

Exhibit C



CENTER for BIOLOGICAL DIVERSITY

Because life is good.

November 30, 2017

Via Electronic Mail

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Environment and Natural Resources Division
Natural Resources Section
U.S. Department of Justice
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Re: *Northern Plains Resource Council et al. v. U.S. Dep't of State et al.*, Civ. No. 17-00031
00029 (D. Mont.) (BMM)

Dear Mr. Hajek and Ms. McNeil:

The Northern Plains et al. plaintiffs (“Plaintiffs”) have the following concerns and questions regarding the Administrative Record compiled and served by the State Department (“State”) and U.S. Fish and Wildlife Service (“Service”) in the referenced case.

Plaintiffs have overarching concerns with the compilation of the Administrative Record (“Record”) and indices as well as questions regarding specific records. To the extent that the overarching deficiencies described below limit Plaintiffs’ ability to raise concerns about specific records, or if issues arise that were not apparent, Plaintiffs may submit more concerns or questions at a later time.

(1) *Disorganized Records and Indices and Large, Batched .PDF Files*

As an initial matter, we are concerned about a lack of consistent organization in the files and indices that you served on November 9, 2017. The State Department did not serve its portion of the Record as individual files and with Optimal Character Recognition (“OCR”) (as the Service did), but as large, batched .pdf files. Please know that in general, it is not possible to review an Administrative Record consisting of several large .pdf files, as it simply is not possible to organize and easily review them. Splitting the records into individual files was time-consuming but unfortunately necessary for us to be able to review the documents, and to confirm that the State Department’s Administrative Record Index aligns with the records that were released. We have tried to complete this process as quickly as possible in a short period of time with the resources we have. But since these files were created and once existed as individual files, we ask

that in the future, you to simply provide them as individual records to us.¹ We thank you in advance.

The indices for the Record raise several concerns, particularly the Service's indices. The Service's Administrative Record included two indices, "Book1" and "Keystone AR," each of which is confusing and inadequate. It is not apparent how or whether the two indices interrelate, as one lists files that we *did not* receive while the other does not list files that we *did* receive.

The "Keystone AR" index contains information such as the date, author, and subject of files, but it does not include all of the records that were included on the DVD (the records that were included on the DVD but are not listed in the "Keystone AR" index are listed in Attachment A). "Book1" is simply a list of 308 files and five folders, a large portion of which were not actually included on the DVD, and many of the hyperlinks in that file are broken. *See* Attachment B (list of hyperlinks in "Book1" that appear to be broken). It is therefore impossible to use the indices for their intended purpose, as they are not comprehensive, and moreover, do not include any claims of privilege. We would appreciate production of an adequate index for the Service's Record.

There are a few additional organizational matters. One, the Service records have no Bates numbering. We would appreciate knowing if you intend to add those to the records at a future time. Two, we note that the Defendants have released the files primarily as .pdf files, regardless of their original format. We therefore request, as to those records already compiled and any records you compile and lodge as part of the Record in the future, that you release records to us in their native formats, such as native email files and datasets, with load files.²

Finally, compiled in Attachment C are additional issues that we have found in connection with the Service's Record.

(2) Categories of Missing Records

In addition to the overarching organizational issues set forth above, we have identified whole categories of records that, it cannot be disputed, are part of the Administrative Record, but are nevertheless excluded from the DVD and flash drive. We address each of these categories below, and propose how to resolve the omission of these records.

- (a) First, as Mr. Hajek stated in his email of November 9, the State Department Administrative Record does not include: (i) an unspecified number of records that were referenced in the 2014 Final Supplemental Environmental Impact Statement

¹ Parties now typically provide opposing parties with OCR'ed, "load files" that allow for the files to be easily imported into document management software programs as individual documents. We see no reason why the State Department and the Service could not do so here.

² We recognize that the agencies have provided certain GIS files in their native format. We address concerns about GIS layers further below.

- (FSEIS) and the 2011 Final Environmental Impact Statement, including an unspecified number of references that have never been made publicly available; and (ii) public comments submitted after the 2014 FSEIS, which would necessarily include comments submitted on the National Interest Determinations in 2014 and 2017. Mr. Hajek did not describe these or other draft documents in his email, thus we would appreciate your confirmation that you consider them all to be part of the Record and certify them as such when you lodge the Administrative Record with the Court.
- (b) In addition to or as part of (a), it appears that Defendants have omitted from the Record the 2013 Draft Supplemental Environmental Impact Statement, the 2009 Draft Environmental Impact Statement, the draft biological assessments from 2009 and 2012, draft biological opinions, and all related references to these or any other relevant materials.³ Please also confirm that these materials belong in the Record and certify them when you lodge the Record with the Court.
- (c) There appears to be little material in the Record that relates to the Big Bend-to-Witten Transmission Line in South Dakota, which is a connected federal action to Keystone XL. The Center for Biological Diversity has obtained some records related to this transmission line project through FOIA. We have included those records on our list of missing records (*see* Attachment D and 2(d) below). We request your confirmation and certification that they are part of the Administrative Record as well.⁴
- (d) Plaintiffs possess dozens of additional records that were not included in the Administrative Record that Defendants compiled and served, but which clearly

