
4 companies.

5 There are literally hundreds of member companies
6 to these three associations that the plaintiffs are seeking
7 preservation of materials for, and a large volume of
8 materials.

9 And that is just way beyond the scope. We have
10 been asking the plaintiffs, and the government has been
11 asking the plaintiffs, to narrow their universe so we can
12 get a better fix on what discovery might look like.

13 But under no circumstances do we believe that the
14 member companies should be ordered. And that's the concern
15 about ordering this litigation hold as a court order:
16 Should the member companies be subjected to preservation
17 requirements.

18 MS. ECKERT: And, Your Honor, if I can add, this
19 is Marie Eckert also on behalf of the intervenors, just a
20 couple of additional thoughts.

21 In the status report itself, the plaintiffs don't
22 actually request that the litigation hold letter be entered
23 as an order. Rather, what they are requesting is an order
24 keeping the federal defendants from changing the website.
25 So we do seem to be talking about two different things.

1 And then following up on Mr. Volpe's comments, the
2 member companies for the trade associations, of course, are
3 not parties to the litigation. We do not represent the
4 member companies, and, as you know, for trade associates to
5 participate in litigation, a requirement of standing is that
6 the member companies not have to participate individually.

7 So the litigation hold does raise additional
8 issues along those lines.

9 And similar to the government, the member
10 companies are going to have in place, as any large corporate
11 or governmental institution will, automatic archiving of
12 e-mails and documents, automatic destruction policies. No
13 company keeps documents forever.

14 So it isn't just a matter of not throwing things
15 away. It's a matter of changing fundamental computer
16 systems and operations for an institution.

17 MR. VOLPE: It's not a -- it's not a passive
18 process. It's an active process, the litigation hold. And
19 given the scope of the litigation hold proposed by
20 plaintiffs, we don't believe it's an appropriate way to get
21 at the fact discovery and the preservation of documents.

22 THE COURT: Well, let me see if I can make an
23 observation here, and this may help: Throughout my
24 educational career, I concluded that the best teachers I had
25 were the ones that could take the most complex subject

1 matter and simplify it to the point where it was more easily
2 understandable.

3 Conversely, the worst teachers I had were those
4 that could take the most simple subject matters and
5 complicate it hopelessly to where you couldn't understand
6 it, and I had to ask my classmates to explain it to me.

7 So what we are going to try to do here in this
8 process is take what appears to be a complex case and see
9 how we can simplify it to where it's more understandable and
10 more manageable. And that task largely falls upon the
11 shoulders of the lawyers involved with the court's
12 assistance.

13 I want to further this discussion by asking a
14 couple of pointed questions here.

15 I have reviewed the government's answer. I have
16 reviewed the intervenor's answer, the answers to the
17 complaint that was filed by the plaintiff. And the
18 government makes a number of admissions in their answer.

19 To summarize, the government has admitted that,
20 yes, climate change is a reality and that, yes, it's induced
21 by human activity, and they admit that CO₂ right now is at a
22 level of 400 parts per million, which exceeds the level --
23 is the highest level in millions of years. So a number of
24 the allegations made by the plaintiffs in their complaint
25 are admitted by the government.

1 The intervenors' answer, on the other hand --
2 basically the mantra of the intervenors' answer is we don't
3 know, and on that basis we deny. We don't know what's going
4 on. We don't know if it's climate change or not. We don't
5 know if it's human induced or not.

6 So to what extent does the government's admissions
7 control where we go in this case? The intervenors in your
8 proposed schedule indicate that they don't intend to do any
9 fact discovery.

10 Does that mean, then, that the intervenors
11 essentially are not going to contest the government's
12 admissions?

13 So are you going to ride the government's
14 coattails, so to speak, in this litigation?

15 MR. VOLPE: So --

16 THE COURT: Are you going to set out and attempt
17 to controvert some of the government's admissions?

18 So that's going to be a big help in terms of how
19 we manage this discovery to find out what the intervenors
20 intend to do.

21 MR. VOLPE: I understand the court's question, and
22 the issue is, however, what are the material facts that the
23 plaintiffs need to have us concede or ride the government's
24 coattails, as the court puts it. And we have asked the
25 plaintiffs to identify those facts that are alleged in the

1 complaint that they would need to take back discovery from
2 the intervenors.

3 This is a case about what the government did or
4 what the government didn't do. It's not a case about what
5 the intervenors did or didn't do.

6 So it really is beside the point whether the
7 intervenors concede or contest the factual underpinnings of
8 the plaintiffs' case. This is largely a case -- and I am
9 sure the court perceives this -- that will ultimately be
10 decided by expert witnesses.

11 This is a complicated area of a human activity,
12 and the question about what climate change is, how it came
13 about, whether it's different than it's been in the history
14 of mankind, is going to be something that a fact witness is
15 not going to be able to discuss. It's an expert issue and a
16 scientific issue.

17 And as we said in our submission to the court, on
18 those issues, we may very well want to participate. But we
19 don't see how fact discovery against the intervenor
20 defendants pertains to that at all.

21 THE COURT: Well, for example, let's just take a
22 small example, do the intervenors acknowledge that the CO₂
23 levels in the atmosphere are currently at 400 PPM?

24 MR. VOLPE: Again, Your Honor, that seems to me to
25 be a question --

1 THE COURT: Do you deny that, or do you not know?

2 MR. VOLPE: I would say that as we said in our
3 answer, we don't know.

4 THE COURT: You don't know.

5 MR. VOLPE: That's an issue that will be
6 determined by a fact witness sitting in the deposition, but
7 by a scientific witness who understands the, you know,
8 environmental science.

9 THE COURT: So as we sit here today, do you have
10 an expert witness that the intervenors intend to call that
11 you can identify that will opine that the CO₂ levels are not
12 400 PPM, but are something other than that and, if so, what?

13 MR. VOLPE: I don't know, Your Honor. I don't
14 know, sitting here today, what the plaintiffs are -- you
15 know, as the court is, I am sure, well aware, often the
16 defendants respond to the plaintiffs' experts. And what the
17 what the plaintiffs' experts are saying, the defendant
18 intervenors and I am sure the federal government will want
19 to respond to that.

