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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al., Plaintiffs,	Case No. 6:15-cv-01517-TC
v.	**FEDERAL DEFENDANTS' OBJECTIONS TO ORDER DENYING MOTION TO STAY LITIGATION**
UNITED STATES OF AMERICA, et al., Federal Defendants.	**Expedited Hearing Requested**

Introduction

On March 7, the United States moved the Court to certify its Opinion and Order of November 10, 2016 to the United States Court of Appeals for the Ninth Circuit for interlocutory appeal. Fed. Defs.' Mot. to Certify Order for Interlocutory Appeal, ECF No. 120 ("Mot. to Certify"). At the same time, the United States moved to stay this litigation until the earliest of (1) such time as the Court of Appeals refuses to accept this matter for interlocutory appeal; or (2) such time as the Court of Appeals has ruled on the certified questions and issues its mandate

to this Court. Fed. Defs.' Mot. to Stay Litigation, ECF No. 121 ("Mot. to Stay"). On May 1, the Magistrate recommended that the Court deny the Motion to Certify and issued an order denying the Motion to Stay. Findings and Recommendation, ECF No. 146 ("F&R"). Four days later, Federal Defendants objected to the recommendation that the Court deny the Motion to Certify. Fed. Defs.' Objections to Finding & Recommendation of Magistrate Judge, ECF No. 149.

The United States now also objects to the order denying the Motion to Stay and respectfully requests that the Court reconsider the Magistrate's order and grant the Motion to Stay pending resolution of the motion seeking interlocutory review. The United States also respectfully requests expedited consideration of this motion.[1] The Magistrate offered no specific reasons for denying the Motion to Stay, stating only that "[t]he federal defendants' motion for a stay (#121) pending consideration of the motion for leave to appeal is denied." F&R 16. However, as set forth below, a stay of the proceedings pending resolution of the Motion to Certify is appropriate because the United States is likely to prevail on appeal and will be irreparably harmed absent a stay, Plaintiffs are not likely to suffer significant injury if a stay is granted, and the public interest would be well-served by a stay.

The United States seeks expedited consideration. We ask the Court to set May 15, 2017, as the deadline for Plaintiffs to respond to these objections. And we respectfully request that the Court rule on the United States' Motion to Certify under 28 U.S.C. § 1292 and the Motion to Stay by May 19, 2017. Such expedited consideration is warranted by the upcoming discovery deadlines—including the May 31, 2017, deadline for responding to requests for admission—and

[1] Pursuant to Local Rule 7-1(g), the parties have conferred on the request for expedited consideration of this motion to stay. Plaintiffs oppose the request for expedited consideration. Intervenor-Defendants do not oppose the request for expedition.

so that the United States might consider the need to seek further review and relief from the Court of Appeals.

I. LEGAL STANDARDS

A. Motion to Stay

It "has always been held . . . that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9-10 (1942) (footnote and citations omitted). This is because "[i]t takes time to decide a case on appeal. Sometimes a little; sometimes a lot. No court can make time stand still while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review." *Nken v. Holder*, 556 U.S. 418, 421 (2009) (internal quotation marks and citation omitted). "A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it." *Id.*

The Court may stay discovery pending appeal based on its "broad inherent powers 'to manage [its] own affairs as to achieve the orderly and expeditious disposition of cases.'" *Sherman v. United States*, 801 F.2d 1133, 1135 (9th Cir. 1986) (per curiam) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997) (a court's "power to control its own docket" means that a "District Court has broad discretion to stay proceedings"); *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972).

In determining whether a stay pending appeal is warranted, courts look to four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where

the public interest lies." *Nken*, 556 U.S. at 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). With regard to the first of these four factors, the moving party can "show either a probability of success on the merits" or that "serious legal questions are raised, depending on the strength of petitioner's showing on the other stay factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (per curiam) (internal quotation marks and citation omitted).

B. Standard of Review

Parties may file timely objections to a magistrate's order on pretrial matters that are not dispositive. Fed. R. Civ. P. 72(a). On review of the magistrate's order, the district court must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.*; *see also* 28 U.S.C. § 636(b)(1)(A). There is clear error when the court is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). This standard of review reflects the broad, but not unbounded, discretion accorded to magistrate judges on pretrial matters. *See, e.g.*, *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002) (questions of law are reviewed *de novo*, while pretrial motions—such as discovery matters—are evaluated under the clearly erroneous standard of review) (citations omitted); *Thunderbird Hotels, LLC v. City of Portland*, 670 F. Supp. 2d 1164, 1167 (D. Or. 2009), *aff'd*, 404 F. App'x 249 (9th Cir. 2010).

