Volume 45, Number 5
March 6, 2019

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: A Mar. 5 letter to Acting Interior Secretary David Bernhardt signed by Sen. Charles Grassley (R-IA), chair of the Senate Finance Committee; Sen. John Cornyn (R-TX), a member of the Senate Finance Committee; Sen. Patrick Leahy (D-VT), vice-chair of the Senate Appropriations Committee; and Rep. Elijah Cummings (D-MD), chair of the House Oversight Committee, urges Bernhardt to abandon the agency's attempt to revise its FOIA regulations to restrict requests. The letter pointed out that "the proposed rule appears to restrict public access to DOI's records and delay the processing of FOIA requests in violation of the letter and spirit of FOIA. Rather than clarifying DOI's FOIA process, the proposed rule would make the process more confusing and potentially expose it to politicization and unnecessary litigation." Calling the agency's proposed rule "misunderstood," Interior spokesperson Alex Hinson told the Associated Press that "those who have followed the issue understand that exponential increases in requests and litigation have overwhelmed the department's capacity to timely process the public's FOIA requests."

Legal Memo on Whale Death Protected by Common Interest Doctrine

Judge Colleen Kollar-Kotelly has ruled that a 16-page memorandum prepared by an attorney at the National Oceanic and Atmospheric Administration discussing the government's legal vulnerability as a result of a prior decision by the National Marine Fisheries Service to treat a 1994 amendment to the National Mammal Protection Act as doing away with the Public Display Permit requirement to provide a clinical necropsy report does not constitute secret law and, further, is protected by the attorney-client privilege and the attorney work-product privilege under Exemption 5 (privileges). Kollar-Kotelly's ruling shows a disturbing willingness of courts to expand the common interest doctrine in ways that undercut the adversarial distinction enunciated by the Supreme Court in *Dept of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001).

ACCESS REPORTS

The Animal Welfare Institute submitted FOIA requests to NOAA and NMFS for records concerning the agencies' decision that clinical necropsy reports were not required after the 2017 death of Tilikum, an orca whale who had been on display at Sea World in Orlando, Florida. Before Tilikum's death, AWI met separately with representatives from NOAA, NMFS, the Fish and Wildlife Service, and the Marine Mammal Commission to argue that the 1994 amendment did not affect the requirement to provide a clinical necropsy report in the Marine Mammal Protection Act. AWI prepared its own draft issue paper and told the agencies that although it had no intention to bring suit, it believed its position could be enforced under the Administrative Procedure Act. After Tilikum's death, AWI urged the agencies to require a clinical necropsy report on the whale's death. The agencies refused to change their position. A NOAA attorney prepared a memo in response to a request from NMFS's Office of Protected Resources supporting the agencies' position. AWI asked the agencies for a copy of the memo and after that request was denied, AWI filed FOIA requests pertaining to the decision. The agencies initially provided 58 files that had been previously processed for release pursuant to a separate FOIA request. The agencies then provided another 471 records with redactions. AWI only challenged the agency's decision to withhold the memorandum under Exemption 5.

AWI argued that the memorandum constituted the agency's final decision in the Tilikum case and that, as a result, the agency was required to disclose it because it represented secret law. The underlying concern about the existence of secret law is that in a democracy, government agencies should not be relying on policy or legal decisions that are not publicly available. But as a practical matter, the deliberative process privilege protects agency deliberations leading to a decision. Once an agency makes a final decision it is no longer privileged because at that point it is no longer pre-decisional nor deliberative.

AWI argued that the disputed memorandum represented the agency's final decision in the Tilikum case. Kollar-Kotelly found that the memo was a reaffirmation of the agency's current policy rather than a new decision. She pointed out that "given the pre-existing policy of non-enforcement, the draft memorandum served not to as a controlling statement of policy that Defendants relied on in discharging their mission. Instead, the draft memorandum constituted legal advice, created by NOAA counsel, advising Defendants of the legal ramifications of continuing their policy of non-enforcement in the face of legal arguments contained in Plaintiff's Issue Paper." She added that "Plaintiff has shown that the draft memorandum was used in support of only one decision, the decision not to require a necropsy report under Tilikum's permit. And, this was the precise decision on which the draft memorandum was requested to provide legal advice. Plaintiff has not shown that Defendants subsequently relied on the rationale in the draft memorandum when making other decisions. Accordingly, Plaintiff has not shown that withholding the draft memorandum will create a body of regularly-implemented secret law." She pointed out that "Defendants were entitled to rely on that legal advice in informing Plaintiffs that Defendants would not reverse their policy and enforce the necropsy requirements in Tilikum's permit," noting that "Defendants' use of the draft memorandum in this way does not transform the draft memorandum into a controlling statement of policy that Defendants repeatedly rely on in discharging their mission."