20 But that issue has not been teed up yet. We are
21 in a morass of allegations that we have asked the plaintiffs
22 to limit so we could get a better sense of what this case
23 might look like.

24 So whether it has to do with the CO₂ levels,
25 whether it has to do with the navigable waters that the

1 plaintiffs seem to be looking for information about, we
2 don't know. We don't know what this case looks like.

3 THE COURT: Well, in an effort to take a complex
4 case and try to simplify it to make it more understandable,
5 isn't the main thrust of this case the levels -- isn't the
6 main thrust of this case the levels of CO₂ in the
7 atmosphere?

8 And what is a point at which -- a tipping point at
9 which it becomes irreversible climate change with an
10 increase in the temperature on the planet earth and what
11 that does to the life forms on the planet? I mean, isn't
12 that, in essence, the thrust of the case? How did we get
13 there is an issue. How we deal with it is another issue.

14 MR. VOLPE: I would say those are the themes that
15 run throughout the case.

16 THE COURT: Okay. So if those are the essential
17 themes, does that help guide us in the discovery issues --

18 MR. VOLPE: Well, Judge --

19 THE COURT: -- or not.

20 MR. VOLPE: Those are pretty broad themes. And,
21 again, if the plaintiffs are -- and I understand there are
22 variations on the themes, to use a musical term, but the
23 plaintiffs are the master of their complaint. The
24 plaintiffs have to tell the court and the parties what they
25 intend to prove, what they need discovery on, what they

1 don't need discovery on.

2 I don't think it's for the government or for the
3 intervenors, without knowing what the plaintiffs are going
4 to do here, to set the -- tell the plaintiffs what they need
5 to prove.

6 THE COURT: Can you assist the attorney for the
7 intervenors?

8 MS. OLSON: Yes, Your Honor. What we -- we set
9 out to prove the facts that are alleged in the complaint,
10 and it is a critical issue for us whether intervenors will
11 dispute the facts that have been admitted by the government
12 because that would be one way we could really limit some
13 discovery.

14 Our approach, what we'd like to propose, is we
15 have been drafting requests for production of documents to
16 the intervenors because we had their answer first. And we
17 are prepared to send those out by February 17th.

18 And we can also send out a first round of requests
19 for production of documents to the federal defendants by
20 February 17th.

21 We would then propose that we all meet and confer
22 on February 23rd to discuss whether there is any
23 over-breadth in those requests that you can assist us in
24 narrowing so that we can still receive the documents that we
25 are looking for to help us prove the facts that are alleged

1 in our complaint.

2 And we have suggested to federal defendants'
3 counsel that with their presence, and it would be helpful to
4 discuss with some of the agency personnel who oversee this
5 kind of discovery production, who might be able to help us
6 narrow our requests. So we are open to that.

7 And we would ask that for purposes of
8 authentication that we engage in a stipulation where both
9 the intervenors and the federal defendants agree that any
10 documents that are produced are deemed authentic so that we
11 can avoid that issue at trial.

12 So with respect to the documents, that's how we
13 would like to proceed to get that ball rolling. I think
14 once you see our specific request for production of
15 documents, it will help give you more information to then
16 meet and confer with us on any problems you see.

17 MR. VOLPE: Well, Your Honor, I understand that
18 and I appreciate what the plaintiffs are saying.

19 How does one set a schedule in a case of this
20 enormity without knowing what the plaintiffs are going to
21 request? I mean, the plaintiffs are proposing a five-month
22 schedule, essentially.

23 And I will say, having done this for a few years,
24 that's impossible. There is no possible way that this
25 discovery could get done in five months. It would take five

1 months to probably schedule and take the plaintiffs'
2 depositions in this case.

3 And so I don't know -- I don't -- it just seems --
4 it seems silly that we are sitting here talking about a
5 five-month schedule without knowing what the plaintiffs are
6 going to do.

7 But I do want to ask a point of order.

8 THE COURT: Well, she indicates that by
9 February 17th she'll have the document request in your
10 hands.

11 MR. VOLPE: Well, so I can promise you --

12 THE COURT: Would it be prudent to wait and see
13 what that is?

14 MR. VOLPE: Well, it may be prudent to wait and
15 see, but I am telling you that unless it's, give us the
16 organizational charts of the intervenor-defendants, anything
17 else is going to entail a motion practice from the -- at
18 least from the intervenor-defendants, and I assume there's
19 going to be motion practice from the federal government as
20 well, at least on the scope of the discovery.

21 So sitting here and asking the court to set a
22 five-month schedule, we'll be back in two months saying,
23 Judge, we need a 36-month schedule.

24 MS. PIROPATO: And, Your Honor, if I may
25 interject, I just want to remind some of the guideposts that

1 plaintiffs have given us in their status report. They
2 suggest they are going to take 35 fact depositions, and each
3 30(b)(6) witness is one witness.

4 Having done this before, 130 -- if you have a
5 30(b)(6) topic across 12 agencies, we could be dealing for
6 each topic 12 witnesses. I have done this before. It is an
7 enormous task to prepare those witnesses because there will
8 not be percipient knowledge and then to effectively marshal
9 everyone's schedules to get these massive amount of
10 depositions to occur.

11 So under their own schedule, the notion that we
12 can, in under 70 days, do this massive amount of depositions
13 is just unfathomable and divorced from reality based on my
14 experience.

15 To do this correctly, just for the depositions, it
16 requires a lot of work, and I have been here before where I
17 have worked 90-hour weeks and I've prepared my clients. But
18 we need the time to prepare our factual case and to prepare
19 our witnesses. And that schedule prejudices us and does not
20 give us that time.

21 THE COURT: Okay. Everybody is starting to use
22 phraseology that, to me, is somewhat overstated:
23 Unimaginable, unfathomable, immense, impossible, *et cetera*.

24 What I am trying to do here is get a handle on
25 this and reduce it to where it's not all those things but

1 where it's manageable.

2 Let me focus on something the intervenor said and
3 see if plaintiffs and the government essentially agree with
4 this: The intervenors have basically made the point that in
5 their view this is mainly a case that involves the experts.

