EXHIBIT A

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Board of County Commissioners of Kane County v. Department of the Interior of the U.S.
D.Utah,2007.
Only the Westlaw citation is currently available.
United States District Court,D. Utah,Central Division.
BOARD OF COUNTY COMMISSIONERS OF KANE COUNTY, Utah, a political subdivision of the State of Utah; Ray Spencer, Mark Habbeshaw, and Daniel Hulet, in their official capacities as members of the Board of County Commissioners of Kane County, Utah; Board of County Commissioners of Garfield County, Utah, a political subdivision of the State of Utah; D. Maloy Dodds, H. Dell Lefevre, and Clare Ramsay, in their official capacities as members of the Board of County Commissioners of Garfield County, Utah, Plaintiffs,
v.
The DEPARTMENT OF THE INTERIOR OF THE UNITED STATES; and The Bureau of Land Management, an agency of the Department of the Interior of the United States, Defendants.
No. 2:06-CV-209-TC.

July 26, 2007.

Karen Budd-Falen, Brandon L. Jensen, Budd-Falen Law Offices LLC, Cheyenne, WY, Lloyd D. Rickenbach, Rickenbach Ranch, Koosharem, UT, for Plaintiffs.
Jared C. Bennett, U.S. Attorney's Office, Salt Lake City, UT, for Defendants.

ORDER AND MEMORANDUM DECISION PARTIALLY GRANTING AND PARTIALLY DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' CLAIMS ARISING UNDER THE FREEDOM OF INFORMATION ACT

TENA CAMPBELL, United States Chief District Judge.

***1** On May 22, 2007, this Court held a hearing on the parties' cross-motions for summary judgment as to Plaintiffs' claims brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). At the hearing, the Plaintiffs were represented by Lloyd D. Rickenbach and Brandon L. Jensen, and the United States Department of the Interior ("DOI"), Bureau of Land Management ("BLM") (collectively "Federal Defendants") were represented by Jared C. Bennett, Assistant United States Attorney.

The Plaintiffs allege that the Federal Defendants violated FOIA on three separate occasions. First, the Plaintiffs assert that BLM erred in denying the Plaintiffs' October 14, 2003 fee waiver request, submitted to the Utah State Office of the BLM (Plaintiffs' Fifth Cause of Action, Second Amended Complaint, filed October 19, 2006). Second, the Plaintiffs claim that BLM erred in withholding three documents from its response to the Plaintiffs' January 31, 2005 FOIA request, submitted to the Utah State Office of the BLM (Plaintiffs' Sixth Cause of Action). Finally, the Plaintiffs argue that DOI erred in withholding five documents from its response to the Plaintiffs' March 9, 2005 FOIA request, submitted to the Office of the Secretary of the Interior, United States Department of the Interior (Plaintiffs' Seventh Cause of Action).

The Federal Defendants filed their motion for summary judgment on January 19, 2007. The Plaintiffs filed their cross-motion for summary judgment on February 23, 2007. Both parties provided reply briefs in support of their respective motions and in response to the other party's arguments. After considering the arguments, this Court:

-GRANTS the Federal Defendants' motion for summary judgment as to Claim 5.

-GRANTS the Federal Defendants' motion for summary judgment as to Claim 6.

-PARTIALLY GRANTS the Federal Defendants' motion for summary judgment as to Claim 7 in that the DOI properly withheld Vaughn Index documents 18 and 19 pursuant to FOIA's exemption 5.

-PARTIALLY GRANTS the Plaintiffs' cross-motion for summary judgment as to Claim 7 in that the DOI improperly withheld Vaughn Index documents 14 and 16 and ORDERS disclosure of documents 14 and 16 to the Plaintiffs.

-PARTIALLY GRANTS the Federal Defendants' motion for summary judgment and PARTIALLY GRANTS the Plaintiffs' cross-motion for summary judgment, pertaining to Vaughn Index document 20, for the reasons stated in a separate Order and Memorandum Decision, dated June 4, 2007, and incorporated herein by reference.Docket No. 100.

On September 29, 2006, this Court ordered, and the parties agreed, that Plaintiffs' Claims 1-4 (as to Plaintiffs' claims arising under the Administrative Procedures Act) and Plaintiffs' Claims 5-7 (as to Plaintiffs' claims arising under the Freedom of Information Act) of the Plaintiffs' First Amended Complaint should be severed. Docket No. 36.[FN1] Accordingly, this Court hereby certifies that this summary judgment order disposing of Plaintiffs' claims arising under the Freedom of Information Act in their entirety is a final, appealable order, under Fed.R.Civ.P. 54(b), notwithstanding the fact that Claims 1-4 remain pending before this Court. Moreover, there is no just reason to delay review of this Court's order, set forth more fully below. The claims resolved herein are clearly distinct and separable, both factually and legally, from the claims left unresolved in this case.[FN2]

FN1. On October 19, 2006, the Plaintiffs filed their Second Amended Complaint. Docket No. 38.The Plaintiffs' Claims 5-7 were the identical to those in the First Amended Complaint.

FN2. Consequently, for purposes of clarity and finality, the Court also determines that the Court's Order and Memorandum Decision pertaining to Document 20, dated June 4, 2007, will not constitute a final and appealable order, in and of itself, pursuant to Fed.R.Civ.P. 54(b), until the Court's summary judgment order, as set forth more fully herein, is entered of record in this matter.

BACKGROUND

I. THE PLAINTIFFS' OCTOBER 14, 2003 FEE WAIVER REQUEST (Plaintiffs' Fifth Cause of Action).

***2** On December 31, 2001, the Plaintiffs submitted a FOIA request to the BLM, Grand Staircase Escalante National Monument Field Office ("GSENM") seeking: "Any and all correspondence, communication, e-mail, facsimiles, hand written letters, telephone confirmations, notes, minutes of meetings, or notes on meetings, relating to grazing and/or resource issues between the Grand Canyon Trust and the BLM from September 16, 1996 to date."(Docket No. 74, Exhibit 2.)

BLM responded to the Plaintiffs' December 31, 2001 FOIA request. On April 11, 2002, the Plaintiffs sent another FOIA request to GSENM, in which the Plaintiffs voiced concern that BLM's response to the December 31, 2001 FOIA request was inadequate. In addition, the Plaintiffs requested copies of all e-mail and other correspondence between BLM and the Grand Canyon Trust and other environmental groups related to grazing and other resource issues. (Docket 74, Exhibit 2.) The Plaintiffs also requested BLM to provide all e-mail messages between specific BLM employees and any environmental groups. (*Id.*)

On May 7, 2002, GSENM responded to the April 11, 2002 FOIA request by providing 44 pages of correspondence responsive to the request between BLM and the Grand Canyon Trust and other environmental groups related to grazing and other re-

source issues. GSENM stated that it could not provide e-mail messages from the specific BLM employees mentioned in the April 11, 2002 FOIA request, but that the Utah State Office of BLM ("Utah State Office") would provide those responses. (Docket No. 74, Ex. 3.) The Plaintiffs never sought and do not seek in this action judicial review of the adequacy of BLM's responses to the December 31, 2001 and April 11, 2002 FOIA requests.

On January 31, 2003, the Plaintiffs submitted a third FOIA request to GSENM seeking "all documents, notes, memoranda and correspondence regarding the retirement of any grazing permits and/or the transfer of grazing privileges to the Grand Canyon Trust on the Clark Bench, Willow Gulch, Last Chance, Big Bowns, Drip Tank Springs, and Moody allotments."(Docket No. 63,Appeal No.2004-033, Jan. 31, 2003 letter.) On February 18, 2003, the Plaintiffs submitted a fourth FOIA request to the GSENM that was identical to the Plaintiffs' third FOIA request. (Docket No. 63,Appeal No.2004-033, Feb. 18, 2003 letter.) On March 5, 2003, the Plaintiffs submitted a fifth FOIA request seeking copies of the "operator file" for both Grand Canyon Trust and Canyonlands Grazing Corporation. (Docket No. 63,Appeal No.2004-33, March 5, 2003 letter.) On March 11, 2003, the Plaintiffs made a sixth FOIA request to GSENM seeking copies of all e-mail between BLM employees and the Grand Canyon Trust and its employees from June 1999 through the date that the GSENM answered the request. (Docket No. 63,Appeal No.2004-033, March 11, 2003 letter.)