Kollar-Kotelly considered whether the memorandum qualified for protection under the attorney-client privilege. She noted that "the Director of the Office of Protected Resources within NMFS requested from an attorney in NOAA's Office of General Counsel legal advice and analysis of the arguments made in an Issue Paper submitted by Plaintiff to Defendants. In making this request, the NMFS Director was acting in the capacity of a client, requesting legal advice from an attorney in NOAA's Office of the General Counsel. Accordingly, the draft memorandum produced in response to this request for legal advice and analysis falls under the protection of attorney-client privilege." She acknowledged that "not every communication between an attorney and a client – government or otherwise – is made for the purpose of securing legal advice or services."

AWI contended that even if the attorney-client privilege applied, it was waived when the memo was shared beyond its privileged circle to staff at FWS, which is part of the Interior Department, and the Marine Mammal Commission, which is an independent agency. The agency asserted that both the consultant corollary and the common-interest doctrine expanded the privilege to FWS and MMC. Kollar-Kotelly explained that in its decision in *Klamath*, the Supreme Court had implicitly recognized the consultant corollary by distinguishing when an agency's interests were aligned with those of a third-party from those instances in which the third party's interests were adverse to those of the agency. Although she found no reason to conclude that the interests of FWS and MCC were adverse to those of NOAA and NMFS, she observed that regardless the agencies were protected by the common interest doctrine. She concluded that both agencies had a common interest. As to MMC, she observed that "MMC is tasked with ensuring that all agencies, including Defendants, adhere to the requirements of the MMPA. As such, MMC and Defendants have a common legal interest in the response to the findings and conclusions in Plaintiff's Issue Paper concerning the applicability of pre-1994 permit requirements." She added that AWI had included FWS and MCC in its prior discussions about the need for a clinical necropsy report.

Kollar-Kotelly also found that the NOAA memo was protected by the attorney work product privilege. AWI argued that its Issue Paper had not been prepared as a preface to bringing suit against the agency and thus the memo had not been written in anticipation of litigation. Kollar-Kotelly disagreed. She observed that "it does not matter that Plaintiff had not made a specific threat of litigation against Defendants at the time the draft memorandum was prepared. After reading Plaintiff's draft Issue Paper, Defendants knew that Plaintiff had taken a position on the continued viability of Tilikum's permit requirements that directly contradicted Defendants' position. Following Tilikum's death, the question of the validity of the permit's necropsy requirement was ripe. With full knowledge of Plaintiff's interest and position, Defendants reasonably anticipated litigation and requested from counsel legal advice and analysis of the arguments made in Plaintiff's Issue Paper. . . Accordingly, despite the lack of an explicit threat from Plaintiff, the Court concludes that the draft memorandum was prepared in anticipation of litigation." (*Animal Welfare Institute v. National Oceanic and Atmospheric Administration, et al.*, Civil Action No. 18-47 (CKK), U.S. District Court for the District of Columbia, Feb. 28)

The Federal Courts…

Judge Rudolph Contreras has ruled that the FBI improperly invoked a *Glomar* response neither confirming nor denying the existence of records in response to the Reporters Committee's request pertaining to the agency's impersonation of journalists as an investigatory technique. After the online newspaper The Intercept wrote in detail about "Operation Longbow" in which the FBI had impersonated a documentary filmmaker to get access to Cliven Bundy during his 2014 armed stand-off with law enforcement agents, the Reporters Committee submitted a FOIA request for records about Operation Longbow and the agency's policy for impersonating documentary filmmakers and film crews. The agency broke up the Reporters Committee's request into multiple parts, withholding some records under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. The Reporters Committee filed an administrative appeal of the FBI's response to the entire request, but then filed suit after the agency failed to respond. In court, the FBI issued a *Glomar* response, claiming that any information about its use of impersonation of documentary filmmakers as an investigative technique was categorically protected by **Exemption 7(E) (investigative methods and techniques)**. Contreras first addressed whether the records had been compiled for law enforcement purposes. Finding that the records did qualify, Contreras pointed out that "the FBI is a law enforcement agency. And the parties do not dispute that the impersonation of documentary filmmakers and film crews is a law enforcement