6 It seems to the court that that's probably a fair
7 observation that this case is mainly going to be guided by
8 expert testimony in terms of the main issue: Is climate
9 change happening, is it human induced, is there a tipping
10 point, is the CO₂ level currently at 400 PPM, is it
11 necessary to reduce that to 350 PPM by a certain point in
12 time, or is the damage to the planet going to essentially be
13 irreversible if that's not done.

14 It seems to me that those issues are not so much
15 within the purview of fact witnesses, the individual
16 plaintiffs, for example, or that defendants who are
17 executives or what have you with various companies that
18 intervenors represent, but it seems like those issues are
19 pretty much within the purview of the experts that the
20 parties would call in the case.

21 Would it make sense to have different phases of
22 discovery in this case? Would it make sense to begin with
23 the experts and to produce their reports or to have them
24 available for discovery? Let me ask the plaintiffs your
25 position on that.

1 MS. OLSON: Your Honor, I think your articulation
2 of the issues, the scientific issues in the case, are
3 correct.

4 However, there are other components to the case
5 that we also have to prove, such as what was the
6 government's knowledge and the intervenors' --

7 THE COURT: I understand that. That's a subset.
8 But that's a subset of the main issue. And would that
9 subset make sense to follow up on that after the main issue
10 is more developed with the experts? What do people know and
11 when did they know it.

12 And by the way, to my understanding of your case,
13 that subset of what was known and when did they know it and
14 did someone cover it up within the government, *et cetera*,
15 that's part and parcel of your creation of danger
16 substantive due process argument.

17 It's really not a subset of your public trust
18 doctrine argument. Under your public trust doctrine
19 argument, it doesn't really matter what was known, who knew
20 it, whether they deliberately ignored it and created a
21 danger.

22 What matters there is where are we now and where
23 will this go if changes aren't made.

24 MS. OLSON: That's correct, Your Honor.

25 THE COURT: Let's not get lost in the substrata

1 here.

2 Why don't we begin by engaging the experts.

3 Have I misquoted the intervenors about your view?

4 MR. VOLPE: No, Your Honor. That's exactly right.

5 I will say because the plaintiffs have started to say this,

6 she began by saying what the government knew, and then she

7 was moving to what the intervenors knew.

8 I still don't understand why what the intervenors'

9 associations knew or didn't know is relevant to the

10 allegations and the causes of action in the complaint.

11 And that's an important issue from our

12 perspective, obviously.

13 And I just -- I just -- I really can't understand

14 why what we knew or didn't know, what we said or didn't say,

15 to the extent it's not in the governmental record, is

16 relevant.

17 THE COURT: Well, that's a legal issue, I suppose,

18 that we can flesh out later. I mean, I am thinking about --

19 this is not a case for money damages, so I suppose by way of

20 analogy, you could liken this scenario to what the tobacco

21 industry knew and what they didn't inform the public about

22 regarding the health effects of smoking.

23 But in those cases, essentially you were dealing

24 with plaintiffs who were suing for monetary damages. Here

25 this case is not about anybody suing for money damages.

1 They are suing for equitable relief is the nature of what
2 they are requesting.

3 MR. VOLPE: That's right, from the federal
4 government, not from the intervenor-defendants.

5 THE COURT: From the federal government.

6 MR. VOLPE: In the tobacco litigation, the tobacco
7 companies were parties to the case. They were actually
8 being sued for monetary damages. This case is different in
9 that the only presence in the case are through the
10 intervention of the three associations.

11 THE COURT: Okay. Let's get back to the experts
12 and what they can contribute in terms of evidence to this
13 case.

14 I want to focus on the experts now.

15 MS. OLSON: So, Your Honor --

16 THE COURT: You asked for how many experts for
17 each?

18 MS. OLSON: Well, we have estimated that we will
19 use 15 to 20 experts.

20 THE COURT: Let me stop you right there. I read
21 that and I wondered why do we need 15 -- or why do you need
22 15 to 20 experts? The court doesn't need 15 to 20 people to
23 duplicate each other.

24 MS. OLSON: Right, Your Honor.

25 THE COURT: So why do you need as many as 20

1 experts? Are they going to address different parts of this
2 case uniquely, or are you just going to call 20 of them to
3 say ditto, ditto, ditto because the court doesn't need that.

4 MS. OLSON: Right. So currently the standing of
5 our plaintiffs is still contested.

6 THE COURT: I will get to the standing of the
7 plaintiffs later. Right now I am focused on the experts.

8 MS. OLSON: Right. Well, part of our evidentiary
9 burden is to establish that the government is in part
10 responsible for causing climate change. The issues that
11 Your Honor discussed related to the level of carbon dioxide
12 that would protect the rights of our plaintiffs.

13 But then there are other issues related to the
14 impacts that are being felt by the plaintiffs and that will
15 be felt in the future.

16 And those involve the expertise of different types
17 of scientists who specialize in increased severity and
18 frequency of storm events or sea level rise or ocean
19 acidification.

20 So a lot of the field of climate science is very
21 specialized, and there are different experts who would
22 testify as to different parts of that story of the harm and
23 the impact, for example.

24 THE COURT: Can you whittle your experts down from
25 20? And if so, how far down can you whittle them? You may

1 not want to answer that now, but you see this direction I am
2 going in.

3 MS. OLSON: I do.

4 THE COURT: Okay. You can confer among yourselves
5 to see if the expert testimony can be narrowed in terms of
6 the number of experts.

7 How about the government?

8 MR. DUFFY: Your Honor, I did want to talk about
9 experts because we have been thinking about this and
10 specifically a couple of thoughts.

11 We, too, have asked the plaintiffs if they can
12 have a smaller amount of experts because with respect to
13 their experts, we believe we are going to need to find
14 rebuttal experts, probably equal or similar in number, and
15 so to the extent they can reduce that, I think that would
16 streamline things a little bit.

17 THE COURT: Well, given your admissions, what
18 rebuttal experts are you going to have to their experts who
19 essentially are going to opine to science that you
20 acknowledge is accurate in your answers.

21 MR. DUFFY: Well, we haven't --

22 THE COURT: So only those experts that you differ
23 with, I take it.

24 MR. DUFFY: Well, we haven't seen those reports,
25 and we need to see the reports. And I don't think we are

1 just going to piggyback on their expert. I mean, that just
2 wouldn't be a trial if we were -- I think we would need to
3 independently evaluate what their experts are saying, as we
4 do in every case.

