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**ATTORNEYS FOR DEFENDANTS/  
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

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**AMERICAN CIVIL LIBERTIES  
UNION, AMERICAN CIVIL  
LIBERTIES UNION FOUNDATION,  
and AMERICAN CIVIL LIBERTIES  
UNION OF MONTANA  
FOUNDATION, INC.,**

**Plaintiffs,**

**vs.**

**DEPARTMENT OF DEFENSE,  
DEPARTMENT OF HOMELAND  
SECURITY, DEPARTMENT OF  
THE INTERIOR, and  
DEPARTMENT OF JUSTICE,**

**Defendants.**

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**CV 18-154-M-DWM**

**DEFENDANTS' STATEMENT  
OF DISPUTED FACTS**

In accordance with L.R. 56.1(b), the Defendants file their Statement of Disputed Facts as set forth below.

**I. United States Army Corps of Engineers**

1. On January 23, 2018, Plaintiffs submitted a FOIA Request to six federal agencies, including the United States Army Corps of Engineers (hereinafter “Army Corps”). USA\_ACE\_00001–14, ECF No. 35-1.

*Admit.*

2. As a general matter, the FOIA seeks information related to agency preparations for protests around the proposed Keystone XL Pipeline.

USA\_ACE\_00001–14, ECF No. 35-1.

*Admit, but the best evidence of Plaintiffs’ FOIA request is the request itself cited above.*

3. On July 16, 2018, the Army Corps responded by letter. The Army Corps’ response identified “12 pages of emails that were considered responsive to your request.” However, five pages were entirely redacted and seven were subjected to additional redactions. USA\_ACE\_00016–17, ECF No. 35-1.

*Admit.*

4. On August 3, 2018, Plaintiff appealed the Army Corps’ determination. Amended Bartlett Decl. ¶ 6, ECF No. 30.

*Admit.*

5. Plaintiffs asserted that comprehensive search would not plausibly reveal only twelve pages of responsive emails. USA\_ACE\_00025–29, ECF No. 35-1.

*Admit.*

6. Moreover, the agency responded to just one of the four categories of information Plaintiff requested. USA\_ACE\_00025–29, ECF No. 35-1.

*Deny. Just because other records were not located does not mean that the search conducted by ACE was limited to only one category. As explained by ACE in the Second Supp. Dec. of Bartlett, (Doc. 36, ¶¶ 3 – 6): no legal and policy analysis relating to funding and staffing for law enforcement around pipeline protests was located because ACE is not a law enforcement agency and its personnel cannot engage in search, seizure, arrest or similar activity. In addition it has a very limited role in pipelines, related to governing river and stream crossings and controlling water and pollution, not law enforcement. (Doc. 36, ¶ 3)*

*Regarding travel and speaking engagements, and conferences on the subject of preparation for oil pipeline protests, there were no such documents because there was no such travel, and ACE personnel were not invited to or involved in any speaking engagements or conferences on the subject of oil pipeline protests. The so called interagency team meeting mentioned in e-mails never came to fruition, and ACE never participated in any meetings regarding security or law*

*enforcement. ACE was merely contacted to coordinate regulatory functions. (Doc. 36, ¶ 4)*

*Regarding requests for meeting agendas, pamphlets, and other documents passed out at meetings where oil pipeline protests and cooperation were discussed, ACE reported that ACE personnel were not invited to any such meetings and did not participate in, or have speaking engagements or meetings regarding protests. (Doc. 36, ¶ 5)*

*Regarding requests for communications between federal employees and state and local discussing cooperation or preparation for oil pipeline protests, only the e-mails produced relate to the issue. ACE searched all other document repositories. ACE believes that because Keystone XL has not yet cleared ACE permitting, discussions about security were not yet occurring. (Doc. 36, ¶ 6)*

7. Finally, the agency failed to provide any explanation as to why the search turned up so few records. USA\_ACE\_00025–29, ECF No. 35-1.

*Deny. See Doc. 36 and references above. More importantly, ACE did not “fail” to provide an explanation in its initial FOIA response, because FOIA does not require an agency to provide an explanation of why it is not likely to have relevant records. It is required to search and respond to the request with records it does locate and set forth the basis for its redaction. It is also not required to provide a Vaughn index at the administrative stage.*

8. While Plaintiff's appeal was pending, the instant action was filed. The Army Corps provided three declarations related to this litigation, all by Michelle Bartlett, FOIA Officer with the Army Corps. Bartlett Decl., ECF No. 21; Amended Bartlett Decl., ECF No. 30; Second Suppl. Bartlett Decl., ECF No. 36.