On March 21, 2003, the GSENM sent a preliminary response to the Plaintiffs' March 11, 2003 FOIA request stating in relevant part:

***3** Please note that Kane County requested this same information last year. This office can provide these records for e-mail currently residing on staff computers or any printed copies of e-mail that may be in our files. However, this office does not maintain files of older e-mail records as you have requested. E-mail backup files are maintained at the Utah State Office so you should contact that office for potential records responsive to this request.

(Docket No. 63,Appeal No.2004-033, March 21, 2003 letter.) Consequently, on April 1, 2003, the Plaintiffs sent their seventh FOIA request to the Utah State Office seeking copies of all e-mail between BLM employees and the Grand Canyon Trust and its employees from June 1999 through the date that the Utah State Office answered the request. (Docket No. 63,Appeal No.2004-33, April 1, 2003 letter.)

On April 11, 2003, the State Office provided the following initial response to the Plaintiffs' April 1, 2003 FOIA request:

As of the date of your request, we had more than 600 backup e-mail tapes that would need to be searched. These tapes date back to November 30, 2001. There are no tapes prior to that date. In your letter, you have not stated your willingness to pay the fees associated with processing your request, nor have you asked for a fee waiver. Searching backup e-mail tapes is extremely time consuming and cost prohibitive. For item 1 only of your request, the estimated cost for 72 employees (the current number of employees at the Grand Staircase Escalante National Monument) to search over 600 tapes is in excess of $800,000.

(Docket No. 63,Appeal No.2004-033, April 11, 2003 letter.) Subsequently, on May 23, 2003, BLM lowered its initial estimate of $800,000 to search through the computer back-up tapes to $280,430.70 and stated that it would not begin processing the request to search the computer back-up tapes unless the Plaintiffs agreed to pay the costs or unless the Plaintiffs applied for and obtained a fee waiver. (Docket No. 63,Appeal No.2004-033, May 23, 2003 letter.)

On October 14, 2003, the Plaintiffs filed an application for a fee waiver with the Utah State Office. (Docket No. 63,Appeal No.2004-033, October 14,

2003 letter.) This fee waiver application requested that BLM waive the fees for the Plaintiffs' January 31, February 18, March 5, March 11, and April 1, 2003 FOIA requests, including the fees for searching through the computer back-up tapes.

On November 13, 2003, the GSENM provided the Plaintiffs with responses to the January 31, February 18, March 5, March 11, and April 1, 2003 FOIA requests from agency files and staff computers and waived the fees for those documents. (Docket No. 74, Ex. 1.) However, the Utah State Office refused to grant a fee waiver to search the 600 computer back-up tapes. Specifically, the Utah State Office stated:

Copies of some of the e-mails responsive to your request have previously been printed and are included with the documents you have requested from the GSENM. These documents may contribute to public understanding of the operations or activities of the Government. We do not believe, however, that the remaining e-mails on the backup tapes would be of such a nature as to make a significant contribution to public understanding of the operations and activities of the Government. For this reason your request for a fee waiver is denied.

***4** (Docket No. 63,Appeal No.2004-033, November 6, 2003 letter.)

On November 24, 2003, the DOI's FOIA Appeals Office received the Plaintiffs' November 19, 2003 appeal challenging the denial of the fee waiver request. (Docket No. 63,Appeal No.2004-033, November 19, 2003 letter.) The DOI did not resolve the appeal administratively and on December 22, 2003, notified the Plaintiffs that a response to the appeal would be delayed and that the Plaintiffs had the right to seek judicial review. (Docket No. 63,Appeal No.2004-033, December 22, 2003 letter at 1.)

II. THE PLAINTIFFS' JANUARY 31, 2005 FOIA REQUEST (Plaintiffs' Sixth Cause of Action).

On January 31, 2005, the Plaintiffs submitted a FOIA request to the Utah State Office. The January 31, 2005 request solicited BLM documents, correspondence, and other records generally relating to livestock grazing permits administered by BLM and the retirement or elimination of livestock grazing allotments, specifically those on the GSENM. (Docket No. 63,Appeal No.2005-108, January 31, 2005 letter at 1-2.) Pursuant to this request, the Utah State Office determined which of its employees were most likely to have documents responsive to the request and forwarded copies of the January 31, 2005 FOIA Request to those individuals. In this search, BLM located approximately 85 pages of documents responsive to the request. (Docket No. 63, Dowdy Decl., ¶ 5.)

On March 18, 2005, BLM replied to the January 31, 2005 request. BLM released 15 pages determined to be not exempt from FOIA and withheld approximately 70 pages under the deliberative process privilege of FOIA exemption 5. (*Id.* ¶ 6.)

On March 22, 2005, the Plaintiffs challenged BLM's decision claiming that BLM "failed to itemize and index the withheld documentation...." (Docket No. 63,Appeal No.2005-108, March 22, 2005 letter at 3.) On September 13, 2005, the DOI denied the Plaintiffs' FOIA appeal. (Docket No. 63,Appeal No.2005-108, September 13, 2005 letter at 1-2.)

On May 3, 2006, the Plaintiffs sought judicial review of the DOI's denial of the Plaintiffs' administrative appeal in Claim 6 of their First Amended Complaint. (Docket No. 3.) In Claim 6, the Plaintiffs alleged that BLM unlawfully withheld approximately 70 pages of material under FOIA exemption 5. However, in their cross-motion for summary judgment, the Plaintiffs limited the scope of Claim 6 to challenge only BLM's decision to withhold redacted portions of Vaughn Index document numbers 10, 11, and 12.

III. THE PLAINTIFFS' MARCH 9, 2005 FOIA REQUEST (Plaintiffs' Seventh Cause of Action).

On March 9, 2005, the Plaintiffs submitted a FOIA request to the Office of the Secretary ("OS") in the DOI seeking "documents, notes, memoranda and correspondence" generally relating to livestock grazing permits administered by the Grand Staircase-Escalante National Monument and/or BLM and the retirement or elimination of livestock grazing allotments, specifically those on the GSENM. (Docket No. 63, Thomas Decl., ¶ 2; Appeal No.2005-165, March 9, 2005 letter at 1-2.) The OS determined that the following offices were likely to hold responsive documents: the Secretary's Immediate Office ("SIO") and the Office of the Assistant Secretary for Land and Minerals Management. (Docket No. 63, Thomas Decl., ¶ 3.)

***5** The SIO received the March 9, 2005 FOIA request on March 21, 2005, and immediately began searching for responsive records. The electronic and paper files of the SIO and the Office of the Assistant Secretary for Land and Minerals Management were searched. (*Id.*) The OS reviewed the documents that were found as a result of the aforementioned search and determined that portions of the responsive documents are exempt from disclosure under FOIA. Approximately 79 documents (270 pages) that were not exempt under FOIA were released, either in full or in part, in electronic format on July 12, 2005, to the Plaintiffs. The OS explained to the Plaintiffs that some documents were withheld or redacted pursuant to FOIA exemptions 5 and 6. The OS asserted exemption 5 to withhold information to which the deliberative process and attorney client privileges applied. The OS applied exemption 6 to protect the personal privacy of individuals. (*Id.* ¶ 4;Appeal No.2005-165, July 12, 2005 letter at 1-4.)

On August 23, 2005, the Department's FOIA Appeals Office received the Plaintiffs' administrative appeal of the OS's FOIA response. (Docket No. 63, Appeal No.2005-165, Aug. 17, 2005 letter.) On August 24, 2005, the DOI's FOIA Appeals Office directed the OS to provide additional information regarding the search for documents responsive to the Plaintiffs' request. The Department's FOIA Appeals Office also directed the OS to confirm that its component offices that were most likely to possess responsive documents had searched for responsive documents and that none were located. Alternatively, if the offices within OS that were most likely to possess responsive documents had not been searched, then OS was directed to search and process any documents responsive to the request. (Docket No. 63, Thomas Decl., ¶ 6.)

Accordingly, the OS conducted an additional search for documents responsive to the March 9, 2005 request. From approximately August 30 through September 9, 2005, the electronic and paper files of the SIO and the Office of the Assistant Secretary for Land and Minerals Management were searched again. (*Id.* ¶ 7.) On April 6, 2006, the OS informed the Plaintiffs that the OS had conducted a second file search for records responsive to the March 9, 2005 request and found 20 documents (121 pages) responsive to the request. The OS reviewed the documents resulting from the supplemental search and, on April 6, 2006, released all 20 documents (*i.e.*, 121 pages) to the Plaintiffs. Portions of some documents were withheld under Exemptions 5 and 6 of the FOIA. The OS asserted exemption 5 to withhold information to which the deliberative process and attorney client privileges applied. The OS applied exemption 6 to protect the personal privacy of individuals. (*Id.* ¶ 8;Appeal No.2005-165, April 6, 2006 letter at 1-4.) [FN3] However, this additional release of documents did not alter the OS's July 12, 2005 FOIA response, in which the OS withheld portions of certain documents under exemption 5 of FOIA.