5 THE COURT: Well, that's fine, but I get the
6 impression that a lot of the government -- the plaintiffs'
7 experts take their information from government findings and
8 science --

9 MR. DUFFY: Well --

10 THE COURT: -- and a lot of your experts agree
11 with their assessment. So I am just trying to -- you know,
12 don't fight just for the sake of fighting. If there's
13 things you agree on --

14 MR. DUFFY: Well, I understand, but we do need to
15 see the reports. And I need to -- not just me see the
16 reports. I mean, I appreciate your point earlier about the
17 teacher simplifying things, but I also recognize my
18 limitations. I am a lawyer. I am not a scientist.

19 And even when I meet with scientists, I need to --
20 it's a process for me just educating myself sufficient that
21 I could write, for example, an answer.

22 But separate and apart from all of that, we have
23 to make an affirmative case. I am not prejudging that. But
24 Ms. Piropato and I now have the unenviable task of scouring
25 the world's research institutions and universities to find

1 our own experts, to build our own model as to what -- what's
2 going on here, and I am not prejudging any of these issues.

3 But in addition to, you know, the climate issues
4 and, you know, our answer is based on our conversations with
5 the agencies, but now we are going to have a separate
6 conversation with our agency personnel to say, okay, who are
7 the experts you relied on when you issued these findings
8 because our case is going to have a lot to do with finding
9 what the agencies have done in the past decade.

10 And the plaintiffs may have numbers that are
11 similar to the ones that we provided in our answer. But the
12 fact is there is no mention, as far as I know, in the
13 complaint of any of these rule makings that EPA has been
14 doing for the past decade.

15 THE COURT: Any of these what?

16 MR. DUFFY: Any of the rule makings that EPA has
17 been doing in the past decade. It's just absent, as if it
18 never happened. And so I don't know how this is all going
19 to play out, but I think the starting point for us is going
20 to be to sit down with all of the agencies, all of which
21 have a part to play in the whole climate science and to work
22 with them to begin this rather difficult process of finding
23 our own experts who are going to issue their own reports.

24 MS. PIROPATO: And if I may interject, Your Honor,
25 to quote Mark Twain, "I'm sorry I didn't have time to make

1 it shorter." To get experts dealing with this complex issue
2 to simplify it in the way Your Honor contemplates, which is
3 what I try to do every time I work with an expert, is no
4 easy task, and it does take time because experts want to
5 give you every single detail. And you have to understand
6 what they are doing to help winnow it for the court as the
7 finder of fact and to get to what I am going to call the
8 heart of the issues. And that is not something you do in a
9 month.

10 And so not only do we have this process of
11 locating the correct experts, building this affirmative
12 case, then we actually have to build our affirmative case
13 with those experts and get it to the point where it's
14 digestible to someone like me and, when someone reads it, it
15 is not, for lack of a better way to describe it, a morass of
16 information of information that's indecipherable.

17 MR. VOLPE: So, Your Honor, I suggested to the
18 plaintiffs that one way to begin this ball rolling is for
19 them to provide the parties a -- what -- an old-fashioned
20 expert disclosure, the old disclosures where you don't give
21 a report but you lay out basically who the expert is and
22 what his or her opinions are likely to be. I thought that
23 that might be a way to get to the nut of the issue quicker
24 than waiting through -- you know, for fact discovery to
25 close.

1 I think it's consistent with what you were
2 thinking, Judge, is a way to kick off the expert discovery
3 here because there may be experts that the plaintiffs
4 propose that the government says, aah, we don't need to
5 contest that, or there may be experts that the government
6 has that the intervenor-defendants don't need.

7 So it seems, again, that we're a bit amorphous
8 here without any real definition, and I think that's what
9 the court is trying to get at.

10 MS. PIROPATO: And, Your Honor, I have done that
11 in other cases and it has been very helpful. And in that
12 case, we did have ten experts and it was a year discovery
13 process for experts alone.

14 But certainly having that initial disclosure
15 helped us tailor our experts that we retained and our
16 affirmative experts.

17 MS. OLSON: Your Honor, we are happy to do that,
18 and I was going to propose that we begin disclosing experts
19 in 45 days and do so on a rolling basis. And we are happy
20 to provide a short summary about the core issues that that
21 expert will be testifying about.

22 THE COURT: Well, then, is it agreed, then, that
23 within 25 days the plaintiffs can identify their experts and
24 make a --

25 MS. OLSON: 45 days, Your Honor.

1 THE COURT: Did you say 25 or 45?

2 MS. OLSON: 45, please.

3 THE COURT: 45.

4 MS. OLSON: 45 days. And in the meantime, we
5 still will send our request for production of documents. We
6 think that there is enough overlap between fact and expert
7 discovery, we want to proceed on both tracks at the same
8 time and move things along according to the schedule that we
9 proposed.

10 MR. VOLPE: What is the overlap? That's what I am
11 trying to get at. What is the fact expert overlap that the
12 plaintiffs need to take fact discovery regarding?

13 THE COURT: I think, from what I understand
14 plaintiff to be saying and from my past familiarity with
15 this case, there's a subset of their substantive due process
16 case that involves what did you know and when did you know
17 it and did someone cover it up, did they create this danger.
18 And therefore does -- that substantive due process
19 violation, is that triggered by essentially what the
20 government knew and the inaction of the government in light
21 of that knowledge or the action of the government in light
22 of that knowledge to contribute to exacerbate the problem.

23 So that's the subset I think you are talking
24 about.

25 And then there -- but, you know, to me this case

1 is primarily driven by the science. And this case goes
2 nowhere with just a string of anecdotal, you know, stories
3 about floods, storms, *et cetera*. It goes somewhere with the
4 assistance of the experts that are going to offer the
5 science regarding what is happening, why it's happening and
6 let the experts, then, address those issues.

7 That's going to be the main thrust of this case as
8 it goes forward, in my opinion.

9 Does anybody disagree with that?

10 MR. VOLPE: I don't, Your Honor.

11 MR. DUFFY: I don't disagree with that.

12 MS. OLSON: No, Your Honor.

13 THE COURT: Okay. So let's get started on the
14 experts. 45 days. And you can have your document
15 production requests filed within that time period, too.