*Admit.*

9. Along with the declarations, the Army Corps produced an additional thirteen pages of documents, bringing the total production to twenty pages. The majority of the subsequently produced documents comprise a "communication plan." USA\_ACE\_00049-68, ECF No. 35-1.

*Admit. Documents ACE 49-55, were previously provided to Plaintiffs with the ACE initial response letter, bates numbered ACE 18-24. Documents 56-68 are primarily a communication plan relating to NEPA and ACE permitting responsibilities.*

10. Bartlett's declarations included the following assertions:

a) The agency queried the "Headquarters Chief of Insider Threat Operations" and were advised that "his office was the primary point of contact for the requested information." Only one other individual would be included in the search. Amended Bartlett Decl. ¶ 7, ECF No.30.

*Admit.*

b) The Army Corps focused its records search on Insider Threat Operations within the Operational Protection Division "because those offices are

the only places at Headquarters USACE that would possess records responsive to ACLU's FOIA request." Second Suppl. Bartlett Decl. ¶ 2, ECF No. 36 (emphasis added).

*Admit.*

c) Bartlett was informed that BLM had located an additional four documents that were not identified in the Army Corps' search for responsive information. Amended Bartlett Decl. ¶ 8, ECF No. 30.

*Admit.*

d) The Army Corps cannot and does not serve in any "law enforcement capacity, conducted no legal or policy analysis surrounding such law enforcement, and possessed no document pertaining to such analyses." Second Suppl. Bartlett Decl. ¶ 3, ECF No. 36.

*Admit.*

e) The Army Corps' lack of responsive documents is consistent with its "very limited role" in Keystone XL and pipelines in general. *Id.*

*Admit.*

f) The Army Corps did not travel to, attend or in any way participate in conferences on the subject of pipeline protests. *Id.* ¶ 4.

*Admit.*

g) The "paucity of records stems from the fact that Keystone XL has not yet cleared permitting, so discussions about security are premature." *Id.* ¶ 6. *Admit.*

11. The Army Corps Deputy for Civil Works Steven Kopecky conducted his search using the terms he deemed “likely to capture responsive information, including”: “Keystone,” “Security,” “Law Enforcement,” and “Consultation.” “These searches yielded no documents responsive to ACLU’s request.” *Id.* ¶ 2 (emphasis added).

*Admit.*

12. Finally, the Army Corps claimed certain FOIA exemptions, including Exemption 5 (deliberative process privilege, attorney–client privilege, work-product privilege), Exemption 6 (individual privacy interest) and Exemption 7(A) (records compiled for law enforcement purposes). Amended Bartlett Decl., ECF No. 30; Amended Army Corps Vaughn Index, ECF No. 30–1; Second Suppl. Bartlett Decl., ECF No. 36.

*Admit.*

## **II. UNITED STATES BUREAU OF LAND MANAGEMENT**

13. On January 23, 2018, Plaintiffs submitted a FOIA Request to six federal agencies, including the Bureau of Land Management (hereinafter “BLM”). USA\_BLM\_00002–14, ECF No. 35-2.

*Admit.*

14. By letter dated January 29, 2018, BLM acknowledged receipt of the Request and assigned it reference number 2018-00388. BLM granted Plaintiffs’ fee waiver request, and did not communicate a decision regarding Plaintiffs’ request

for expedited processing. BLM did, however, note that it had placed the Request into its “Exceptional/Voluminous” track, which it noted would require more than sixty workdays for processing. USA\_BLM\_00016–17.

*Admit.*

15. Plaintiffs received no further correspondence from BLM until April 12, 2019, when BLM provided a Declaration by Sally Sheeks. Declaration of Sally Sheeks, BLM, ECF No. 31 (“Sheeks Decl.”). Ms. Sheeks is a Government Information Specialist in the FOIA Office for the BLM Montana-Dakotas State Office at the United States Department of the Interior. Id. ¶ 1.

*Admit.*

16. Along with this Declaration, BLM produced 184 pages of documents. The majority of the documents comprise planning and coordination emails. USA\_BLM\_00001–167, ECF No. 35-2.