FN3. On May 23, 2006, the DOI FOIA Appeals Officer received the Plaintiffs' second administrative appeal regarding the OS's second FOIA response, which appealed "the redaction or non-disclosure of information relating to five docu-

ments."However, the Plaintiffs have not yet sought judicial review of the May 23, 2006 FOIA appeal.

***6** The Plaintiffs then sought judicial review of the OS's decision to withhold information in certain documents in its July 12, 2005 FOIA response. (Docket No. 3.) Specifically, the Plaintiffs sought disclosure of approximately eight documents that the OS decided to withhold in full or in part from its July 12, 2005 response. However, in their cross-motion for summary judgment, the Plaintiffs seek disclosure of only Vaughn Index documents numbered 14, 16, 18, 19, and 20.[FN4]

FN4. Given that the issues surrounding Vaughn Index document 20 are resolved in this Court's June 4, 2007 Order and Memorandum Decision, it is not discussed further herein. Docket No. 100.

STANDARD OF REVIEW

Fed.R.Civ.P. 56(c) permits the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). Almost all FOIA cases are resolved by summary judgment procedure. *See Wickwire Gavin P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 591 (4th Cir.2004).

This Court exercises *de novo* review over BLM's decision to deny the Plaintiffs' fee waiver request. *See*5 U.S.C. § 552(a)(4)(A)(vii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F.Supp.2d 5, 8-9 (D.D.C.2003). The Plaintiffs bear the burden of showing that they are entitled to a fee waiver. *See Larson v. CIA*, 843 F.2d 1481, 1483 (D.C.Cir.1988). Further, judicial review of a FOIA fee waiver decision is "limited to the record before the agency."*See*5 U.S.C. § 552(a)(4)(A)(vii); *see also Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1177 (10th Cir.2005). The record before the agency consists of, among other things, "the initial FOIA request, the agency's response, and any subsequent materials related to the administrative appeal."*See Forest Guardians*, 416 F.3d at 1177.

This Court also exercises *de novo* review over BLM's decision to withhold or redact documents in its responses to the Plaintiffs' FOIA requests, and the agency bears the burden to justify all non-disclosures. *See*5 U.S.C. 552(a)(4)(B); *see also Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). To carry this burden, the agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly [or partially] exempt from the Act's inspection requirements."*See Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978). This Court may award summary judgment in a FOIA case solely on the basis of information provided by the agency in affidavits or declarations that describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith."*See Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C.Cir.1981). Agency affidavits or declarations must be "relatively detailed and non-conclusory." *See SafeCard Servs. v.. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C.Cir.1991) (quotations and citations omitted). Such affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents."*See id.* (quotations and citations omitted).

ANALYSIS

I. BLM APPROPRIATELY DENIED THE PLAINTIFFS' FEE WAIVER REQUEST TO

SEARCH THE COMPUTER BACK-UP TAPES.

***7** BLM appropriately denied the Plaintiffs' request that BLM waive fees for searching through 600 computer back-up tapes for e-mails between BLM and the Grand Canyon Trust. BLM's denial is appropriate for two reasons. First, searching for e-mail on the computer back-up tapes is not "likely to significantly contribute to public understanding of the operations and activities of the government," because in its responses to the Plaintiffs' seven prior FOIA requests relating to BLM's interactions with the Grand Canyon Trust, BLM had already provided the Plaintiffs with responsive e-mails. Second, the Plaintiffs' request that BLM search through its computer back-up tapes for e-mail that may have already been disclosed in prior responses is unduly burdensome. Each reason for denying the fee waiver request is discussed in order below.

A. *The E-mail on the Computer Back-up Tapes Would Not Significantly Contribute to Public Understanding.*

Generally, a FOIA requester must pay a reasonable fee for "document search, duplication, and review...." *See*5 U.S.C. § 552(a)(4)(A)(ii)(I) to (III). However, fees are to be reduced or waived if disclosure of the records is "in the public interest because [they] are likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester."*See*5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.19(b) & Appendix D to Title 43 C.F.R. Part 2. To establish that the requested records will "contribute significantly to public understanding," the requester must show that the requested records are not already available. *See*43 C.F.R. Part 2, Appendix D(b)(3)(iv). Where the agency has already made the requested information available to the public, further requests for that information will not warrant a fee waiver. *See Judicial Watch, Inc. v. Dep't of Justice,* 365 F.3d 1108, 1127 (D.C.Cir.2004) ("Absent some indication of why it was not reasonable for the district court to have relied on the documents already released by the Department and its supplemental declaration as to the remaining non-exempt documents, there is no basis to conclude that Judicial Watch is entitled to a blanket waiver of FOIA processing fees."); *Vote-Hemp, Inc. v. Drug Enforcement Agency,* 237 F.Supp.2d 55, 60 (D.D.C.2002) (declining to grant fee waiver because requested documents already in public domain); *Sloman v. U.S. Dep't of Justice,* 832 F.Supp. 63, 68 (S.D.N.Y.1993) (declining to grant fee waiver request because some documents already released and others were available in agency public room). If disclosure of documents to the general public is a sufficient basis on which to deny a fee waiver request, then, a fortiori, denying a fee waiver request for documents that the agency has already given directly to the requester in prior FOIA responses is more than a sufficient basis on which to deny the requester's fee waiver.

***8** The e-mail on the computer back-up tapes would not likely contribute significantly to public understanding because those e-mails showing BLM's interactions with Grand Canyon Trust that merit a fee waiver have already been disclosed to the Plaintiffs in BLM's responses to the Plaintiffs' seven FOIA requests dated December 31, 2001, April 11, 2002, January 31, 2003, February 18, 2003, March 5, 2003, March 11, 2003, and April 1, 2003. In reaching this conclusion, this Court presumes, as it must, that the government complied with its regulations pertaining to FOIA and the preservation of records. *See Am-Pro Protective Agency v. United States,* 281 F.3d 1234, 1240 (Fed.Cir.2002) ("It logically follows that showing a government official acted in bad faith is intended to be very difficult, and that something stronger than a 'preponderance of evidence' is necessary to overcome *the presumption that he acted in good faith, i.e., properly.*This is especially so when, as in this case, years have passed between the occurrence of the underlying facts and the allegation of bad faith.") (emphasis added).

Pursuant to regulation and BLM policy:

The bureau will make a reasonable effort to search for records responsive to your request. In determining which records are responsive to your request, the bureau will include any records in its possession and control as of the date it begins its search. This will including searching for records in an electronic form/format[.]

43 C.F.R. § 2.21; *see also* 1996 BLM Instruction Memorandum No. 97-46 (Dec. 27, 1996) (distributed at oral argument). Furthermore, under the Federal Records Act, an agency "shall make and preserve *records* containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."*See*44 U.S.C. § 3101 (emphasis added). The term "record" [i]ncludes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301.

According to the DOI's departmental manual, e-mail messages that meet the definition of a record must be preserved pursuant to 44 U.S .C. § 3101. 385 Department Manual 7.8. Specifically, the DOI has a well-known policy that requires e-mails that meet the definition of a "record" to be printed before being deleted. *See* Memorandum from the Department's Chief Information Officer dated Sept. 10, 1999, *http://www.doi.gov/ocio/records/news/emailguidrev2.htm* (stating "Federal agencies can delete electronic records from their computers as long as they have filed a paper copy of the records in their official recordkeeping system.") (emphasis in original omitted). Given that this Court must presume that BLM complied with these policies and regulations, BLM reasonably searched for relevant e-mail showing the interaction between it and Grand Canyon Trust and adequately disclosed those e-mail messages in its responses to the Plaintiffs' seven FOIA requests.

***9** The Plaintiffs have not provided any persuasive evidence from the record showing that BLM failed to comply with its well-established policies. Instead, the Plaintiffs' fee waiver request was based on speculation that a search through the backup tapes by the BLM would yield new material that is meaningfully informative. The Plaintiffs' justification is speculation and not borne out by the record. Therefore, since these e-mails have already been provided to the Plaintiffs, the e-mails on the computer back-up tapes would not likely "contribute significantly to public understanding." *See*43 C.F.R. Part 2, Appendix D(b)(3). Accordingly, BLM appropriately denied the Plaintiffs' fee waiver request.