16 To me it makes sense to approach this case, in
17 terms of discovery, in phases, although I notice that you
18 didn't think that was appropriate. I think it is
19 appropriate because I think it will, as we go forward,
20 clarify a number of the issues.

21 MS. PIROPATO: And, Your Honor, may I clarify
22 something? That 45 days I assume only applies to plaintiffs
23 because the United States at this juncture has not retained
24 any experts, and I don't think we would be in a position to
25 make any disclosures by 45 days, particularly since we

1 haven't seen plaintiffs' list yet.

2 THE COURT: Well, okay, but surely you are going
3 to look for experts --

4 MS. PIROPATO: We are.

5 THE COURT: -- without even knowing what the
6 plaintiffs' experts' disclosures are, correct?

7 MS. PIROPATO: Correct.

8 THE COURT: I would think because you know what
9 the issue is.

10 MS. PIROPATO: Right, but it's been my experience,
11 Your Honor, that sometimes even going through our
12 contracting unit can take up upwards of 40 days, at which
13 point we can't disclose it until we get approval from the
14 contracting unit. So even when I was about to go to trial
15 in a year, they still took two months.

16 So we have not only the logistical difficulty of
17 locating these experts and tacking that up with our
18 affirmative case, there are some bureaucratic hurdles I want
19 to alert the court to. So I do think 45 days would be
20 ambitious for us.

21 THE COURT: Well, at least start on it.

22 MS. PIROPATO: Absolutely.

23 THE COURT: Surely there must be some in-house
24 experts.

25 MS. PIROPATO: We are going to start this on

1 Thursday. We are going to do everything we can. I just
2 want to be very candid about some of the practical
3 difficulties we may face.

4 I don't want to prevent -- present a date that I
5 don't know if we can meet.

6 MR. VOLPE: I do think, Your Honor, this is --
7 what the government said and what my experience has been in
8 litigation tells me that it makes sense that it's staggered
9 expert disclosure that we can respond to the plaintiffs'
10 expert disclosure, and again, it's not -- these are not
11 reports.

12 It's just the -- you know, a summary of what the
13 experts might say. And then we will know and the government
14 will know, hey, I don't need an expert here or I definitely
15 need an expert here. We can see what the government does
16 and we can say, yeah, we are all covered. We are good.

17 But to just -- for all the parties to submit
18 expert disclosures to each other on the same day seems to be
19 somewhat wasteful in my mind.

20 THE COURT: Well, it can be staggered. I just
21 want that process to begin.

22 MR. VOLPE: Yes, I definitely agree, Your Honor,
23 that we should begin.

24 MR. DUFFY: That seems like a sensible approach to
25 me.

1 MS. PIROPATO: We will begin right away. That is
2 not the issue here.

3 MS. OLSON: Can we set a deadline for the number
4 of days after we disclose our experts that you will then
5 disclose yours?

6 THE COURT: 21 days?

7 MS. OLSON: That's fine with plaintiff.

8 THE COURT: Will that be -- will that be enough?

9 MR. DUFFY: I think -- I would like to address
10 that. If we are going to have monthly status reports,
11 address it then because the first thing that comes to my
12 mind is, okay, I can set up a meeting with some of the
13 agency personnel pretty quickly. Then they need to direct
14 me to a couple of people that they think are going to have
15 good knowledge, and then I need to interview them and see,
16 you know, who's going to be a good witness.

17 And I just want to -- I am not quite sure exactly
18 how that task is going to be, but I think, you know, we are
19 definitely willing to, you know, work on this straight away
20 and, you know, provide updates and --

21 MS. PIROPATO: We could do rolling as well, Your
22 Honor, because it might be that we can find experts very --
23 certain experts very quickly and others take longer. So we
24 could do a rolling disclosures as well.

25 THE COURT: Okay. And we'll do these monthly

1 status reports to stay on top of this.

2 I have another question. And I don't expect an
3 answer right now, necessarily. But I would like to know the
4 ability of the intervenors to independently contest issues
5 that the United States admits.

6 MR. VOLPE: Are you asking as a legal -- a legal
7 matter?

8 THE COURT: Yes. To the extent the United States
9 has made admissions, to what extent do the intervenors have
10 the ability to contest the admissions of the United States?

11 You assert, to me somewhat inconsistently, that
12 you intervened but you don't need any fact discovery or you
13 don't want the plaintiffs to participate in fact discovery
14 from your individual corporations that your agencies
15 represent, and you really have no -- apparently your
16 position is you have no control over these individual
17 companies that are members of the organizations that are
18 intervening?

19 MR. VOLPE: They are not parties to the
20 litigation. The associations -- the ultimate representation
21 of the individual members, the associations, the three
22 associations have intervened in the case. They are before
23 the court. The member companies are not before the court.

24 THE COURT: Okay. So my question, then, is to the
25 extent that that's your status in the case, to what extent

1 do you have the ability to challenge the government's
2 admissions? The government is the defendant being sued by
3 the plaintiffs.

4 MR. VOLPE: True.

5 THE COURT: As you point out, you are not being
6 sued.

7 MR. VOLPE: Right.

8 THE COURT: And your member companies aren't being
9 sued.

10 So what legal standing do you have to contest
11 admissions that the United States makes in this litigation?
12 That's my question. You don't need to answer it now, but I
13 need some guidance on that.

14 MR. VOLPE: That's a good question, Your Honor,
15 and I will think some more about it. But let me make sure I
16 understand the court and the plaintiffs' position. If the
17 plaintiff -- intervenors do not contest the government's
18 admissions in their answer, does that mean the plaintiffs
19 will not take back discovery or will agree not to take back
20 discovery against the intervenor?

21 THE COURT: Well, I can't answer that question off
22 the top of my head, but it would certainly seem to call into
23 question the need for fact discovery.

24 MR. VOLPE: I understand you can't answer that,
25 Judge, but maybe the plaintiff -- plaintiffs can answer

1 that.

2 THE COURT: Sure. That's something for them to
3 contemplate. Yes, I agree.

4 MS. OLSON: Your Honor, we would agree not to take
5 discovery on issues that are not contested in the case. But
6 to the extent there are facts that are contested, then we do
7 want to do discovery.

