

Exhibit D



U.S. Department of Justice

Environment and Natural Resources Division

90-1-4-14946

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VIA E-MAIL

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Re: *Indigenous Env'tl. Network v. U.S. Dep't of State*, No. 4:17-cv-29-GF-BMM
Northern Plains Resource Council v. Shannon, No. 4:17-cv-31-GF-BMM

Dear Counsel:

This letter responds to the issues regarding the agencies' administrative records raised in Ms. Atwoods' November 30, 2017 letter and Ms. Clarke's December 1, 2017 e-mail. The issues are organized into the categories raised by the Plaintiffs in their respective correspondence.

1. Organization of the Records, Indices, and Searchability

We believe that the records have been appropriately compiled and indexed. While the plaintiffs might prefer that the documents be OCR'd and thus made searchable, that is not a requirement for an administrative record. The agencies lack the time and resources to do so. It is also not necessary for the agencies to break up the batched documents into individual documents. Each document is Bates numbered and identified in the index and searching for the particular Bates number in each .pdf batch will take the user directly to that document. To the extent that additional documents are produced and the agencies are able to produce them individually, we will do so. Where possible to do so, attachments to documents are included with each document and can be readily located; therefore, it is not necessary to separately list the attachments in the index. Below, we address the specific sub-issues raised by the Center for Biological Diversity in this category.

Fish and Wildlife Service Indices

As noted in Center for Biological Diversity's letter, there were two indices on the DVD containing the Fish and Wildlife Service's ("FWS") administrative record: one marked "Keystone AR" and one marked "Book 1." We have conferred with FWS, and the documents listed in the Book 1 index are not part of the record, as "Book 1" was a working spreadsheet that was inadvertently included on the DVD and will be removed from the replacement copies mentioned below. In review of Attachment A provided with your letter, we confirm that the following documents are either already contained in the Service's administrative record, and will be added to the index, or will be added to the administrative record and index:

2013 02-19 LTR Esmoil_BigFlat Electric Coop Ke.pdf (located at FWS000000001942)
2013 02-19 LTR Esmoil_McCone Electric Coop Key.pdf (located at FWS00000000195)
20170302 145200_Email_Robert HarmsMichele McNultyKXL and NLEB.pdf (located at FWS000000002625)
20170303 123445_Email_Robert HarmsEliza HinesNGPC and Keystone XL.pdf (located at FWS000000002626)

However, the remaining documents identified in Attachment A to your letter were inadvertently included as they are subject to the Attorney-Client and Attorney Work Product privileges or are deliberative material.

We will be providing the parties with replacement administrative records, on thumb drives, that eliminate these inadvertently disclosed files. Please note that the Service also did not include in the administrative record a set of shape files for South Dakota that were inadvertently included in the record that was provided to you (file name KeystoneXLProject Shapefiles_SD-2017).¹ In accordance with Federal Rule of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502(b), we request that you immediately erase these documents from all electronic copies of the Administrative Record in your possession or control. We also ask that you and any others who may have been given access to, or copies of, these documents destroy copies of the documents, whether physical or electronic. Please advise us when this action is completed.

FWS Bates Numbering and File Format

We agree that the FWS should be Bates numbered, and we will provide a numbered copy to the Court and the parties. Please note that the Service was not able to apply a Bates number to Appendix B of the Biological Assessment—the document is contained in the administrative record, and there are page numbers contained in the appendix. There is no requirement that documents in an administrative record be produced in native format, and it is customary that agencies provide administrative record documents in PDF format.

Attachment C Regarding the FWS Record

The issues identified in Center for Biological Diversity's Attachment C are addressed below.

¹ As discussed below, FWS will add these files to the administrative record once an appropriate protective order has been entered in this case.