B. *The Plaintiffs' Request that BLM Search Through 600 Computer Back-up Tapes For E-mail that was Previously Disclosed was Unduly Burdensome.*

Given that e-mail regarding BLM's interaction with the Grand Canyon Trust was already disclosed to the Plaintiffs in response to their seven FOIA requests, the Plaintiffs' request that BLM search through 600 computer back-up tapes is unduly burdensome. "An agency need not honor a request that requires 'an unreasonably burdensome search.' " *See Am. Fed'n of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C.Cir.1990) (citation omitted). An agency's authority to refuse to perform unduly burdensome searches is at its acme when the agency must expend vast amounts of resources with only a suspicion that the search may yield responsive docu-

ments. *See Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 664 (D.C.Cir.2003) (holding that request that would require agency to research nonresponsive records to find requester's social security number "require[s] the Government to shoulder such a potentially onerous task-with dubious prospects of success-goes well beyond the 'reasonable effort' demanded in this context."); *Goland*, 607 F.2d at 352-53 (finding unduly burdensome a request that would require agency to search through 84,000 cubic feet of documents where it was not clear that the additional search would turn up any responsive documents).

Viewing the record as a whole, *Forest Guardians*, 416 F.3d at 1177, the Plaintiffs' request that BLM search through 600 computer back-up tapes with little more than a suspicion that BLM may find an e-mail that merits a fee waiver and was not previously disclosed is the type of speculative request that unduly burdens both the agency and the public. First, the record shows that BLM notified the Plaintiffs that searching through the back-up tapes would require the agency to expend approximately $800,000. (Docket No. 63,Appeal No.2004-033, March 23, 2003 letter.) Second, after further review, BLM notified the Plaintiffs that searching the 600 computer back-up tapes would cost approximately $280,430.70. (Docket No. 63,Appeal No.2004-033, May 23, 2003 letter.) Given the exorbitant expenditure of costs and resources with only a speculative prospect of success, the Plaintiffs' request that BLM search through 600 computer back-up tapes is unduly burdensome.[FN5] Therefore, BLM appropriately denied a fee waiver for the Plaintiffs' unduly burdensome FOIA request.

FN5. The Federal Defendants attached a declaration from a BLM employee, Stewart A. Nelson, who provided further explanation of the costs and resource burdens associated with searching the computer back-up tapes. However, since this declaration was not part of the record before the agency and the Plaintiffs object to its inclusion in the record, this Court did not consider Mr. Nelson's declaration.

II. BLM APPROPRIATELY WITHHELD VAUGHN INDEX DOCUMENTS 10, 11, AND 12.

***10** BLM appropriately withheld Vaughn Index documents 10, 11, and 12 pursuant to exemption 5 of FOIA. Exemption 5 of FOIA protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency."5 U.S.C. § 552(b)(5). The Supreme Court has interpreted this language to mean that a document must "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."*See Dep't of the Interior v. Klamath Water Users*, 532 U.S. 1, 8 (2001). Among other privileges encompassed within exemption 5 is the "deliberative process privilege." *See id.*

An agency's use of exemption 5 is analyzed under a two-stage process. First, the agency must show that the documents in question qualify as "inter-agency or intra-agency." Second, the agency must show that the documents are covered by a civil discovery privilege such as deliberative process. *See Nat'l Inst. of Military Justice v. Dep't of Def.*, 404 F.Supp.2d 325, 342 & n. 10 (D.D.C.2005). Based on these standards, BLM appropriately withheld Vaughn Index documents 10, 11, and 12.

As to Vaughn Index document 12, the Federal Defendants demonstrated at oral argument and the Plaintiffs agreed that they already possessed document 12 in its un-redacted form. Therefore, any dispute over the disclosure of document 12 is moot.

As to Vaughn Index document 11, the Plaintiffs do not dispute that it is an intra-agency document. Instead, the Plaintiffs contend that document 11 is neither deliberative nor pre-decisional. However, at oral argument, the Plaintiffs agreed that document 11 is a draft of document 10 and, therefore, was

predecisional and deliberative. *See Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 866 (D.C.Cir.1980) (stating the deliberative process privilege protects "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"). Consequently, BLM appropriately withheld portions of document 11.

However, as to Vaughn Index document 10, the parties do not agree. In its memorandum in support of summary judgment, BLM argued that the redacted portions of document 10 were protected from disclosure under the deliberative process privilege, because the document was intra-agency, deliberative, and predecisional. The Plaintiffs do not challenge that the document was intra-agency, but rather claim that the document was neither deliberative nor predecisional. Specifically, the Plaintiffs claim that since document 10 was authored after proposed amendments to the GSENM management plan were disclosed to the public, document 10 could not have been deliberative or predecisional, because there was no longer a decision to be made. (Docket No. 74, at 17.)However, the Vaughn Index shows otherwise.

***11** The Vaughn Index shows that document 10 involves discussions between a subordinate, the Utah State Director of BLM, and her superior, the National Director of BLM, regarding how to proceed in "potential courses" of action for grazing policies within the National Monument. Even though the Vaughn Index does not state whether BLM arrived at a decision as a result of these discussions between the Utah State Director of BLM and her supervisor, the law does not so require. *See Nat'l Labor Relations Board v. Sears, Roebuck & Co.,* 421 U.S. 132, 151 n. 18 (1975) (stating that the deliberative process privilege does not "*turn[ ] on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared,*" because agencies should be engaged in a continuing process of examining their policies, which will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process) (emphasis added). Instead, the Vaughn Index states that BLM was working within its "ongoing process" of policy determinations regarding retirement of grazing within the GSENM. Indeed, there was an ongoing decision-making process regarding grazing within the GSENM, because BLM determined to prepare an Environmental Impact Statement addressing grazing issues within the GSENM. Given the foregoing, the Federal Defendants have carried their burden to show that the redacted portions of document 10 were properly withheld under the deliberative process privilege of exemption 5.

III. BLM SHOULD HAVE DISCLOSED DOCUMENTS 14 AND 16, BUT PROPERLY WITHHELD DOCUMENTS 18 AND 19.

BLM erred in withholding documents 14 and 16, because they are not intra-agency, as required by exemption 5 of the FOIA. These documents were authored by Mr. Karl Hess who was a consultant outside of the government that DOI hired to advise it regarding potential policy alternatives for retiring grazing in the GSENM. Although the views of a consultant can be deemed "intra-agency" for purposes of FOIA, *see CNA Fin. Corp. v. Donovan,* 830 F.2d 1132, 1162 (D.C.Cir.1987), a non-governmental consultant's views are not entitled to "intra-agency" status when the consultant is "communicating with the Government in [his] own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant."*Dep't of the Interior v. Klamath Water Users,* 532 U.S. 1, 12 (2001). Although the Federal Defendants correctly point out that Mr. Hess was neither competing for a grazing permit nor representing any party competing for a grazing permit within the GSENM, that fact alone does not show that Mr. Hess was sufficiently disinterested for his communications with the DOI to qualify for "intra-agency" status. To the

contrary, Mr. Hess has authored several articles and has advocated extensively for a market-based approach to retiring grazing permits on public lands. Even though he may not have been competing with others for grazing permits within GSENM, his deep-seated views regarding the retirement of grazing permits through market-based principles shows that he is communicating with the DOI in the interest of his deep-seated views, not as a disinterested expert. Consequently, Mr. Hess's communications with DOI do not qualify for "intra-agency" status and, therefore, cannot be withheld under the deliberative process privilege of exemption 5.FN6

FN6. The foregoing analysis also applies to document 20, also written by Mr. Karl Hess. However, in a separate order and decision, this Court previously determined, after in camera inspection, that portions of document 20 contain attorney-client privileged communications. (Docket No. 100.)The Court hereby orders that the non-attorney-client privileged portions of document 20 must be disclosed to the Plaintiffs. Given that documents 14, 16, and 20 do not qualify for "intra-agency" status, this Court does not reach the question of whether those documents are deliberative or pre-decisional in nature.

***12** Given that Vaughn Index document 10 is the same as Vaughn Index document 18, BLM appropriately withheld document 18 under exemption 5 of FOIA.