8 THE COURT: Okay.

9 MR. VOLPE: So that's a -- Ms. Olson's
10 articulation, I understand what she's saying, but to what
11 facts are -- the fact that the plaintiff -- the plaintiffs
12 themselves enjoy skiing, is that a fact that we don't -- we
13 say we can't admit or deny that but have to take discovery
14 on that? Or -- and I am being silly for a point.

15 THE COURT: I understand your question, and that
16 brings up to plaintiffs that I was going to get to anyway,
17 the plaintiffs, many of them, if not all of them, have
18 submitted declarations regarding the impact of climate
19 change on them.

20 The court has ruled that in essence the fact that
21 harm is widespread doesn't mitigate against the standing of
22 the plaintiffs to file a lawsuit complaining about the harm
23 to them.

24 The court has in essence ruled that these
25 plaintiffs don't have to show some sort of individualized,

1 particularized, peculiar harm to them that is different from
2 the harm to the rest of us, the rest of humankind, from
3 climate change.

4 And so if that's the legal ruling in the case,
5 quite frankly, I am a little bit in the dark as to what
6 individualized questioning of each plaintiff on the standing
7 issue, why that's necessary, but I am not going to preclude
8 the parties from doing that, the government from doing that
9 or the intervenors from doing that.

10 But maybe the way to proceed there is to
11 streamline that, begin with the declarations of the
12 plaintiffs, and then make them available for a deposition
13 wherein the government and the intervenors can ask them
14 questions.

15 Quite frankly, I would think that you could do
16 most of that telephonically and save the expense and the
17 time of having everybody travel to have the individual
18 plaintiffs deposed.

19 But I am open for suggestions on that. Does that
20 make sense?

21 MR. DUFFY: Your Honor, we have discussed this a
22 little bit with the plaintiffs during our status conference,
23 and just a few things.

24 They propose a couple of things like maybe
25 streamlining the number of plaintiffs we would depose. And

1 we are certainly open to that.

2 One concern I have and something that I would want
3 to ask about is there's a number of allegations concerning
4 causation that are in the complaint with respect to each of
5 the plaintiffs.

6 And we want to -- we contest that. And so that --
7 that's an issue we want to explore a little bit.

8 THE COURT: Such as? Give me an example,
9 causation.

10 MR. DUFFY: Federal government causes climate
11 change. It's in their, plaintiffs' -- the part of the
12 complaint that I was responding to for the individual
13 plaintiffs. It's just kind of thrown in there, but, I mean,
14 it's in there. And so we --

15 THE COURT: If I understand, their contention in
16 that regard is that the federal government has promoted the
17 development of fossil fuels and leases -- you know,
18 mineral -- allows companies to come in and extract natural
19 gas, things of that nature.

20 MR. DUFFY: Well --

21 THE COURT: I think that's how they mean that you
22 cause it.

23 MR. DUFFY: Well, the individual plaintiffs don't
24 make those sorts of allegations, but, I mean, to just take
25 one example, specifically defendants' actions have caused

1 damage to and continue to threaten the resources on which
2 plaintiff relies for her survival and well-being.

3 Well, we want to ask the plaintiff what, you know,
4 what basis -- where is this coming from, how are you
5 connecting this all up because that's kind of one of the
6 important issues I think in this case is how you tie up all
7 of this causation, and they are alleging that, and so we
8 would want to do a deposition.

9 From my own experience, I don't like video
10 depositions and I don't like video interviews. They just --
11 you just can't replace speaking to a person in a room.

12 And so I would prefer -- I know -- I don't like
13 flying around the country. I have small children. But, you
14 know, maybe we can consolidate these. I mean, they don't
15 need to be long depositions, that's for sure.

16 THE COURT: Okay.

17 MS. OLSON: And Your Honor, we are happy to
18 provide the plaintiffs that we are putting forward for
19 standing for depositions, and we would again ask that you
20 limit your depositions to those plaintiffs.

21 We would like to ask for a protective order over
22 the content of those depositions to protect the privacy and
23 safety of the youth involved in this case, and I believe
24 counsel for both sets of defendants have agreed that they
25 are open to having a protective order.

1 MR. DUFFY: We agree.

2 MR. VOLPE: Yes.

3 MS. PIROPATO: No challenge.

4 THE COURT: Okay.

5 MR. VOLPE: So I use the core example, Your Honor,
6 I mentioned the plaintiffs specifically, but what my point
7 was, it's -- to the extent we are contesting or conceding
8 factual points, it's useful for us to understand which
9 points the plaintiffs believe that we would need to contest
10 or not contest, rather, sorry. Not contest.

11 There's -- it's a hundred -- what, two hundred and
12 some odd -- 310 allegations in the complaint. Some of them
13 obviously are legal without factual underpinnings, but it's
14 helpful to understand what -- again, back to my point, which
15 is how is this case going to get built. What is the case
16 going to look like when we -- when and if this case goes to
17 trial.

18 And there are many allegations that will -- I
19 don't think will pertain to what ultimately is tried before
20 the court.

21 THE COURT: That may be, but the good news is it's
22 a court trial, and a court trial can provide for a lot more
23 flexibility than a jury trial and schedules can be more
24 easily accommodated. The trial can proceed in phases with
25 gaps between the phases, and we can make progress that way.

1 And speaking of phases, okay, I have indicated we
2 can have a phase where the experts are disclosed and
3 summarized and people can know more about what the experts
4 are going to say and retain their experts and respond, and
5 we can have that fleshed out.

6 We can deal with the plaintiffs and their
7 standing. We can deal with whatever fact witnesses and
8 document discovery issues we have.

9 We can talk about having a trial in phases where
10 the first phase may be -- it may be logical to have a first
11 phase on the issue of liability. Is climate change
12 happening?

13 Are there levels beyond which it's going to be
14 irreversible or extraordinarily harmful? Is it human
15 induced? Is the government responsible and did the
16 government cause any of it and are the plaintiffs'
17 constitutional rights violated by what's happening in terms
18 of climate change?

19 And depending upon the outcome of that phase, then
20 it makes sense to me that it would be appropriate to proceed
21 to the next phase, if there is one, and the next phase would
22 be the remedy phase.