ACCESS REPORTS

technique. The Court agrees with the FBI's justification that any investigative record related to the use of the technique would necessarily have been compiled for a law enforcement purpose." But, having reached the conclusion that the records qualified for the threshold of what constituted a law enforcement record, Contreras observed that "Exemption 7(E) does not justify the FBI's refusal to confirm or deny the existence or nonexistence of responsive records." Contreras explained that in the D.C. Circuit an agency was required to show that the law-enforcement techniques were generally unknown to the public and that disclosure of the techniques would risk circumvention of the law. However, the FBI urged Contreras to adopt the Second Circuit's interpretation that Exemption 7(E) categorically protected records that would reveal law enforcement techniques not known to the public regardless of the risk of harm. Noting that the D.C. Circuit itself had recognized the conflict with the Second Circuit in *PEER v. International Boundary Water Commission*, 740 F.3d 195 (D.C. Cir. 2014), Contreras indicated that "the Court would be hard-pressed to adopt the Second Circuit's reading of Exemption 7(E) in this case. . .given that this Court is bound by D.C. Circuit precedent." Even though it acknowledged that impersonation of journalists was a publicly known technique, the FBI suggested that impersonation of documentary filmmakers was not publicly known. The Reporters Committee argued that documentary filmmakers were usually included in the First Amendment journalists' privilege. Contreras agreed, noting that "at a minimum, Defendants appear to recognize that a least *some* documentary film workers are members of the news media. This leaves unclear how the impersonation of documentary filmmakers as a whole can be a secret technique when the impersonation of news media is not." The FBI asserted that the impersonation of documentary filmmakers was not well known because there was only one public acknowledgement of its use during the Bundy investigation. But Contreras pointed out that "but that is all that is needed in order for the technique itself to become known. The Court agrees with RCFP that it is implausible for Defendants to assert the technique is secret simply because it has only been acknowledged to have been used in one instance. What other situations the technique may have been used in is still a secret, but the fact that it is a technique law enforcement uses is not, and Defendants accordingly cannot justify the FBI's *Glomar* response on the ground that revealing whether documents exist would disclose an unknown law enforcement technique." Contreras found that the FBI had failed to show why disclosing the existence of the technique of impersonating documentary filmmakers would risk circumvention of the law. He observed that "simply revealing that the FBI has any such records would not allow criminals to discern whether or not the FBI has used the technique to investigate their own, specific criminal activity, because all a criminal would know is the existence of any unquantified number of records. For the same reason, acknowledging the existence of records, without any indication about the number of type of records found, would not provide any information about the frequency of the technique's use." (*Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, Civil Action No. 17-1701 (RC), U.S. District Court for the District of Columbia, Mar. 1)

Judge Rudolph Moss has ruled that the Department of Health and Human Services has justified its attorney-client privilege claims under **Exemption 5 (privileges)** but has not yet sufficiently supported its deliberative process privilege claims. The Protect Democracy Project submitted a FOIA request for records concerning the agency's decision to discontinue advertising for healthcare.gov during the final weeks of the 2016-17 enrollment period. The agency located 274 responsive pages – 33 pages from the Office of the Secretary and 241 pages from the Centers for Medicare and Medicaid Services – and disclosed them with redactions made under Exemption 5. PDP argued that the agency's deliberative process privilege claims were far too broad. Moss agreed and ordered the agency to supplement its *Vaughn* indices. He pointed out that the *Vaughn* indices were "devoid of any detail about the nature of relevant declarations." PDP contended that the agency's deliberative process privilege claims were generic at best. The agency claimed there was nothing wrong with such general descriptions, but Moss observed that "what is insufficient, however, is boilerplate language that might be used in any *Vaughn* index in any FOIA case. Because such boilerplate descriptions are unmoored from the specific rationale for, or the content of, the relevant redactions, they fail to provide the