As for document 19, the Federal Defendants appropriately withheld it under the deliberative process privilege of exemption 5. The Plaintiffs do not contest that document 19 is "intra-agency." Instead, the Plaintiffs claim that document 19 is neither deliberative nor predecisional. The Federal Defendants have established otherwise.

The Vaughn Index establishes that this briefing paper was from the National Director of BLM to her superior, the Secretary of the Interior, in which the Director of BLM conveyed to the Secretary a bullet-point list discussing potential courses of action available to BLM for developing grazing policies in the Monument. Communications of potential grazing policies between the Director of BLM and the Secretary of the Interior are predecisional and deliberative discussions. Furthermore, given that these discussions about potential grazing policy concerned an area as controversial as the National Monument, this communication requires protection from disclosure to ensure that future discussions between chief policy makers are not stifled by the fear of public release. Indeed, "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."*United States v. Nixon*, 418 U.S. 683, 705 (1974). Therefore, the Federal Defendants appropriately withheld document 19 under the deliberative process privilege of exemption 5.

SO ORDERED.

D.Utah,2007.
Board of County Commissioners of Kane County v. Department of the Interior of the U.S.
Slip Copy, 2007 WL 2156613 (D.Utah)

END OF DOCUMENT

EXHIBIT B

H

Stearns v. McGuire
C.A.10 (Colo.),2005.
This case was not selected for publication in the Federal Reporter.Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,Tenth Circuit.
John R. STEARNS, an individual; Walnut Realty, Inc., a Colorado Corporation, Plaintiffs-Counter-Defendants-Appellees,
v.
Michael T. McGUIRE, Defendant-Counter-Claimant-Appellant.
No. 04-1459.

Nov. 14, 2005.

Background: Real estate agent brought action against vendor, alleging breach of contract. Vendor counterclaimed alleging breach of fiduciary duty. The United States District Court for the District of Colorado, Blackburn, J., 354 F.Supp.2d 1188, granted partial summary judgment in favor of agent on counterclaim. Vendor appealed.

Holdings: The Court of Appeals, Baldock, Circuit Judge, held that:
(1) partial summary judgment was final appealable order;
(2) agent was "transaction broker" under Colorado law, and thus, did not owe fiduciary duty to either vendor or purchaser; and
(3) agent was not estopped, under Colorado law, from using his status as transaction broker as shield to liability for alleged breach of fiduciary duty.

Affirmed

West Headnotes

[1] Federal Courts 170B 595

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk595 k. Summary Judgment; Judgment on Pleadings. Most Cited Cases
District Court's partial summary judgment order, dismissing real estate vendor's breach of fiduciary duty counterclaim and affirmative defenses, was final appealable order, so that Court of Appeals had jurisdiction to review it, where affirmance of the order would terminate the litigation in its entirety. 28 U.S.C.A. § 1291.

[2] Brokers 65 6

65 Brokers
65II Employment
65k6 k. Relation to Principal in General. Most Cited Cases
Real estate agent that consummated sale between vendor and purchaser was "transaction broker" under Colorado law, and thus, did not owe fiduciary duty to either vendor or purchaser, since there was no written agreement between parties establishing single agency relationship; agent's unilateral disclosure that agent represented seller at bottom of real estate contract did not constitute written agency agreement, absent seller's consent. West's C.R.S.A § 12-61-802(6).

[3] Estoppel 156 87

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k87 k. Relying and Acting on Representations. Most Cited Cases
Real estate agent that consummated sale between vendor and purchaser was not estopped, under Colorado law, from using his status as transaction

broker as shield to liability for alleged breach of fiduciary duty; existence of written real estate contract precluded reasonable reliance by vendor on agent's representations in unexecuted listing agreement that he represented vendor. West's C.R.S.A § 12-61-802(6).

***71** Richard F. Schaden, Daniel Alan Nelson, Kenneth L. Levinson, Balaban & Levinson, P.C., Denver, CO, for Plaintiff-Counter-Defendant-Appellee.
James R. Ghiselli, Ghiselli Law Offices, Boulder, CO, for Defendant-Counter-Claimant-Appellant.

Before TYMKOVICH, PORFILIO, and BALDOCK, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.BOBBY R. BALDOCK, Circuit Judge.

****1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See*Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This is an appeal from a summary judgment order in a real estate case founded on diversity jurisdiction. Appellant contends that the district court erred in dismissing his breach of fiduciary duty counterclaim and affirmative defense and his estoppel affirmative defense. We affirm.

BACKGROUND

John R. Stearns is a real estate broker at Walnut Realty, Inc. (collectively, Stearns) in Boulder, Colorado. Michael T. McGuire is a California criminal defense attorney who has a real estate license. In October 2001, Stearns was asked by Candace and Grove Stafford to locate an investment property in the price range of $1 million to $1.6 million. Stearns had previously represented the Staffords in five real estate transactions and was a long-time friend.

In December 2001, Stearns contacted McGuire after learning that McGuire owned an apartment building in Boulder. Stearns stated that he "may have some ***72** buyers for" the building. Aplt.App. at 89. McGuire had not been to Boulder in fifteen years and was unaware of the building's condition or the Boulder real estate market.

On January 16, 2002, Stearns faxed McGuire a proposed "CONTRACT TO BUY AND SELL REAL ESTATE" signed by Grove Stafford that recited a $1.55 million purchase price. *Id.* at 120. At page six of the document, following Stafford's signature and the words "END OF CONTRACT," there is a "BROKER ACKNOWLEDGMENTS" section signed by Stearns that includes boxes checked to designate brokerage relationships:

> *Selling Company Brokerage Relationship.* The Selling Company and its licensees have been engaged in this transaction as Buyer Agent
>
> [][FN1] Seller Agent/Subagent Dual Agent [] Transaction-Broker.
>
> FN1. It is unclear whether the "Seller Agent/Subagent" box is checked.
>
> *Listing Company Brokerage Relationship.* The Listing Company and its licensees have been engaged in this transaction as Seller Agent [] Dual Agent [] Transaction-Broker.

Id. at 125-26. Stearns also prepared an "EXCLUSIVE RIGHT-TO-SELL LISTING CONTRACT" that states, "The parties agree that Seller irrevocably engages [Walnut Realty] as

> Seller's exclusive agent,"*id.* at 128, to "promote the interests of Seller with the utmost good faith, loyalty and fidelity,"*id.* at 129. But Stearns neither signed the listing contract nor sent it to McGuire.

In response to a "counterproposal" submitted by McGuire, *id.* at 99, Stearns faxed McGuire on January 29, 2002, another proposed "CONTRACT TO BUY AND SELL REAL ESTATE,"*id.* at 138. This document increased the purchase price to $1.65 million and included an "ADDITIONAL PROVISIONS" section that gave Stearns a four percent commission and stated that the "[Staffords] understand[ ] that they are purchasing the property 'AS IS' and that the Seller and Seller's Agent make no representations whatsoever as to the condition of the structure." *Id.* at 143. McGuire signed the contract on January 30, 2002. A "BROKER ACKNOWLEDGMENTS" section signed by Stearns follows McGuire's and the Staffords' signatures and the words "END OF CONTRACT." This time, only the "Seller Agent/Subagent" box was checked:

> ****2** *Selling Company Brokerage Relationship.* The Selling Company and its licensees have been engaged in this transaction as [] Buyer Agent
>
> Seller Agent/Subagent [] Dual Agent [] Transaction-Broker.
>
> *Listing Company Brokerage Relationship.* The Listing Company and its licensees have been engaged in this transaction as [] Seller Agent [] Dual Agent [] Transaction-Broker.

Id. at 144. Contemporaneous to the contract's execution, Stearns and Stafford also executed a "BROKERAGE RELATIONSHIPS DISCLOSURE" form stating that Walnut Realty was "working with you [the Staffords] as a seller's agent on properties we have listed and as a transaction-broker on properties listed with other companies." *Id.* at 135.

According to McGuire, in the months leading up to closing, he "began to realize that Stearns had failed to disclose any pertinent information about the Boulder market or the property ... [and] that he had been 'lifelong friends' with Candace Stafford." *Id.* at 106-07. McGuire informed the Staffords of his realization and insisted that they pay him for expenses he ***73** had incurred. They refused, "and the closing did not occur." *Id.* at 107.[FN2]

> FN2. McGuire eventually conveyed the property to the Staffords after they sued him for specific performance.