- (1), (2) FWS has fixed the numbering in the index.
- (3) 49 FW_Bird Flight Diverter
 - (a) FWS did not receive all attachments to the e-mail from Randy Fisher to Mark Sullivan, so does not have additional attachments to provide.
 - (b) FWS has included the two attachments referenced in this email in the administrative record.
- (4) 50 FW_Norval Comments and sage grouse thesis
 - (a) FWS could not locate this attachment.
 - (b) FWS has included the two attachments in the administrative record.
- (5) 52 FWS NE 2013-163.pdf. FWS has not located one particular specific response to this request but the administrative record contains additional information concerning power lines that post-date this request.
- (6) Four letters have been located and included in the administrative record.
- (7) FWS has added the ten attachments to the record.
- (8) FWS has added the document to the record (note that the letter referenced is a draft and not a final).
- (9) FWS has added the follow-up emails to the record.
- (10) FWS has added the June 2010 letter to the record.
- (11) This data is involved in the FOIA litigation referenced below and FWS will add to the administrative record once an appropriate protective order has been entered in this case.
- (12) FWS cannot locate the referenced letter.
- (13) FWS included documents from Jeff Berglund. FWS could not locate the attachments from Martha Tacha.
- (14) The file contains shape files and detailed maps. Like the information referenced in Item 11, FWS will add to the administrative record once an appropriate protective order has been entered in this case.
- (15) Response has been included in the administrative record.
- (16) The maps have been included in the administrative record.
- (17) FWS does not have a copy of this letter.
- (18) These shapefiles will be added to the administrative record once an appropriate protective order has been entered in this case.

Please note that the Service replaced the 2012 biological assessment (“BA”) that was contained in the record that was provided to you with a complete copy of the BA, including the missing appendices.

2. Missing Documents

Each of the categories of documents that Plaintiffs claim are missing from the agencies’ records are discussed below.

a. References to the 2011 EIS and 2014 SEIS and Comments on the Draft SEIS

The Center for Biological Diversity indicates that it was not clear which references to the 2011 EIS and 2014 SEIS and comments on the Draft SEIS are included in the State Department’s administrative record. A complete list of the references to the 2011 EIS is in the record at DOSKXLDMT 23654-96, and a complete list of the references to the 2014 SEIS is in the record at DOSKXLDMT 24099-219 (both are listed on the last page of the index). And as I indicated in my November 9, 2017 e-mail, all of the comments on the Draft SEIS are available online at: <https://www.regulations.gov/document?D=DOS-2014-0003-0001>, which identifies the date of the comment and the submitter; the comments also are searchable. We confirm that all of the listed references to the 2011 EIS and 2014 as well as the public comments listed at the regulations.gov site listed in the previous sentence are part of the State Department’s administrative record and that is reflected in the record certification.

The Indigenous Environmental Network has requested that all of the references to the EIS and SEIS and all of the comments be reproduced in the administrative record. It is not necessary that all of the record documents be physically reproduced in the record. The certification makes clear that these documents are all part of the agency’s record, and if the parties wish to cite particular documents, Defendants are willing to physically reproduce them to the parties and the court. But the value of reproducing all of the documents does not justify the time and effort necessary to do so. The references to the 2014 SEIS alone number in the thousands. *See* DOSKXLDMT 24099-219. However, many of the references, particularly ones that were in the agency’s files and are likely to be cited, given their significance to the issues in the litigation, are reproduced in the administrative record. This is typical of agency records, and it would be unusual if every single reference to the EIS were physically reproduced in a record. As to the comments on the Draft SEIS that are available at www.regulations.gov, we believe that if you review the materials on the website, you will find that the comments are readily available, as well as searchable, as discussed above. Given the submission of over 127,200 comments and that the vast majority of these comments will not be relied on by the parties, it is not necessary to reproduce them all in the record. That said, if there are specific comments or EIS references that the parties wish to reproduce in physical form in the record, we are willing to do so.

b. Draft Environmental Impact Statement, Biological Assessment, and Biological Opinions

The 2013 Draft Supplemental Environmental Impact Statement and the 2009 Draft Environmental Impact Statement, which were circulated for public comment, are now included in the State Department’s record. As to drafts of the State Department’s Biological Assessment

and FWS's Biological Opinion, which were not publicly circulated, the agencies were not required to include them in the record. There is no blanket requirement that all draft documents be included in an administrative record. In addition, as discussed in section 3, *infra*, documents reflecting an agency's internal deliberations need not be included in the record.