II. ARGUMENT

A. The United States is likely to prevail on appeal.

As noted in our brief in support of the Motion to Certify, the November 10, 2016 Order's recognition of an entirely new fundamental right under the Due Process Clause and expansion of the public trust doctrine so as to apply to the federal government are groundbreaking rulings. ECF 120-1 at 18-25. In addition, the Order's rulings on standing conflict with Supreme Court

precedents that restrict Article III courts to actual cases and controversies and prevent them from becoming fora for policy disagreements. *Id.* at 8-17. For these reasons, the United States is likely to succeed on the merits and has unquestionably raised serious legal questions. *Mueller v. First Nat'l Bank of Quad Cities*, 797 F. Supp. 656, 663–64 (C.D. Ill. 1992) (interlocutory appeal appropriate where movant's dispositive arguments are "not insubstantial" and the case is "of first impression") (quoting *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983)).

Under section 1292(b), certification is appropriate where, among other things, there are "substantial grounds for difference of opinion" on "controlling question[s] of law." 28 U.S.C. § 1292(b). Here, the United States District Court for the District of Columbia has dismissed a virtually identical public trust suit (brought by the same attorneys) on the basis that the public trust doctrine is not a matter of federal law. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012). That decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014) (per curiam) ("the public trust doctrine remains a matter of state law" and . . ."the contours of that public trust do not depend upon the Constitution.") (quoting *PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012)). This conflicting Circuit precedent establishes, at minimum, that there are substantial grounds for difference of opinion on Plaintiffs' public trust claims. "Courts traditionally will find that a substantial ground for difference of opinion exists where," as here, "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (internal quotation marks and citation omitted).

In determining the propriety of a stay, this Court's inquiry may properly consider the likelihood that the Court of Appeals will take an interlocutory appeal and the likely scope of the

Ninth Circuit's review. If the Ninth Circuit were to accept the interlocutory appeal, it would divest this Court of jurisdiction over this matter. The filing of an interlocutory appeal "divests the district court of jurisdiction to *proceed with trial*." *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (emphasis added; citation omitted). And such a filing also "divests the district court of jurisdiction over the particular issues involved in that appeal." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001); *see Braun-Salinas v. Am. Family Ins. Grp.*, No. 3:13-cv-00264-AC, 2015 WL 128040, at *2 (D. Or. Jan. 8, 2015) (same). Because the issues raised by the United States in the Motion to Certify substantially affect the merits of the case—including whether it may proceed in the first instance—an interlocutory appeal would divest this Court of jurisdiction. *Ariav v. Mesch, Clark & Rothschild, P.C.*, No. CV 03-464-TUC-MHM, 2005 WL 3008616, at *1 (D. Ariz. Nov. 8, 2005) (finding that the issue of jurisdiction in a Family Medical Leave Act suit was "intertwined with the merits, and therefore, any discovery in this matter would necessarily implicate the jurisdictional issue on appeal"). Where, as here, an interlocutory appeal involves a controlling issue of law, courts routinely stay litigation in its entirety pending a decision by the court of appeals. *See e.g. Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1323 (D. Or. 1997). Given that the United States provided ample grounds to support its Motion to Certify—which could deprive this Court of jurisdiction—this also militates in favor of a stay.

B. The United States will be irreparably injured absent a stay.

The extraordinary scope of this litigation and the massive scope of discovery that Plaintiffs are demanding set this case apart. The discovery burdens this case is likely to impose were forecast by Plaintiffs' January 24, 2017 litigation hold demand letter. That letter demands

preservation of, *inter alia*, the following categories of documents without any temporal limitation:

> All Documents related to climate change since the Federal Defendants or the Intervenor Defendants (and their member companies) became aware of the possible existence of climate change;
>
> All Documents related to national energy policies or systems, including fossil fuels and alternative energy sources and transportation;
>
> All Documents related to federal public lands, navigable waters, territorial waters, navigable air space or atmosphere, or other public trust resources; [and]
>
> All Documents related to greenhouse gas emissions or carbon sequestration as those terms apply to agriculture, forestry, or oceans.

Mot. to Stay, Ex. A at 5-6, ECF No. 121-1.

Consistent with the January 24 letter, Plaintiffs have made clear that they intend to seek discovery of virtually all of the federal government's activities relating to control of carbon dioxide ("CO_2") emissions; the production and transportation of fossil fuels; alternative energy sources; and public lands, transportation, and energy policy that may relate to CO_2 emissions. For example, Plaintiffs have propounded more than 800 requests for production to a dozen agencies and the Executive Office of the President. *See* Exhibits 1-8. In addition, Plaintiffs have indicated that they will notice the depositions of four Cabinet-level Secretaries and other high-level officials. *See* Meet and Confer Notice for Depositions, attached hereto as Exhibit 9. And they have also signaled their intent to seek twelve 30(b)(6) depositions, which if experience proves any guide, will require multiple agency designees and hundreds of hours of preparation.