23 MS. OLSON: Your Honor, one issue that plaintiffs
24 have with that two-phased approach at this point is that
25 there are facts that will be in evidence and expert

1 testimony that will relate both to the liability question
2 and to the remedy phase.

3 THE COURT: Okay.

4 MS. OLSON: So there's overlap, and I think it
5 would be more efficient and save time to present that in one
6 trial.

7 THE COURT: Well, but this is one trial because
8 you have the same trier of the case.

9 MS. OLSON: Um-hmm.

10 THE COURT: You are not going to have different
11 juries. But it may be that depending upon the outcome of
12 the first phase, there may be some -- you may have your
13 witnesses opine on what the remedies are, but it may be that
14 the other parties may have different experts to call at a
15 remedy phase.

16 MR. VOLPE: Your Honor, I just can't imagine this
17 case proceeding in any other manner, a remedy and then a --
18 follow -- following a liability determination. Otherwise,
19 this trial will go on forever, and then the court would be
20 presented with a record that it would have to sift through
21 on both remedy and liability when, if the court found that
22 there is no liability, that would be the end of the matter.

23 And I understand what Ms. Olson is saying, that
24 there are going to be some overlap experts. That's almost
25 always the case in a complicated piece of litigation like

1 this.

2 THE COURT: What was that case that Dickens wrote
3 about that went on for over --

4 MR. VOLPE: I believe that's in *Bleak House*,
5 Jarndyce.

6 THE COURT: Okay. It won't last that long.

7 MS. PIROPATO: And, Your Honor, the United States
8 has no opposition to the two-phased approach. In fact, we
9 think it makes a lot of sense, in fact, and perhaps during
10 the liability trial, if it doesn't go away, it can be
11 narrowed. The remedy phase itself then can be narrowed.

12 So there's -- it would be -- I have found that
13 when you do two-phased trials, it allows the second phase to
14 be more efficient and more focused.

15 THE COURT: And another question that comes up,
16 speaking about being more focused, does plaintiff need all
17 the named defendants, all the agencies? How many agencies
18 are there that are named in the case?

19 MR. DUFFY: I believe 12.

20 THE COURT: Do you need all 12 agencies as
21 defendants, or can that be narrowed down too? Like, for
22 example, do you still want to pursue the Jordan Cove issue?
23 It's named in your complaint, but then they didn't receive
24 the necessary permit to go forward. So is that moot, or do
25 you still want to talk about Jordan Cove in the trial?

1 MS. OLSON: We'd like to leave that in the
2 complaint, Your Honor, because given some of the statements
3 out of the Trump administration, we are not sure what
4 direction that might take going forward.

5 THE COURT: Well, you can leave it in the
6 complaint, but, you know, do you need to have a trial on it
7 unless it somehow is reactivated?

8 MS. OLSON: At this phase --

9 THE COURT: Isn't it kind of a moot issue?

10 MS. OLSON: At this point we don't need to have a
11 trial on that issue.

12 THE COURT: Okay.

13 MS. OLSON: However, all of the 12 named
14 defendants have played a role in causing the constitutional
15 infringements and violating the Public Trust Doctrine and
16 will likely play a role in the remedy, and so I think it's
17 important to keep them all in the case, although there will
18 be more limited discovery and facts that are presented at
19 trial with respect to different defendants.

20 THE COURT: Well, for example, one of the agencies
21 is the Department of Interior.

22 Is that -- do you intend to notice a deposition of
23 the head of the Department of Interior?

24 MS. OLSON: We haven't decided that yet, Your
25 Honor, but the Department of Interior plays a crucial role

1 in leasing federal public lands for fossil fuel extraction,
2 for example.

3 THE COURT: I understand that, but do you intend
4 through the discovery to get into every lease on public land
5 that's out there?

6 MS. OLSON: We sure hope not, Your Honor.

7 THE COURT: That's what I am talking about,
8 simplifying.

9 MS. OLSON: We intend to.

10 MR. DUFFY: Your Honor, I might just volunteer a
11 few ideas. I mean, my conversations with OMB, the Office of
12 Management and Budget, and the Council on Environmental
13 Quality, it's not clear to me that there would be any basis
14 for having liability there, just to get the conversation
15 started, because it would certainly make our lives a lot
16 easier if we didn't have to have 12 conversations every time
17 something happens in this trial.

18 THE COURT: I agree. I agree. See to what extent
19 you can focus it and narrow it. It will go a lot -- I mean,
20 if your goal here is to have an earlier rather than a later
21 trial date, then streamline this as a way of achieving that
22 goal.

23 MS. OLSON: We are open to talking with counsel at
24 our next meet and confer about ideas that they have.

25 MS. PIROPATO: And, Your Honor, we are, of course,

1 open to that. We think those conversations to some extent
2 have been fruitful, and I hope that continues.

3 THE COURT: Good. I encourage that.

4 MS. OLSON: Your Honor, I have a couple of just --

5 THE COURT: Yes. Go ahead.

6 MS. OLSON: -- last-minute things. One, if we
7 could set a date for our next status conference.

8 THE COURT: I was just going to do that.

9 MS. OLSON: Okay. Great.

10 THE COURT: Well, it is now February 7th. A month
11 from now would be March 7th. Would that work for everybody?
12 And we can do this telephonically. And if necessary, we can
13 have everybody back in person, but I think most of these we
14 can probably do over the phone.

15 MR. DUFFY: Yes, Your Honor. Yeah, we agree with
16 that.

17 MS. OLSON: Is it possible to do March 8th or
18 Wednesday --

19 THE COURT: Sure.

20 MS. OLSON: Would that work for you all?

21 THE COURT: Paul?

22 MR. VOLPE: Yes, Your Honor. That works fine.

23 MS. OLSON: Thank you. The next question was --

24 THE COURT: Wait. He's going to give us a date.

25 MS. OLSON: Oh, sorry.

1 THE CLERK: Do you want to take Ms. Olson's next
2 comment? I'll have a date in just one moment. My computer
3 is a little slow.

4 THE COURT: Oh, his computer is slow. Okay. Go
5 ahead.

6 MS. OLSON: We are wondering if the
7 intervenor-defendants' counsel could tell us when they will
8 take a position on whether they will contest the facts that
9 have been admitted by the federal defendants.