Center for Biological Diversity also inquired about references to the draft documents mentioned above. As to the Draft SEIS and Draft EIS, the references to these documents are likely to be virtually the same as the references to the final documents. As discussed in section 2.a., *supra*, many references are included, but to the extent they are not, some of those documents could be physically reproduced if Plaintiffs indicate that they are likely to rely on the particular document during briefing. As to references to the Biological Assessment and Biological Opinion, many of these references are in the agencies' records. If there are particular references that you believe are missing, please let us know. Center for Biological Diversity has also indicated that it believes some of the appendices to the Biological Assessment are missing from the record. The Biological Assessment was attached as Appendix H to the SEIS, but not all of the Biological Assessment Appendices were reproduced at that location in the State Department's record. Appendices A through G were reproduced at other locations in the record. *See* SEIS App. H. (unnumbered page following 4.0-10). Appendices H through R were not disclosed to the public out of concern that they contained sensitive information about listed species, but the agencies have re-evaluated the sensitivity of the information and determined that they will be produced in FWS's record.

c. Big Bend-to-Witten Transmission Line

Center for Biological Diversity indicates that there are few documents in the record relating to the Big Bend-to-Witten Transmission Line. The Big Bend-to-Witten Transmission Line is discussed in the SEIS, and there are also other documents relating to the transmission line. *See, e.g.*, DOSKXLDMT 2555-58, DOSKXLDMT 3040-80, and DOSKXLDMT 3089-3123. Furthermore, the FWS added five documents—including the EA, two cover letters, a file containing correspondence and a file with images. Plaintiffs have indicated that some additional documents relating to the transmission line are contained in Attachment D to the Center for Biological Diversity Letter. There appear to be four documents in Attachment D that relate to the transmission line: nos. 338, 644, 645, and 655. No. 338 in the Excel spreadsheet is an internal FWS e-mail, which is not part of the agency's record, as discussed in section 3, *infra*. No. 655 is Appendix J to the SEIS and is included in the record at DOSKXLDMT 11272-311. Nos. 644 and 645 are described as "various documents," and therefore we are unable to determine whether they are in the administrative records.

d. Additional Records

Center for Biological Diversity indicates that there are additional documents that should be included in the administrative records and sets forth a list in Attachment D to the letter. It does not appear that plaintiffs have cross-checked this list with documents in the administrative record. In fact, the first three documents in the list – the 2015 national interest determination and comment letters from the U.S. Department of Commerce and the U.S. Department of the Interior regarding that determination – are included in the State Department's record. *See* DOSKXLDMT 12982, DOSKXLDMT 975, and DOSKXLDMT 787-966. While we have not cross-checked all of the documents, it is possible that many of them are in the administrative

records. If there are particular documents in this list that Plaintiffs have confirmed are not in the record, please let us know which documents those are and we will consider whether they should be added to the records. That said, it is apparent from the list that many of these documents are internal communications reflecting the internal thought processes of the agency, which may be produced under the Freedom of Information Act (FOIA), but are not properly part of an agency's administrative record, as discussed in section 3, *infra*.

e. Federal Register Notice

The Indigenous Environmental Network asserts that an April 4, 2017 Federal Register Notice should not be in the administrative record. *See* 82 Fed. Reg. 16,467 (Apr. 4, 2017). As the notice relates, however, to the presidential permit at issue in this case, its inclusion in the record was appropriate.

f. Sierra Club Comments

On December 7, 2017, Center for Biological Diversity sent a spreadsheet listing its comments at various stages of the NEPA and decision making process. The comments will be added to the State Department's administrative record.

3. Deliberative Materials

Center for Biological Diversity indicates that it is concerned about the lack of internal e-mails and other correspondence in the administrative record and suggests that the government must provide a log if it wishes to "withhold" internal deliberative communications from the administrative. As an initial matter, there are dozens of e-mails in each of the agencies' records – documents have not been excluded just because they were in the form of e-mails. E-mails that reflected significant, substantive communications within the agencies or with other parties were included in the records. An administrative record is not a response to a FOIA request or a discovery production and need not include every e-mail, regardless of its significance to the administrative process.

In a case brought pursuant to the Administrative Procedure Act (APA), the court's review is to be based on the agency's stated reasons. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). The probing of the internal thought processes is to be avoided. *United States v. Morgan*, 304 U.S. 1, 18 (1938); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 470 (1971). As you are aware, the D.C. Circuit, which hears a significant number of APA cases, has long held that an agency's administrative record need not include deliberative material reflecting the internal thought processes of the agency. *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 44-45 (D.C. Cir. 1986). Courts within the D.C. Circuit also have squarely rejected the notion that an agency must prepare a privilege log to justify the withholding of internal deliberative documents that are not considered part of the record to begin with. *See, e.g., National Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009).