And while Plaintiffs pay lip service to narrowing discovery, they have not taken any steps in that direction, as their discovery requests make evident. Pls.' Resp. in Opp'n to Fed. Defs.' Mot. to Stay Litigation 9, ECF No. 134. Most recently, the parties met and conferred in Portland, on May 4, 2017, in an effort to establish a more manageable discovery plan. Despite

approximately six hours of discussions, the parties were unable to agree to a reasonable discovery schedule or impose any meaningful limits on the amount of discovery sought. Contrary to these goals, the Plaintiffs have made plain that they intend to file more discovery of an indefinite nature, and the United States remains subject to discovery requests with a temporal scope of over 60 years and that stretch across a dozen diverse federal agencies. In short, the scope of fact discovery in this matter lacks any reasonable bounds and—if allowed to continue pending appeal—would significantly and negatively impact Federal Defendants' ability to perform their statutory and constitutional duties by disrupting the normal operations of the defendant agencies and executive components.

The expert phase of discovery will also be extraordinary in its reach. Plaintiffs have provided a list of 11 experts spanning numerous disciplines from geology to ocean acidification, hydrology, psychiatry, medicine, economics, and political science. And Plaintiffs have indicated they may call additional experts. All parties, including Intervenor-Defendants, will retain affirmative and rebuttal experts on many, if not all, of these disciplines. Expert discovery will therefore be complicated, resource-intensive, and drawn-out. The United States, therefore, would be irreparably harmed absent a stay of proceedings pending appeal. *See Bituminous Cas. Corp. v. Hartford Cas. Ins. Co.*, No. 12-cv-43-WYD-KLM, 2012 WL 5567343, at *3 (D. Colo. Nov. 15, 2012) (holding that "time-intensive, voluminous, and expensive" discovery weighs in favor of granting a stay).[2]

[2] Beyond these considerations, this Court should stay discovery because this action is unmoored to any statute that could limit its scope and, by extension, the scope of documents sought. If Plaintiffs had properly brought suit under the Administrative Procedure Act or specific statutes that permit challenges to discrete agency acts or failures to act, judicial review would be limited to a specific action or set of actions and would occur on the administrative record. Here, by bringing an equitable action, Plaintiffs attempt to circumvent the fundamental legal principles

C. Any injuries to Plaintiffs due to a stay should be negligible.

A stay of these proceedings during the pendency of an appeal is not likely to appreciably harm Plaintiffs. Because Plaintiffs' claims involve complex scientific knowledge and factual allegations directed at Federal Defendants concerning conduct that took place over several decades, discovery and a trial in this case are likely to be complex and time-consuming. Indeed, Plaintiffs anticipate introducing eleven expert witnesses in the case. Initial Expert Disclosures, attached hereto as Exhibit 10. Given the already complex nature of the case and the time it would take to complete discovery and proceed to trial, the incremental additional time needed for an appeal of the legal issues is relatively modest by comparison.

Insofar as Plaintiffs may argue that time is of the essence because CO_2 levels continue to increase with each passing day, Plaintiffs waited until 2015 to file their complaint, after more than sixty years of government actions they now challenge, and elected to pursue novel constitutional and public trust claims rather than challenge discrete agency actions. Thus, any delay corresponding to the need for interlocutory appellate review is more than justified; as the party solely responsible for the timing and framing of their civil action, Plaintiffs cannot credibly assert that a delay pending appellate review would be unjust.

D. The public interest in participation in the political process would be well-served by a stay.

Two important public interests are at stake here. First is the public's ability to participate in the political process that determines how best to protect the environment while serving other important values such as employment, national security, affordable energy, balance of trade, job creation, international affairs, and energy independence. Through this suit, Plaintiffs seek to

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that require them to invoke a statutory waiver of sovereign immunity and limit the review of their claims to the record.

steer decision-making authority on these critical issues away from our publicly elected representatives. These public policy issues affect every American and the balancing involved in resolving these issues is the province of the legislative and executive branches, not the judicial branch.

Second, the public interest also weighs heavily in favor of a stay because of the intrusive nature of the discovery sought against the Executive Branch. As discussed above, Plaintiffs seek to depose four Cabinet-level officials and will demand a Rule 30(b)(6) witness from the Executive Office of the President. If a stay is not granted, the Executive Branch and its agencies (including the Executive Office of the President) would be subject to continued discovery and would be forced to divert substantial resources away from their essential function of "faithfully execut[ing]" the law. U.S. CONST. art. II, § 3. The discovery served on the President here is especially problematic in light of the absence of controlling statutory authority and the effect such discovery would have on the normal operations of the Executive Branch. *See* Mem. in Supp. of Mot. to Certify 17; *Mississippi v. Johnson*, 71 U.S. (4 Wall) 475, 501 (1866) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."). The public interest accordingly will be served by staying this litigation.

Conclusion

For all of the foregoing reasons, the United States respectfully requests that the Court stay this litigation until the earliest of (1) such time as the Court of Appeals refuses to accept an interlocutory appeal of the Court's November 10, 2016 order; or (2) such time as the Court of Appeals has ruled on the certified questions and issued its mandate to this Court. The United States also respectfully requests that the Court rule on the United States' Motion to Certify under 28 U.S.C. § 1292 and the Motion to Stay by May 19, 2017.

Dated: May 9, 2017

Respectfully submitted,

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Certificate of Service

I hereby certify that on May 9, 2017, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

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