10 MR. VOLPE: Well, I have been trying to -- I must
11 be doing a poor job of articulating our view, which is which
12 facts -- I mean, every fact that's alleged in the complaint?
13 Every fact that the government weighs in on?

14 I mean, the government, in many of their
15 responses, there's a hybrid admit/denies. It basically says
16 we admit this, we don't admit this, it's too vague for us to
17 admit. What are we supposed to do with that?

18 THE COURT: I have an idea.

19 MS. OLSON: I have a complaint summary that I can
20 send you.

21 THE COURT: I've got an idea. Why don't you draw
22 up a list of admissions that the government has made and
23 forward those to counsel for the intervenors.

24 And then you can respond to that list.

25 MS. OLSON: And I already have that drawn up, so

1 we can do that this week.

2 MR. VOLPE: That seems fair, Your Honor.

3 MS. PIROPATO: I think that would be helpful and
4 would also, you know, possibly address the issue of if we
5 are going to get around -- sounds like we are going to have
6 fact discovery going on at the same time that we are trying
7 to work on the expert pieces.

8 Obviously having some clarity there would -- may
9 obviate the need for a lot of the traditional fact
10 discovery, paper discovery from at least on the intervenors'
11 side and probably the government as well.

12 THE COURT: Okay. So do we have a date?

13 THE CLERK: Status conference is set for
14 March 8th, 2017, 10:00 a.m., before Judge Coffin. And are
15 we doing that by phone?

16 THE COURT: We are doing that by phone. Would you
17 prefer, those of you at the East Coast, an earlier time or a
18 later time? Ten o'clock would be one.

19 MR. VOLPE: One o'clock, that works great.

20 THE COURT: Okay. All right.

21 MS. OLSON: And then the -- the final -- the
22 question for defendants is if they will be providing a
23 response to our litigation hold letter to make sure that we
24 are all on the same page with respect to that issue in
25 preserving documents.

1 MR. VOLPE: I think we have responded in the open
2 court on our views on the litigation hold notice.

3 MS. OLSON: We are not clear how you are complying
4 with Rule 26 at this point.

5 MR. VOLPE: We understand our Rule 26 obligations.
6 What we don't understand is what the litigation hold does
7 that's reasonable, not over -- overly broad, not burdensome.
8 So we understand our obligation is to preserve materials,
9 but the litigation hold notice is way beyond the pale.

10 THE COURT: I think what he has said, if I
11 understand him correctly, is that the intervenors do not
12 represent the individual corporations that constitute the
13 membership of the intervenors. So to the extent you are
14 demanding that the individual membership corporations hold
15 onto the evidence pursuant to your request, he's saying, I
16 think, we don't represent them.

17 This is the similar problem that he's had with
18 Mr. Tillerson, who no longer was an officer with the
19 intervenors.

20 MS. OLSON: Right. Well, it's interesting because
21 intervenor-defendants, they moved to intervene as full party
22 defendants in this case based on the financial interests of
23 their members.

24 Many of their members sit on their board of
25 directors and actually make executive decisions about how

1 API and NAM and AFPM operate, including in this case, and
2 those members presumably were consulted, your board members,
3 when you answered the complaint.

4 So I think to the --

5 THE COURT: Maybe so, but -- you can do some
6 research on the court's authority over membership
7 corporations based upon the presence of the intervenors in a
8 case.

9 Right now I am not aware that the court would have
10 authority to order individual officers of individual member
11 corporations to do anything. I don't know what my
12 jurisdiction over them would be.

13 But you could do research on that and move the
14 court for an order.

15 MR. VOLPE: That research will be unavailing.

16 But then the second point is that, again, what's
17 at issue here is what the government knew, what the
18 government did, what the government didn't do. And to the
19 extent the intervenors' associations said anything about
20 that, those materials will be in the public record and will
21 be available through discovery on the federal government,
22 not on the intervenor-defendants.

23 What's in our records is irrelevant except to the
24 extent that it was transmitted to the federal government.
25 You can get those materials from the federal government. I

1 don't see why the plaintiff -- intervenors need -- there
2 needs to be fact discovery against them.

3 MS. OLSON: Well, counsel, unfortunately, the
4 named defendants actually have a lot of communication
5 between your clients and the federal government on the issue
6 of climate change and what should be done about it and
7 influencing those decisions for the financial benefit of
8 your clients. So there's a lot of information actually
9 contained in the records of, for instance, API and NAM on
10 those questions.

11 THE COURT: I think what you need to do on your
12 hold request is interact with the government and try and
13 narrow what your request means so that the government
14 understands because they are saying that -- that right now
15 they really are not able to understand exactly what it is
16 they are supposed to do. They have to meet with all these
17 different agencies.

18 So clarify that, and then you can have further
19 discussions with counsel for the intervenors and do the
20 research on what the court's authority over officers of
21 member corporations is.

22 MS. OLSON: Thank you, Your Honor.

23 MR. DUFFY: Your Honor, we have one additional
24 point, and it's not directly related to what we are
25 discussing today, but I just want to raise it in full

1 candor.

2 The United States is considering whether to seek
3 interlocutory appeal of the court order denying the motions
4 to dismiss.

5 I say "seeking" because no decision has been made,
6 and it's, frankly, not my decision to make. But I just
7 wanted to put that out there so Your Honor and all the
8 parties are aware of that.

9 THE COURT: Okay. What is your ability to appeal
10 from an interlocutory order at this stage?

11 MR. DUFFY: So specifically it would be the order
12 denying the motions to dismiss.

13 THE COURT: Right.

14 MR. DUFFY: So we're researching whether we meet
15 the standards of 28 U.S.C. 1292.

16 THE COURT: Okay. All right. Thank you.

17 MS. OLSON: Thank you, Your Honor.

18 MR. DUFFY: Thank you.

19 THE COURT: We'll go forward.

20 THE CLERK: This court's adjourned.

21 *(The proceedings were concluded this*
22 *7th day of February, 2017.)*

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25

1 I hereby certify that the foregoing is a true and
2 correct transcript of the oral proceedings had in the
3 above-entitled matter, to the best of my skill and ability,
4 dated this 14th day of February, 2017.

5
6 /s/Kristi L. Anderson

7 Kristi L. Anderson, Certified Realtime Reporter
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