Some courts within the Ninth Circuit have agreed that an agency need not produce deliberative material in an administrative record and also need not provide a log of such

materials. *See Carlsson v. U.S. Citizenship & Immigration Servs.*, 2015 WI 1467174, at *7 n.15 (C.D. Cal. Mar. 23, 2015). The Ninth Circuit's prior rulings do not squarely address whether deliberative material must be included in an administrative record, but as you note, Defendants have recently raised this issue with the Ninth Circuit. *See In re United States of America*, No. 17-72917 (9th Cir. Nov. 16, 2017). In a two to one decision, the Ninth Circuit decided, in the context of a mandamus petition, that it was not clearly erroneous for the district court to have required the agency, in that instance, to require the inclusion of additional documents in the record and to require a log of deliberative documents. Given the posture of the case, this hardly resolves the issue in a circuit-wide basis, and in any event, the government believes that the Ninth Circuit's decision was wrongly decided and has filed a petition for a writ of mandamus in the Supreme Court.

While the issue of deliberative material is an important legal issue that has yet to be resolved by the courts outside of the D.C. Circuit, it is important to understand that the agencies' records in this case were compiled in good faith and, we believe, are sufficient to allow the Court to review the claims in this case. Although it is our position that the agencies' records need not include each and every e-mail or internal communication, internal communications that contained significant substantive discussion of issues and which were important to the decisions at issue in this case were included in the records.

4. Redactions in the State Department Record

Center for Biological Diversity asserts that the redactions in the State Department record have not been sufficiently documented. In fact, for each instance where information was redacted, the reason for the redaction is noted. *See, e.g.*, DOSKXLDMT 13180-82 and State Department Index at 40. These documents and others contain fairly modest redactions to protect confidential business information. *See id.*; DOSKXLDMT 24051-98. Redaction of record documents to remove confidential business information is appropriate. DOS 13023-25 contains modest redactions to remove information from the report of a meeting between State Department officials and a delegation from the Canadian government, which the agency identified as sensitive but unclassified (SBU) due to the potential impacts on foreign relations. The redacted information has no bearing on the issues in this case. As Plaintiffs note, certain documents have been redacted to remove personally identifiable information (PII). This redaction done to protect individuals' privacy and is commonly done in administrative records. Finally, DOSKXLDMT 17533-52 (Sierra Club's comments on the SEIS) was redacted to remove handwritten comments of State Department staff in order to provide a clean set of the Sierra Club's comments for the record. As discussed in section 3, *supra*, it is not necessary to include the internal comments of State Department staff in the administrative record.

5. Whooping Crane Telemetry Data

As you note, FWS included telemetry data in the record. Your letter indicated that you have additional data from the USGS obtained through FOIA and that you would submit this dataset, but we do not see anything meeting such a description in Attachment D to your letter. We have coordinated with the attorney handling the FOIA litigation referenced and we are adding two explanatory files that were provided to Ms. Atwood in July 2017. FWS also included an Excel spreadsheet of data from USGS that was also provided to CBD under FOIA. However, if this is not the information to which you refer, we would appreciate it if you would please

provide the dataset to which you refer for the Service's evaluation and potential inclusion in the administrative record.

6. *GIS Data for the Keystone XL Pipeline*

As the parties agree, the GIS data are the subject of a FOIA lawsuit brought by the Center for Biological Diversity in the District Court for the District of Columbia. *See Center for Biological Diversity v. U.S. Department of State*, No. 1:17-cv-937 (TSC). The parties recently produced a status report in that case, and in that report, the government indicated that the GIS data would be exempt from disclosure under exemption 4 (confidential business information) and exemption 7 (law enforcement records that may endanger life or physical safety). In light of that determination, the documents cannot be made public. Defendants are willing, however, to include the GIS data in the record under a protective order and will work with the parties to draft a protective order for the approval the Court.

7. *Further Proceedings*

Defendants agree to work diligently to compile and add to the record all of the documents that we have agreed to add to the agencies' records. The FWS record filed with the court today contains all of the additional documents that Defendants have agreed, to date, to add to that record. The State Department record filed with the Court includes the 2011 Draft EIS and the 2013 Draft SEIS. The record will be updated with the additional documents we have agreed to add as soon as possible, and we will send a supplement to you and the Court.

Respectfully,

/s/ Luther L. Hajek

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