*Admit. The reason that the number of pages produced exceeds 167 pages in bates numbers is that 17 of the pages are Bates numbered BLM 17-1 through 17-17.*

17. Ms. Sheeks’ Declaration included the following assertions regarding BLM MT’s search method:

- a) Custodians, their role, and the key search terms used are as follows:
  - i. Donato J. Judice, Branch Chief of Fluid Mineral Branch:
    - “Keystone”;



- ii. Alan Nash, Supervisory Public Affairs Specialist:
  - “Keystone XL,” “KXL,” “Security,” “Protests”;
- iii. Lori Harbaugh, Law Enforcement Field Staff Ranger:
  - “Keystone,” “Pipeline”;
- iv. Kim Prill, Branch Chief of Realty, Lands, and Renewable Energy (Acting):
  - “KXL law enforcement,” “KXL situational awareness,” “law enforcement oil and gas pipeline”;
- v. Jon Raby, State Director (Acting):
  - “Keystone,” “pipeline,” “protest,” “law enforcement”;
- vi. Todd Yeager, Miles City Field Manager:
  - “Oil pipeline protest,” “oil pipeline protests,” “Pipeline,” “protests,” “law enforcement,” “Keystone protest”;
- vii. Cecil Werven, Realty Specialist:
  - “Agenda,” “meeting notes,” “security,” “Stobaugh”; and
- viii. Loren Wickstrom, Field Manager of Dickenson Field Office:
  - “DAPL.” Sheeks Decl. ¶ 7, ECF No. 31.

*Admit.*

b) There were no other locations reasonably likely to have responsive records. Id. ¶ 8.

*Admit, that based on the information known, Sheeks concluded that no other locations were reasonably likely to have responsive records.*

18. BLM withheld, in part, sixteen of the released records, claiming Exemptions 4, 5, 6, and 7(c). *Id.* ¶¶ 12–15; BLM Vaughn Index, ECF No. 31-1.

*Admit.*

### **III. FEDERAL BUREAU OF INVESTIGATION**

19. On January 23, 2018, Plaintiffs submitted a FOIA Request to six federal agencies, including the Federal Bureau of Investigation (hereinafter “FBI”). USA\_FBI\_00001–12, ECF No. 35-3.

*Admit that FBI received the FOIA request at FBI 1-12. Deny that it received the FOIA request on January 23, 2018. The FOIA request at FBI 1-12 is dated April 2, 2018.*

20. By letter dated April 6, 2018, the FBI acknowledged receipt of the Request and assigned it reference number 1401682-000. The FBI classified Plaintiffs as an “educational institution, noncommercial scientific institution or representative of the news media,” and stated that Plaintiffs’ request for public interest fee waiver was under consideration. The FBI did not communicate a decision regarding Plaintiffs’ request for expedited processing. USA\_FBI\_00013–14, ECF No. 35-3.

*Admit.*

21. By separate letter also dated April 6, 2018, the FBI stated that “unusual circumstances” applied to the Request. The FBI informed Plaintiffs it could reduce the scope of its request in order to seek a determination on the request within 20 days. USA\_FBI\_00015–16, ECF No. 35-3.

*Admit.*

22. By letter dated April 24, 2018, the FBI denied Plaintiffs’ request for expedited processing, stating that Plaintiffs had not articulated an urgency to inform the public as it relates to this subject matter. USA\_FBI\_00017–18, ECF No. 35-3.

*Admit that FBI denied the request for expedited processing, but state that the basis for this denial was that Plaintiff had “not provided enough information concerning the statutory requirements for expedition; therefore, your request is denied. Specifically, you have not articulated an urgency to inform the public as it relates to this subject matter.” Id. at 17.*

23. Plaintiffs received no further correspondence from the FBI until January 9, 2019, when the FBI provided a Glomar response claiming that:

The FBI can neither confirm nor deny the existence of any records which would tend to disclose the FBI’s preparations, strategy, or available resources for responding to a particular event or activity, including potential protests against the Keystone XL Pipeline. Acknowledging the existence or non-existence of specific FBI strategies, level of resources, capabilities or vulnerabilities regarding any unlawful criminal activity connected to potential protests against this Pipeline triggers the risk of circumvention of federal law enforcement efforts. Thus, pursuant to FOIA exemptions (b)(7)(A) and (b)(7)(E) [5 U.S.C. §552 (b)(7)(A) and (b)(7)(E)], the FBI

neither confirms nor denies the existence of records disclosing FBI strategy, coordination, or resources that are or are not available to thwart criminal activity related to future protests against the Keystone XL Pipeline.