Stearns sued McGuire for his commission, pleading breach of contract, misrepresentation, and unjust enrichment. McGuire answered, asserted a variety of affirmative defenses, including breach of fiduciary duty and estoppel, and also counterclaimed for breach of fiduciary duty, negligence, negligent misrepresentation, and fraud. During discovery, Stearns and McGuire deposed each other. Stearns testified that he mistakenly checked the "Dual Agent" and "Seller Agent" boxes on the proposed contract and the "Seller Agent/Subagent" box on the accepted contract. *Id.* at 93, 100. McGuire testified that he "probably" did not read the contract before signing it because he "thought [it] was a bunch of hogwash,"*id.* at 47, or a "hoax," *id.* at 48, that he did not notice the "Seller's Agent/Subagent" box was checked, and that he never authorized Stearns to take any action on his behalf, *id.* at 45-46. McGuire further testified that he never asked Stearns for a listing agreement.

In July 2004, the district court entered a partial summary judgment, ruling that Stearns was a transaction-broker, rather than a seller's agent, because there was no written agency agreement. And as a transaction broker, Stearns owed no fiduciary duty to McGuire. The district court further determined that Stearns was not estopped from relying on the absence of a written agency agreement. App. at 199. Accordingly, the district court dismissed McGuire's breach of fiduciary duty counterclaim and affirmative defense and his estoppel affirmative defense.

In September 2004, the district court entered an order, based on a stipulation reached by the parties, dismissing with prejudice Stearns' claims of misrepresentation and unjust enrichment and McGuire's claims of negligence, negligent misrepresentation, and fraud. But the order also provides that McGuire "reserves the right to pursue his breach of fiduciary claim and estoppel and breach of fiduciary duty affirmative defenses, and only his breach of fiduciary claim, against [Stearns]." *Id.* at 202-03. The order further awards Stearns damages for breach of contract.

****3** In October 2004, the district court entered judgment "in accordance with the [September] Order,"*id.* at 209, such that it repeated McGuire's reservation of "the right to pursue his breach of fiduciary claim and estoppel and breach of fiduciary duty affirmative defenses,"*id.* at 210. But the judgment then goes on "in accordance with the [July] Order" to dismiss with prejudice McGuire's breach of fiduciary duty counterclaim and breach of fiduciary duty and estoppel affirmative defenses, *id.* The judgment concludes with "This Order shall be deemed final for purposes of Fed.R.Civ.P. 54(b)." *Id.*

McGuire appealed.

DISCUSSION

I. Appellate Jurisdiction

[1] Before proceeding to the merits of this appeal, we must first address our jurisdiction. Under 28 U.S.C. § 1291, this court exercises appellate jurisdiction over the "final decisions of the district courts" that are not subject to direct review by the Supreme Court. "A party generally may not take an appeal under § 1291 until there has been a decision by the district ***74** court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988) (quotation marks omitted). Any decision that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties" is ordinarily not appealable without "an express determination that there is no just reason for delay and ... an express direction for the entry of judgment." Fed.R.Civ.P. 54(b).

The finality of the district court judgment on appeal here is obscured by two things. First, the judgment both declares McGuire's right to pursue his breach of fiduciary claim and dismisses that claim with prejudice. Second, the judgment refers to Rule 54(b), thereby suggesting a lack of finality. Nevertheless, we are satisfied that this court has jurisdiction. McGuire's reservation of a right to pursue a breach of fiduciary duty claim appears to be a precautionary measure employed in the event that this court determines that Stearns owed McGuire a fiduciary duty, reverses the judgment, and remands for the district court to determine whether Stearns breached that duty. Our perception of the reserved right is supported by the fact that the September order holds Stearns' commission in escrow during the appeal and releases it to him only if the judgment is affirmed. In cases such as this, when an affirmance will terminate the litigation in its entirety, appellate jurisdiction is present. *See Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1288 (10th Cir.2001). The reference to Rule 54(b) appears to be have been inadvertent.[FN3]

FN3. The existence of a final judgment renders Rule 54(b) certification unnecessary. *See*Fed.R.Civ.P. 54(b). And in those cases falling within the rule's ambit, certification fails if the district court does not "express[ly] determine that there is no just reason for delay" and "express[ly] direct[ ] ... the entry of judgment,"*id.; see, e.g., Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1266 (10th Cir.2005).

II. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We review "a grant of summary judgment de novo with an examination of the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1196 (10th Cir.2005).

III. Breach of Fiduciary Duty

****4** [2] A transaction-broker "assists one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms, and the closing of such real estate transaction without being an agent or advocate for the interests of any party to such transaction." Colo.Rev.Stat. § 12-61-802(6) (West 1996); *see also id.* § 12-61-807(1). A real estate broker who serves as a transaction-broker "is not in a fiduciary relationship with either party to a real estate transaction." *Hoff & Leigh, Inc. v. Byler*, 62 P.3d 1077, 1078 (Colo.Ct.App.2002). A seller's agent, on the other hand, is a "broker who is engaged by and represents the seller in a real estate transaction." Colo.Rev.Stat. § 12-61-802(4)(c) (West 1996). When a real estate broker serves as a seller's agent and breaches a fiduciary duty, he "not only forfeits the commission but also is liable for the full amount of" any actual loss suffered by the ***75** seller. *See Moore & Co. v. T-A-L-L, Inc.*, 792 P.2d 794, 800 n. 8 (Colo.1990). A real estate broker is presumed to be a transaction-broker and not a seller's agent unless there is a written agreement between the broker and the party to be represented establishing a single agency relationship with the seller. *See*Colo.Rev.Stat. § 12-61-803(2)(a) (West 1996).

McGuire argues that the real estate contract established an agency relationship with Stearns. McGuire points to the "BROKER ACKNOWLEDGMENTS" section, in which the "Seller Agent/Subagent" box is checked, Aplt.App. at 144, and the "ADDITIONAL PROVISIONS" section, in which the Staffords concede that the "Seller and Seller's Agent" make no representations regarding the building's condition, *id.* at. 143.

We conclude that the real estate contract between McGuire and the Staffords is not a written agreement sufficient to transform Stearns from a transaction-broker into a seller's agent.[FN4] Missing from that document is a manifestation of McGuire's consent for Stearns to serve as his agent. *See City & County of Denver v. Fey Concert Co.*, 960 P.2d 657, 660 (Colo.1998) (stating that an agency relationship requires "the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act"); *Stortroen v. Beneficial Finance Co.*, 736 P.2d 391, 395 (Colo.1987) ("Agency is ... a legal relation having its source in the mutual consent of the parties."). McGuire's signature does not appear after the "END OF THE CONTRACT" to coincide with Stearns' checkmark in the "Seller Agent/Subagent" box. And we decline to interpret the Staffords' concession in the "ADDITIONAL PROVISIONS" section (that "the Seller and Seller's Agent" make no representations concerning the building's condition) as somehow evincing McGuire's consent to Stearns being his agent. Our view of the real estate contract as not being a written agency agreement between McGuire and Stearns is bolstered by McGuire's deposition testimony that he did not authorize Stearns to act on his behalf. *See Moses v. Diocese of Colorado*, 863 P.2d 310, 324 (Colo.1993) (stating that "[t]he most important factor in determining whether a person is an agent is the [principal's] right to control" the manner of work). Further, we find it difficult to see how McGuire could have manifested his consent to an agency relationship via a document that he probably did not read and which he considered to be "hogwash" or a "hoax," Aplt.App. at 47, 48. Nor can we discern how McGuire's missing consent is

supplied by Stearns checking agency boxes on the proposed contract that was rejected by McGuire, Stearns preparing a listing agreement that he did not sign or send to McGuire, Stearns indicating to Grove Stafford on a brokerage relationship disclosure form that Walnut Realty was working as a "seller's agent" on properties listed with Walnut Realty, or Stearns relying on the contract for a commission.

> FN4. Although the existence of an agency relationship is ordinarily a factual issue, we may resolve the issue as one of law where, as here, the material facts are not in dispute. *City & County of Denver v. Fey Concert Co.*, 960 P.2d 657, 660 (Colo.1998).

****5** We conclude that the district court did not err in ruling that the real estate contract between McGuire and the Staffords was not a written agreement making Stearns a seller's agent.

IV. Equitable Estoppel

[3] McGuire alternatively argues that Stearns is estopped from asserting the absence of a written agency agreement because he (Stearns) failed to disclose the ***76** nature of the brokerage relationship. Colorado Revised Statute § 12-61-808(2)(a)(I) (West 1996) requires a transaction-broker to "disclose in writing to the party to be assisted that such broker is not acting as agent for such party and that such broker is acting as a transaction-broker." While a failure to disclose may result in administrative action by the Colorado Real Estate Commission, *id.* § 12-61-811, there is no statutory allowance for estoppel.