³ It is our understanding that most of the appendices to the final Biological Assessment were never made publicly available (*e.g.*, during public comment periods). The Center for Biological Diversity was only able to obtain them (and, hence, add them to the Record now) after filing a Freedom of Information Act request and bringing suit against the State Department pursuant to FOIA. *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv. et al*, Civ. No. 14-01527 (DDC) (RC).

⁴ The Western Area Power Administration (“WAPA”) has released about 30 records to the Center in response to a FOIA request for all records concerning the Big Bend-to-Witten Transmission Line Project (tracking number WAPA-2017-01129-F), but WAPA withheld the GIS layers for the line by invoking Exemption 3 of FOIA. The Center is appealing this determination through the administrative process. The Center has also filed a request for records from the Rural Utilities Service, an agency of the Agriculture Department, that is still pending (tracking number 2017-RD-04354-F). In light of this, Plaintiffs may obtain additional records through FOIA that concern the Big Bend-to-Witten line; if so, we will also seek certification that they are part of the Record in this case at that time. Nevertheless, the Defendants must also add records related to Big Bend-to-Witten as it is a connected federal action and a power line with potential impacts to native wildlife habitat and the landscape.

pertain to the merits of Keystone XL and hence should be in the Record.⁵ *Portland Audubon v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (the whole record “includes everything that was before the agency pertaining to the merits of its decision”); *see also* 5 U.S.C. § 706 (judicial review shall be based upon “the whole record or those parts of it cited by a party”). These records are listed in Attachment D. Many of these records consist of comment letters that were submitted to the Defendants during or outside of public comment periods in connection with NEPA review and the National Interest Determination. Others were obtained by the Plaintiffs through FOIA requests for records related to the federal government’s decisions regarding whether to approve Keystone XL, and hence, should also be in the Record. *In re United States of America*, No. 17-72917 (9th Cir. Nov. 16, 2017) (“the whole administrative record ‘consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position’”) (quoting *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks omitted)). Yet it appears that these records were omitted. Hence, please review this list and let us know that you agree that they may be added to the Record. At a minimum, if Defendants do continue to withhold any of these materials, they must clearly describe them in a privilege log so that judicial review of these withholdings can be facilitated. *See infra* at (4).

(3) Unidentified Withholdings

We are concerned that both the State Department and Service have withheld records as privileged without identifying and certifying them on a privilege log. The State Department Administrative Record includes very few emails and inter-agency communications, even though such materials are typically included in administrative records that are compiled for litigation by federal agencies (including the Service in this case).⁶ Yet the State Department has provided no

⁵ It is unclear whether at least some of these records are either among those described by Mr. Hajek (*see* (2)(a)(i) and (ii)), and/or among the unidentified withholdings described below (*see* (3)). We anticipate that the parties can resolve the status of these records informally, but if not, Plaintiffs reserve the right to file any appropriate motion

⁶ *See, e.g., Regents of the Univ. of Cal. v. Duke*, No. C 17-05211 WHA, 2017 U.S. Dist. LEXIS 171805, at *9 (N.D. Cal. Oct. 17, 2017) (rejecting “defendants’ contention that it need only produce documents directly considered by the [decisionmaker]” as “[d]ocuments reviewed by subordinates, or other agencies who informed her on the issues underlying the decision ..., either verbally or in writing, should be in the administrative record” as well); *see also* U.S. DEP’T OF JUSTICE, ENV’T AND NAT. RES. DIV., GUIDANCE TO FEDERAL AGENCIES ON COMPILING THE ADMINISTRATIVE RECORD 3 (Jan. 1999), http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf (last visited Nov. 30, 2017) (the administrative record should “[i]nclude all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials” and “communications the agency received from other agencies ... documents and materials that support *or* oppose the challenged agency decision ... minutes of

descriptions of these records, or even acknowledged the existence of these and other records that have been withheld in their entirety, let alone provided a log with basic details about what these records are, who generated them, and why the State Department is evidently hoping to shield them from judicial review. [Fed. R. Civ. P. 26\(b\)\(5\)](#) (“When a party withholds information otherwise discoverable by claiming that the information is privileged ..., the party must ... expressly make the claim” and “describe the nature of the documents, communications, or tangible things not produced or disclosed...in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim”); *Ctr. for Food Safety v. Vilsack*, No. 15CV01590HSGKAW, 2017 U.S. Dist. LEXIS 67822 at *5 (N.D. Cal. May 3, 2017) (Mag. Judge Westmore) (noting that “courts in this district have required parties withholding documents on the basis of the deliberative process privilege to, at a minimum, substantiate those claims in a privilege log”).⁷