Moreover, as a federal law enforcement agency, a confirmation by the FBI that it has or does not have responsive records would be tantamount to acknowledging the detection of and existence or nonexistence of credible threats and pending threat assessments, potential investigation(s), and/or prosecutions. Therefore, the FBI neither confirms nor denies the existence of records responsive to your request per FOIA Exemption (b)(7)(A) of 5 U.S.C. § 552.

Exhibit E to Declaration of David M. Hardy, FBI, ECF No. 32-5. The FOIA Request does not seek records concerning “threats,” investigations, criminal activity, specific activities, or specific protests. Request, ECF No. 37-1.

*Admit that the first two indented paragraphs set forth above are an accurate quote, but a quote of only a portion of the Glomar response. The Glomar response letter further provides a description as to why Glomar is appropriate under FOIA Exemption (b)(7)(E) which is omitted above. (Doc. 32-5, p. 2)*

*Deny the final sentence of the above paragraph. Based on the FOIA request Plaintiffs submitted to FBI, it does include such information: The ACLU stated that it “submit[s] this Freedom of Information Act (“FOIA”) request (the “request”) for records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline.” (Doc. 35-3, FBI 1) (emphasis added) The breadth of the*

*categories of the request would include “threats”, investigations, criminal activity, and specific activities or protests, because FBI is a law enforcement entity whose function is law enforcement investigations regarding criminal/terrorists activity. Thus, Plaintiff’s statement is not an undisputed fact, but rather a basis for argument which is addressed by both parties in the briefing as to this issue.*

*In addition, support for the FBI Glomar response is set forth in the Hardy Declaration which provides a detailed explanation as to why Glomar is appropriate in this case. (Doc. 32) Under FOIA litigation, declarations of support are proper in support of Glomar responses.*

24. The record contains ample evidence that the FBI does have records responsive to the FOIA Request. For example:

- a. BLM produced two pages it identified as “FBI DOCUMENTS ADDRESSED IN ITS RESPONSE.” USA\_BLM\_00060–61, ECF No. 35-2.
- b. The FBI has been party to conversations and meetings concerning the topics sought by the FOIA Request. USA\_BLM\_00055, 00057, 00059, 00062–63, ECF No. 35-2.
- c. Some individuals employed by the FBI appear on email chains concerning an “upcoming meeting” about “the joint efforts currently underway at the national, state and local levels to ensure we are

approaching this with one unified effort.” USA\_BLM\_00063, ECF No. 35-2.

- d. The FBI is listed as a “Guest” at “another” planned “Large Incident Planning meeting” hosted by a state agency, the Montana Disaster and Emergency Services Division. USA\_BLM\_00027, ECF No. 35-2.
- e. The FBI received updates from BLM concerning public records obtained by one of the Plaintiffs in this lawsuit through a Montana state records request. USA\_BLM\_00052, ECF No. 35-2.
- f. An FBI employee wrote an email to a large group of federal officials identifying him- or herself as being “assigned to the Pipeline Security Initiative,” and as the “primary point of contact between the FBI HQ and the pipeline industry”—someone whose role it is to “examine the challenges and best practices associated with the protection of oil and natural gas critical infrastructure with locally based federal, state and municipal officials.” USA\_BLM\_00067, ECF No. 35-2.
- g. FBI is identified as part of an “LE”—law enforcement—“sub group” whose goal it was to “talk[] about issues that the state may face due to pipeline construction and hear some lessons learned from agencies that assisted in North Dakota.” USA\_BLM\_00091, 00093, ECF No. 35-2.

- h. FBI is identified as part of an “Intelligence” “work group” concerning a “Pipeline Planning” meeting in June 2017. USA\_BLM\_00107, 00136, 00138, 00152, ECF No. 35-2.

*FBI denies paragraph 24 a. through h. These allegations are Plaintiffs’ argument and are not undisputed facts. For all of the reasons set forth in the Hardy Declaration and the attachments, FBI cannot confirm or deny the existence or non-existence of responsive records.*

**DATED** this 12<sup>th</sup> day of June, 2019.

KURT G. ALME  
United States Attorney

/s/ Victoria L. Francis  
Mark Steger Smith  
Victoria L. Francis  
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