Assuming, without deciding, that the estoppel doctrine could be grafted onto Colorado's statutory framework for brokerage relationships, McGuire's invocation of the doctrine fails. Estoppel requires that (1) "the party to be estopped must know the facts and either intend the conduct to be acted on or so act that the party asserting estoppel must be ignorant of the true facts," and (2) "the party asserting estoppel must [reasonably] rely on the other party's conduct with resultant injury." *Committee for Better Health Care v. Meyer*, 830 P.2d 884, 891-92 (Colo.1992). "Estoppel is predicated on a factual situation, and while in cases where only one inference can be drawn from it, it is a question of law for the court, if there is any conflict, it is for the trier of facts." *Guthner v. Union Finance & Loan Co.*, 110 Colo. 449, 135 P.2d 237, 237 (1943).

McGuire states that a genuine issue of fact exists as to whether he relied on Stearns' agency representations in the unexecuted listing agreement, the proposed contract, and the accepted contract. We reject this proposition for several reasons. First, McGuire could not have relied on any representation in the unexecuted listing agreement because Stearns never sent it to him. Second, McGuire has identified no evidence suggesting that he was aware that agency boxes were checked in the proposed contract. McGuire's general declaration statement that "[a]t all times I believed Stearns was acting as my agent," Aplt.App. at 107, is insufficient to create a genuine issue of material fact with respect to any representations in the proposed contract. *See MacKenzie v. City & County of Denver*, 414 F.3d 1266, 1273 (10th Cir.2005) ("Unsupported conclusory allegations ... do not create an issue of fact."). Finally, McGuire could not have relied on any representation in the accepted contract because he probably did not read it, thought it was "hogwash" or a "hoax," and did not see that the "Seller's Agent/Subagent" box was checked.

McGuire cannot create an issue of fact by relying on his February 2003 interrogatory response stating that he "noticed right away" that the "Seller Agent/Subagent" box was checked, Aplt.App. at 112, while ignoring his August 2003 contradictory deposition testimony. *Cf. Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir.1986) (disregarding an affidavit that is contrary to the affiant's earlier sworn statements and designed to create a sham issue of

fact); *Burns v. Bd. of County Comm'rs,* 330 F.3d 1275, 1282 (10th Cir.2003) (extending *Franks* to deposition corrections that contradict the original testimony). Although the typical *Franks* scenario involves a summary judgment opponent distancing himself or herself from an earlier discovery response, we conclude that *Franks* may apply in reverse, i.e., when the summary judgment opponent spurns his or her later discovery response in order to create an issue of fact. Adjusting the *Franks* factors to fit the reverse scenario, we must assess whether the subsequent contrary discovery response was made under oath, whether the responding party had access to the pertinent evidence at the time of the subsequent contrary response, and whether the subsequent contrary response reflects confusion not exhibited in the prior response. *See Franks,* 796 F.2d at 1237. As McGuire was deposed***77** under oath, had the ability to recall whether he read the contract, and appeared to comprehend opposing counsel's inquiries into the matter, the prior contradictory interrogatory response cannot create an issue of fact.

****6** We conclude that the district court did not err in rejecting McGuire's estoppel defense.

CONCLUSION

The judgment of the district court is affirmed.

C.A.10 (Colo.),2005.
Stearns v. McGuire
154 Fed.Appx. 70, 2005 WL 3036538 (C.A.10 (Colo.))

END OF DOCUMENT

EXHIBIT C

H

U.S. v. Duke Energy Corp.
M.D.N.C.,2004.
Only the Westlaw citation is currently available.
United States District Court,M.D. North Carolina.
UNITED STATES OF AMERICA, Plaintiff,
andENVIRONMENTAL DEFENSE, et al.,
Plaintiff-Intervenors,
v.
DUKE ENERGY CORPORATION Defendant.
No. Civ.A. 1:00 CV 1262.

April 14, 2004.

Gill P. Beck, Joan Brodish Binkley, Office of U.S. Attorney, Greensboro, NC, Daniel C. Beckhard, Katherine E. Konschnik, James Lofton, Lois J. Schiffer, Environment & Natural Resources Div., Robert A. Kaplan, Sonja Petersen, Jason Dunn, John C. Cruden, Deborah Behles, James R. Macayeal, U.S. Department of Justice, Washington, DC, Alan Dion, U.S. Environmental Protection Agency, Office of Regional Counsel, Atlanta, GA, for Plaintiff.
James Blanding Holman, IV, Chapel Hill, NC, Jeffrey M. Gleason, Charlottesville, VA, for Plaintiff-Intervenors.
Peter G. Pappas, Robert Harper Heckman, Daniel W. Fouts, Nexsen PruetAdams Kleemeier, PLLC, Greensboro, NC, Albert Diaz, T. Thomas Cottingham, III, Nash E. Long, III, Wood W. Lay, Hunton & Williams, Garry Stephen Rice, Charlotte, NC, Mark B. Bierbower, Henry V. Nickel, William F. Brownell, Makram Jaber, Hunton & Williams, Washington, DC, for Defendants.
John J. Buckley, Jr., Robert M. Cary, Bradley J. Bondi, Todd F. Braunstein, Williams & Connolly, Washington, DC, Jonathan Arthur Berkelhammer, Smith Moore, L.L.P., Greensboro, NC, for Movant.

ORDER AND FINAL JUDGMENT

BULLOCK, J.

***1** On August 26, 2003, the Court issued a Memorandum Opinion in this action (Docket No. 234) addressing the parties' motions for summary judgment (hereinafter the "Summary Judgment Order"), in which the Court made certain legal determinations to be applied in this case, including the legal standard to be applied in determining whether Defendant Duke Energy Corporation's ("Duke Energy") projects were "routine maintenance, repair, and replacement" and hence not subject to regulation under the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act and related regulations, as well as the legal standard for calculating whether Duke Energy's projects caused an increase in annual net emissions triggering PSD. In particular, with regard to the latter issue, the Court determined as a matter of law that, for purposes of determining whether Duke Energy's projects resulted in a "net significant emissions increase" triggering PSD requirements, "post-project emissions must be calculated on an annual basis, measuring emissions in tons per year, and in calculating post-project emissions levels the hours and conditions of operations must be held constant. Accordingly, a net emissions increase can result only from an increase in the hourly rate of emissions."(Docket No. 234 at 48.)The Court deferred ruling on the issue of whether Duke Energy's projects resulted in an increase in emissions above the baseline rate until trial, but held as a matter of law that "to the extent the projects did not increase the unit's maximum hourly rate of emissions, however, these projects are not subject to PSD." (Docket No. 234 at 70.)The Court subsequently considered and denied Plaintiff United States' Motion for Reconsideration of the Summary Judgment Order. (Docket No. 294.)

Plaintiff United States and Plaintiff-Intervenors Environmental Defense, *et al.* and Duke Energy have submitted a joint stipulation that obviates the need for a trial under the legal standards applicable in this case under the Summary Judgment Order, and

that enables the Court to enter an appealable final judgment under those legal standards, thereby saving the parties and the Court the time and expense of a trial. Specifically, the parties have made the following stipulations:

1. Plaintiff and Plaintiff-Intervenors stipulate that their contention that each of the projects at issue in this case resulted in a significant net emissions increase within the meaning of the relevant PSD regulations is based solely on their contention that the projects would have been projected to result in an increased utilization of the units at issue.

2. Plaintiff and Plaintiff-Intervenors stipulate that they do not contend that the projects at issue in this case caused an increase in the maximum hourly rate of emissions at any of Duke Energy's units.

3. Plaintiff and Plaintiff-Intervenors stipulate to the dismissal, with prejudice, of those Claims for Relief which are not PSD claims (the "Non-PSD Claims"), *i.e.*, the even-numbered Claims for Relief in the Complaint, as incorporated by reference in the Complaint-inIntervention.

***2** 4. Defendant stipulates to the dismissal of its counterclaims in this action, without prejudice to revive such counterclaims in the event of a remand of this case as the result of an appeal. In the event of a remand, Plaintiff and Plaintiff-Intervenors will not oppose Defendant's counterclaims on timeliness or statute of limitations grounds.