We are particularly concerned about the possible application of the deliberative-process, attorney-client, and/or attorney work-product privileges—three privileges that federal agencies frequently invoke to withhold relevant information from administrative records—but which are yet to be identified in connection with any records here. Any uncertified withholdings must fail, however, in light of the Ninth Circuit’s recent decision in *In re United States of America*, No. 17-72917 (9th Cir. Nov. 16, 2017). As the court explained, relevant records that the government considers to be privileged must be identified in a privilege log. The reason is obvious: only by identifying records that are (purportedly) privileged in a privilege log may the parties and Court assess whether the government’s privilege claims are legitimate, and if so, whether all segregable material has been released.⁸

Plaintiffs request an adequate explanation as to whether Defendants have applied privileges to records that were “before the agency pertaining to the merits of its decision,” *Portland Audubon*, 984 F.2d at 1548, but which have not been identified, nor included in an index or released to Plaintiffs. We request that Defendants include a privilege log that specifically identifies the materials being withheld, and the basis for considering these records to be privileged.

(4) Inadequate Privilege Justifications

Plaintiffs are concerned that where the State Department Administrative Record Index does show redactions, it does not explain how any privileges apply to the withheld materials. At most, the

meetings or transcripts thereof ... [and] memorializations of telephone conversations and meetings, such as memorandum or handwritten notes”).

⁷ The index shows only a few redactions. The Service’s Administrative Record indices (“Book1” and “Keystone AR”) do not reflect any redactions.

⁸ Even if Defendants could establish that the privilege(s) apply, their interest in secrecy would be outweighed by the Court’s need to exercise judicial review. *See Federal Trade Comm’n v. Warner Comm’cns*, 742 F.2d 1156, 1161 (9th Cir. 1984).

descriptions in the “Basis for Redactions” column of the State Department’s index merely identify redacted records with oblique references to a privilege. *See, e.g.*, DOSKXLDMT0013180 - DOSKXLDMT0013182 and DOSKXLDMT0024051 - DOSKXLDMT0024098 (redacting “Business Confidential Information”); DOSKXLDMT0013023 - DOSKXLDMT0013025 (redacting “Memo for Record TC Meeting” to “remove SBU regarding foreign relations”); DOSKXLDMT0013198 - DOSKXLDMT0013199 (withholding sign-in sheet for May 16, 2013 meeting as “PII”). Some entries do not identify a particular privilege at all. *See, e.g.*, DOSKXLDMT0017533 - DOSKXLDMT0017552 (redacting “Handwritten Comments by DOS” from NRDC/Sierra Club SEIS comments). The descriptions of many records do not reflect what the withheld material consists of, describing the records only by using titles, subject lines, or other vague terms that do not establish the applicability of any privilege but rather exemplify conclusory claims of privilege.⁹ The government must provide sufficient descriptions for Plaintiffs (and the Court) to adequately assess the government’s correlations of specific privileges to specific records or portions thereof.

(5) Whooping Crane Telemetry Data and GIS Layers for Keystone XL

At the October 11, 2017 case management hearing, the Court directed the Federal Defendants to include whooping crane telemetry data and location data for the pipeline route and its ancillary facilities in the Administrative Record. This directive was in response to the Plaintiffs’ request for discovery of these materials. ECF No. 86. When it directed Federal Defendants to include these materials in the administrative record, the Court stated that it would determine at a later time whether to consider them in connection with its review of Plaintiffs’ claims.

With regard to the telemetry data for the cranes, Mr. Hajek stated in a November 10, 2017 email that the Service “will include the whooping crane telemetry and sighting data that plaintiffs have requested be included in the record”; but the entire dataset was not in fact included in the materials that we received. The file that Defendants released through the Record is simply a GIS map with data points, but it is unclear what those data points represent—*i.e.*, whether they are telemetry data or historical sighting data, when the sightings took place, etc.—and there is no raw data. This map is far narrower in scope than the dataset that the Center obtained from the U.S. Geological Survey through FOIA. We will submit the full data set with our other additions to the Administrative Record.

