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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ECOLOGICAL RIGHTS FOUNDATION, Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, Defendant.	CASE NO. 18-cv-888 JSC **DECLARATION OF ROBERT L. GREGORY IN SUPPORT OF DEFENDANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** Date: July 19, 2018 Time: 2:00 p.m. Place: Courtroom F, 15th Fl. Hon. Jacqueline Scott Corley

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ECOLOGICAL RIGHTS FOUNDATION,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-cv-00888
NATIONAL MARINE FISHERIES SERVICE,	)	
Defendant.	)	

DECLARATION OF ROBERT L. GREGORY

Pursuant to 28 U.S.C. § 1746, I, Robert L. Gregory, declare and state as follows:

1. I am currently the Deputy Director of the Office of Law Enforcement (OLE) in the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), which is a part of the United States Department of Commerce (DOC). I have occupied this position since December 2015. My primary duties include overseeing the operations and activities of the office to support its long-term and annual goals and objectives. My role can be viewed as the equivalent of a "Chief Operating Officer" for a corporation. As such, my main focus is to ensure that daily operations run smoothly and any risks or issues are addressed. In order for this to be achieved, I lay out the plans, expectations, and mechanisms for the office's operations. I serve as acting Director in his absence. I directly supervise five (5) GS-15 Enforcement Division Assistant Directors, one (1) GS-15 Headquarters Operations Assistant Director, and one (1) GS-15, Operations, Management and Information (OMI) Chief. I am also responsible for reviewing and approving all outgoing FOIA responses assigned to OLE to ensure

information released does not contain information that is exempt from disclosure and review redactions, in consultation with NOAA General Counsel, to ensure they should, in fact, be redacted.

2. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, upon conclusions and determinations reached and made in accordance therewith, and upon my personal examination of the withheld and redacted documents in this action. I am personally familiar with the FOIA request of Plaintiff Ecological Rights Foundation (ERF), which is at issue in this case.

3. This Declaration is being submitted in support of Defendant's Reply In Support of Cross-Motion for Summary Judgment.

4. Plaintiff submitted the present FOIA request, dated December 6, 2016, seeking three categories of documents: documents related to a July 24, 2014 email from Chris Yates concerning input that he and other West Coast Region staff provided to NOAA HQ on the impact of a June 11, 2013 memorandum from Earl Stockdale, Chief Counsel of the U.S. Army Corps of Engineers (limited to documents generated on or prior to July 24, 2014, and only those documents related to the input those members provided to NOAA HQ on the impact of the memorandum); documents to or from Chris Keifer related to a draft letter to the U.S. Army Corps of Engineers providing an informal letter with the results of a consultation pursuant to Section 7 of the Endangered Species Act for proposed activities at the Englebright Dam; and documents since January 1, 2000 from any office with NOAA Fisheries Service related to whether any entities are causing unauthorized take of threatened or endangered anadromous fish in the Yuba River at or

near Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion. A copy of Plaintiff's FOIA request was submitted as part of Plaintiff's Motion for Summary Judgment, Hudak Declaration, Exhibit 1 (ECF no. 12-14).

5. In response to Plaintiff's FOIA request, OLE performed searches of its records between approximately December 12, 2016 and January 18, 2017.
6. In conducting the search, OLE examined all email files, hard drives, shared drives, cloud-based systems, and paper files of the office's employees.
7. This search targeted the terms Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, Hallwood-Cordua Diversion, Yuba River, Chris Yates, Stockdale memo, Englebright concurrence letter, and Chris Keifer.
8. On February 13, 2017, the agency provided its final response to Plaintiff's FOIA request.
9. On March 10, 2017, Plaintiff appealed, challenging the adequacy of the search conducted in response to Plaintiff's FOIA request.
10. Plaintiff's appeal also challenged the partial withholdings on 10 documents.
11. In response to Plaintiff's appeal regarding the adequacy of the search, DOC's Office of the General Counsel reviewed the available search logs, made further inquiries about the production of emails to and from the regional NMFS law enforcement agent Don Tanner and the search performed by the OLE, and determined that, in order to ensure that all relevant documents had been located, additional searches would be advised. The additional searches were intended to ensure that a consistent set of search terms were used, and to encompass all OLE agents within the search.

12. DOC's Office of the General Counsel instructed that offices, including OLE, perform a search using the same keywords, checking both emails and network drives. OLE was specifically instructed to search the documents of all agents, not just those of Tanner, the regional NMFS law enforcement agent. The 45 sets of keywords to be used for the search were:

1. Yates Stockdale
2. Keifer Stockdale
3. Keifer Draft Englebright
4. Concurrence Letter
5. Tanner Yuba
6. Tanner Englebright
7. Tanner Daguerre
8. Tanner Narrows
9. Tanner Hallwood-Cordua
10. Thompson Yuba
11. Thompson Englebright
12. Thompson Daguerre
13. Thompson Narrows
14. Thompson Hallwood-Cordua
15. Yates
16. Keifer
17. Baker
18. Tucker
19. Thompson Take
20. Thompson Death
21. Thompson Mortality
22. Thompson Stranding
23. Thompson

24. Dewatering
25. Thompson Sprague
26. Ellrott
27. Flow Deviations
28. rescue
29. Englebright
30. Narrows
31. Hallwood
32. Cordua
33. Daguerre
34. Take
35. Yuba
36. Yuba BiOp
37. 2007 BiOp
38. 2002 BiOp
39. Powerhouses
40. Lawson Fite
41. Narrows 1
42. Narrows 2
43. Brophy
44. entrainment
45. Tanner

13. On April 21, 2017, I tasked all employees in the NMFS OLE to conduct a new search using the terms described in paragraph 13. Employees were instructed to search all electronic (email files, hard drives, shared drives, cloud-based systems) and paper files. I did not specify a start date for that search. The end date used was the date the search was executed.

14. In addition, OLE conducted a search of the current and legacy electronic case management systems to locate any cases involving any entities or individuals may have caused or did cause, or may be causing, or are causing "unauthorized take" of threatened or endangered anadromous fish in the Yuba River at, or in the vicinity of, Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion.

15. OLE's current web-based electronic case management system, TRIDENT, is designed to capture data that OLE collects during investigations, patrols, education, outreach, and compliance assistance work performed by both sworn and non-sworn OLE staff and contractors. TRIDENT is the primary data collection tool for OLE and is designed to assist in tracking, managing, sharing, and analyzing data in support of OLE's mission priorities. Tracking, management, performance metrics analyses, and reporting are the primary objectives of this system.

16. OLE used the advanced search to find any cases that would have had the following:

- Term "unauthorized take" appearing in Activity Comments;
- Term "unauthorized take" appearing in Brief Synopsis; and
- Term "unauthorized take" appearing in Cite Description.

The term "unauthorized take" was used to net the most potentially responsive cases. In addition, no date parameters were set; therefore, the return would have been for any incident that was closed in and after 2008. OLE reviewed each item returned by the system for responsiveness using the instructions described in paragraph 14.

17. To search for incidents closed prior to 2008, OLE conducted a search of its reporting tool, COGNOS. COGNOS performs a query of OLE's legacy electronic case management system, LEADS. In using COGNOS to search the LEADS database, OLE utilized the "Find" feature to search for any responsive cases using the instructions described in paragraph 14.

18. The additional searches did not uncover any additional responsive documents that had not already been produced to Plaintiff.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 21 day of June, 2018, Silver Spring, Maryland.

Robert L. Gregory