5. The Parties stipulate that the Court stay enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244 and 250) and stay consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) to those orders. Upon entry of such a stay and a final judgment and order pursuant to the Joint Motion for Entry of Final Judgment, Plaintiff shall return the documents that are the subject of those Orders and Objections and any and all copies of these documents to Defendant. Defendant shall retain and preserve these documents.

6. Upon entry of an Order staying enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244 and 250) and staying consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281), Plaintiff and Plaintiff-Intervenors agree to the withdrawal of the documents submitted as Exhibits 166-176 in support of Plaintiff's Motion for Reconsideration (Docket No. 268) and stipulate that these documents and the other documents that are the subject of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) shall not be part of the record in any appeal of the final judgment entered pursuant to the Joint Motion for Entry of Final Judgment. Plaintiff and Plaintiff-Intervenors further stipulate that they shall not refer to these documents and the other documents that are the subject of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) in any of their argument or filings in the course of that appeal.

7. In the event of a remand after appeal of a final judgment entered pursuant to the Joint Motion for Entry of Final Judgment, Plaintiff and Plaintiff-Intervenors reserve the right to seek to lift the stay of enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244, and 250), and Defendant and UARG reserve the right to seek to lift the stay of consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281).

8. With respect to the miscellaneous action pending in the United States District Court for the District of Columbia relating to subpoenas served upon UARG, Plaintiff agrees to withdraw the subpoenas served on UARG in *United States v. Duke Energy Corp.* (M.D.N.C.). If this case is remanded as the result of an appeal, UARG and Defendant will not oppose the enforcement of new subpoenas as un-

timely.

***3** 9. Defendant stipulates to the withdrawal of Duke Energy's Motion for Sanctions (Docket No. 286) with prejudice, and Duke Energy's Motion to Strike Exhibits 166-176 (Docket No. 282), without prejudice.

10. Plaintiff and Plaintiff-Intervenors reserve the right to appeal the final judgment as to the PSD claims in this action. *i.e .*, the odd-numbered Claims for Relief in the Complaint, as incorporated by reference into the Complaint-in-Intervention. Defendant agrees and stipulates that the final judgment entered in connection with these stipulations is appealable by Plaintiff and Plaintiff-Intervenors as of right pursuant to 28 U.S.C. § 1291 with respect to the PSD claims in this action.

The Stipulations eliminate any need for a trial by this Court to determine any facts relevant to whether Duke Energy's projects triggered PSD. In this case, Plaintiff and Plaintiff-Intervenors (collectively "Plaintiffs") do not contend that any of the projects "increase[d] the unit's maximum hourly rate of emissions."(Docket No. 234 at 70.)Accordingly, under the test set forth by the Court, "these projects are not subject to PSD" as a matter of law (*id.*), and Plaintiffs cannot prevail at trial. Establishing an emissions increase is an essential element of Plaintiffs' PSD claims, and the failure of this element is grounds for granting summary judgment. *McClain v. South Carolina Nat. Bank*, 105 F.3d 898, 901 (4th Cir.1997), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (if a party cannot prevail on an element of a claim that is essential to that claim, summary judgment on the entire claim is appropriate).

Plaintiffs' stipulation is not equivalent to a voluntary dismissal of the PSD Claims, because Plaintiffs clearly contend that a different legal test is applicable for determining PSD requirements. Specifically, Plaintiffs contend that PSD emissions increases can occur as the result of projects that would increase the projected capacity utilization (hours of operation) of a unit, even if hourly emissions rates are unchanged. The Court has rejected Plaintiffs' interpretation of the PSD emissions test. In light of Plaintiffs' stipulation, there is nothing currently left for trial, but Plaintiffs have appropriately reserved the right to appeal the resulting dismissal of their PSD Claims.

The even-numbered claims in the Complaint, which are incorporated by reference into the Complaint-in-Intervention, allege that Duke Energy's projects violated the general permitting requirements under the North Carolina or South Carolina State Implementation Plans ("SIPs"). In order to enable the Court to enter an appealable final judgment on all claims in this case, however, Plaintiffs have stipulated to the voluntary dismissal, with prejudice, of these Non-PSD claims.

This leaves the issue of Defendant Duke Energy's counterclaims. Duke Energy's counterclaims are premised on the threatened application of the interpretation of the PSD regulations urged by EPA in this case. The Court has rejected EPA's interpretation of the PSD regulations. Accordingly, Duke Energy has stipulated to the dismissal of these claims, without prejudice to Duke Energy to revive them in the event that they become relevant in a remanded proceeding. Dismissal of these counterclaims as requested by Duke Energy eliminates them as a technical obstacle to finality.

***4** All of the claims in this action have been addressed. This Order constitutes a final judgment entered pursuant to Rule 58(a) of the Federal Rules of Civil Procedure. An appealable final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."*Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), *quoting Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). In order to be final, a judgment must dispose of all claims as to all parties. *J.D. Pharmaceutical Distribs., Inc. v. Save-On Drugs & Cosmetics Corp.*, 893 F.2d 1201, 1208

(11th Cir.1990).

Plaintiffs have reserved the right to appeal this judgment as to their PSD Claims in this action. While Plaintiffs have dismissed their Non-PSD Claims with prejudice, they have not consented to judgment on their PSD Claims. Rather, they have stipulated to facts that obviate the need for trial under the legal standards for PSD announced by this Court. If Plaintiffs do not appeal, or if this Court's judgment is affirmed, the case will be over. There is clear precedent in this Circuit for this procedural means of achieving finality while preserving the losing party's right to appeal. *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108 (4th Cir1993); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42 (4th Cir.1983). In addition, Duke Energy has stipulated that this final judgment is appealable by Plaintiffs pursuant to 28 U.S.C. § 1291 as of right with respect to the PSD Claims.

There remain four as-yet unresolved motions pending in this matter: Duke Energy's Rule 72(a) Objections (Docket No. 252) relating to documents containing certain UARG communications; UARG's Rule 72(a) Objections (Docket No. 251 and 281) concerning the same documents; Duke Energy's Motion To Strike Exhibits 166-176 (Docket No. 282); and Duke Energy's Motion for Sanctions (Docket No. 286). The Joint Stipulation resolves these matters. The parties and UARG have requested that the Court stay enforcement of the Orders of Magistrate Judge Eliason that were the subject of the Rule 72(a) Objections (Docket Nos. 164, 244 and 250), and stay any further consideration of the Rule 72(a) Objections, without prejudice to seeking enforcement of the Orders or reviving the Objections in the event that the case is remanded after appeal. Plaintiff has agreed to withdraw the documents that are the subject of the Motion To Strike, and has agreed that the disputed UARG documents will not be part of the record on any appeal of this Order. Duke Energy has agreed to withdraw the Motion To Strike, without prejudice, and Duke Energy has agreed to withdraw the Motion for Sanctions, with prejudice.

Accordingly, it is hereby ORDERED that:

1. Summary judgment is granted in favor of Defendant Duke Energy on Plaintiff's and Plaintiff-Intervenors' PSD claims in this action. Plaintiffs and Plaintiff-Intervenors have reserved the right to appeal this determination.

***5** 2. Plaintiff's and Plaintiff-Intervenors' Non-PSD Claims are hereby voluntarily dismissed, with prejudice. Plaintiff and Plaintiff-Intervenors have not reserved the right to appeal this voluntary dismissal.

3. Defendant Duke Energy's counterclaims are hereby dismissed, without prejudice to their being revived in the event of a remand following an appeal.

4. Enforcement of Magistrate Judge Eliason's Orders regarding certain UARG documents (Docket Nos. 164, 244 and 250) is hereby stayed. Consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) is hereby stayed. In the event of a remand after appeal of this judgment, Plaintiff and Plaintiff-Intervenors may seek to lift the stay of enforcement of Magistrate Judge Eliason's Orders and Defendant and UARG may seek a lift of the stay of consideration of the Objections.

6. Duke Energy's Motion for Sanctions (Docket No. 286) has been withdrawn, with prejudice.

7. Duke Energy's Motion To Strike (Docket No. 282) has been withdrawn without prejudice to refile the Motion in the event that the case is remanded after appeal and Plaintiffs obtain and seek to resubmit the subject documents.

8. The Parties shall comply with the terms of their stipulations as described above.

9. All claims and counterclaims having been dis-

Not Reported in F.Supp.2d, 2004 WL 1118582 (M.D.N.C.)

posed of in this action, Final Judgment is accordingly hereby entered pursuant to Rule 58.

SO ORDERED

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