⁹ For instance, to withhold any relevant record as “confidential business information” (“CBI”), the State Department must demonstrate that it qualifies as CBI and is not publicly available. Any material that does not meet the test for CBI must be disclosed. *Env’tl. Def. Ctr. v. Bureau of Safety & Env’tl. Enft.*, No. CV 14-9281 PSG (FFMx), 2015 U.S. Dist. LEXIS 111807, at *11 (C.D. Cal. Aug. 14, 2015) (“the Trade Secrets Act ‘expressly permits the disclosure of trade secrets and other privileged information’” only “to the extent that disclosure is authorized by law”) (quoting Federal Defendants’ brief). Because the indices do not meet the government’s burden to explain why the material may be withheld as “Business Confidential Information,” handwriting, SBU, or “PII,” at a minimum we request adequate explanations for Defendants’ use of such privileges.

Second, Defendants have refused to release the GIS layers (despite the Court's direction) because those records are also at issue in a FOIA lawsuit that is pending in the U.S. District Court for the District of Columbia.¹⁰ Assuming that this is a legitimate concern, which we do not concede, there is no reason why the parties cannot negotiate a protective order in this matter that would preclude public dissemination of the GIS layers pending resolution of the FOIA lawsuit. If necessary, we intend to move the Court to enter a protective order for the GIS layers. *See* Fed. R. Civ. P. 26(c)(1)(G) (a "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way").

Additionally, given that the Nebraska Public Service Commission ("PSC") has now denied TransCanada's application for a permit in connection with TransCanada's preferred route, and has approved the "mainline alternative" route instead, then (even putting aside larger questions about what that means for the project's federal authorizations or this litigation overall), at a minimum the Record should be completed with maps or other information about the specific route and facilities for the "mainline alternative." Thus, we again ask you to submit the GIS layers to the Court and all parties without further delay, including the GIS data for the pipeline route as approved by the PSC and its ancillary facilities including pump stations, power lines, roads, rights-of-way, and worker camps.

We will soon submit a draft protective order for your review to facilitate this production.

(6) Further Proceedings

In a November 9, 2017 email to parties' counsel, Mr. Hajek suggested that the State Department was unable to compile a complete Administrative Record "within the time allowed." Defendants have had eight months to prepare the record in this case. In our view, the State Department and the Service could have compiled and served a complete, well-organized record by the Court-ordered deadline. Yet because they did not do so, we have spent considerable time since November 8, 2017 simply organizing the files that we did receive. These avoidable issues impeded our ability to rapidly and comprehensively respond well in advance of the December 8, 2017 deadline for lodging the Administrative Record with the Court.¹¹

¹⁰ That case is *Ctr. for Biological Diversity et al v. U.S. Dep't of State*, Civ. No. 17-00937 (DDC) (TSC). Defendants are correct; the Center and its co-plaintiff in that FOIA lawsuit, Thomas Bachand, founder of the [Keystone XL Mapping Project](#), have been waiting for years for Defendants to articulate a valid rationale(s) for withholding these records from disclosure under FOIA. The Center and Mr. Bachand are still awaiting these determinations.

¹¹ While we need not establish that Defendants act in bad faith by compiling an incomplete administrative record, incompleteness can nevertheless suggest bad faith. *See, e.g., Forest Guardians v. Kempthorne*, No. 06CV2560-L(LSP), 2008 U.S. Dist. LEXIS 76234, at *10 (S.D. Cal. Sep. 29, 2008) ("FWS's failure to timely produce a complete administrative record smacks of bad faith").

Accordingly, to remain on track with the Court-ordered schedule going forward, we ask Defendants:

- (a) to certify that any and all materials included or referenced in any of the environmental reviews of the Keystone XL Pipeline Project, including but not limited to any reviews prepared for the Keystone XL project pursuant to National Environmental Policy Act, Endangered Species Act, or any other federal, state, or local laws, regulations, or other directives, as well as all materials that are available publicly at regulations.gov, are part of the Administrative Record;
- (b) to produce, within 14 days, all materials referenced or informing any such reviews that are not publicly available; and
- (c) to provide all additional certifications and records consistent with the issues we have identified in this letter.

In light of the deficiencies identified above, we reserve the right to file any appropriate motions necessary to complete or supplement the Administrative Records in this case.

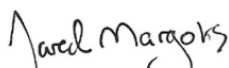
Thank you for your attention to our concerns. If you have any questions or wish to discuss this letter, please contact me at 971-717-6401 or atwood@biologicaldiversity.org.

Sincerely,



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on behalf of:

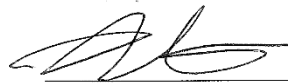


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