Court with 'a reasonable basis to evaluate the claim of privilege.' In other words, the problem is not that each *Vaughn* entry is identical; the problem is that the entries lack sufficient detail." He pointed out that "the Department fails to make an adequate showing regarding the function and significance of the withheld material to any agency deliberations." Moss faulted the agency's failure to provide sufficient identifying information about the role of the participants. He noted that "the Department never explains who these individuals are, nor, more importantly, what role they played in the relevant discussions." Moss found the agency fared far better with its attorney-client privilege claims. Here, Moss observed that "the Department has carried its burden on showing that the communications were between a law office – the Office of the General Counsel – and a client – CMS (or was passed along to other agency officials); that those communications were 'confidential;' and that they were either for the purpose of securing or disseminating legal advice. Nothing more is required to maintain the privilege." (*Protect Democracy Project, Inc. v. U.S. Department of Health & Human Services*, Civil Action No. 17-792 (RDM), U.S. District Court for the District of Columbia, Feb. 27)

Judge Rudolph Contreras has ruled that EPIC's claims that the Drone Advisory Committee, which was set up by the FAA under its Radio Technical Commission for Aeronautics Advisory Committee, violated the **Federal Advisory Committee Act** by failing to make its records publicly available are **non-justiciable**. After the DAC and its subcomponents failed to respond to EPIC's request for records, EPIC filed suit alleging that the failure to provide records violated both FACA and the Administrative Procedure Act. Contreras explained that the Supreme Court held in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that "absent statutory intent to create a cause of action. . . 'courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" Applying this to FACA, he pointed out that courts that have "addressed the availability of a private right of action under FACA *after Sandoval* was decided have consistently found the statute not to create such a right." He added that "the Court concurs with the reasoning of others in this circuit that 'FACA does not provide a cause of action, given that none is apparent from the statutory text.'" While the government agreed that EPIC had **standing** to bring an APA claim for failure to release records under FACA, it argued that since EPIC had not shown that it attempted to attend any of the DAC's meetings it did not have standing on its open meetings claim. Pointing out that EPIC's complaint only challenged the failure to hold open meetings after they had taken place, Contreras noted that "absent from the complaint are allegations of *particularized* harm to EPIC, which at a bare minimum would require EPIC to indicate that it had an interest in attending the DAC and task group meetings before they took place but was unable to attend because of a lack of information available on when such meetings were to take place." EPIC argued that the records of DAC's subgroups were subject to disclosure because they were essentially records of the parent committee. Contreras rejected that claim, noting that "even taking EPIC's definition of a subgroup, the Court disagrees that any record made available to or prepared for the parent group pursuant to 5 U.S.C. appl 2 § 10(b) is a record of the parent group. Just because the DAC task groups ultimately answer to the DAC does not mean that all of their documents are made available to or prepared for the DAC." Contreras also rejected EPIC's claim that the subgroups were set up to independently provide advice. Instead, he noted that "the DAC Subcommittee was set up specifically to conduct staff work for the DAC, with a clearly established hierarchical structure mandating for all recommendations to be approved by the DAC." He added that "the DAC Subcommittee provided reports of its activities at public DAC meetings, and so did its component task groups. Absent any allegations that the DAC Subcommittee provided advice or recommendations directly to the FAA – beyond the conclusory assertion that 'FAA officials have repeatedly circumvented the full DAC' – the Complaint does not plead sufficient facts to plausibly suggest that the DAC Subcommittee was an advisory committee." (*Electronic Privacy Information Center v. Drone Advisory Committee, et al.*, Civil Action No. 18-833 (RC), U.S. District Court for the District of Columbia, Feb. 25)

# #

ACCESS REPORTS

Judge Trevor McFadden has ruled that the FBI has finally shown that it conducted an **adequate search** for records concerning the agency's investigation of the Jonestown Massacre in response to a 1998 FOIA request for Fielding McGehee and his wife Rebecca Moore and that it properly withheld records under **Exemption 1 (national security), Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. McFadden inherited McGehee's case from Judge Gladys Kessler, who ruled in 2011 that the agency's search was adequate but that its *Vaughn* index was deficient. McGehee's only remaining challenge to the adequacy of the FBI's search was that there appeared to have been a large number of unaccounted for records at the FBI's San Francisco office. McFadden noted that at the time McGehee made his request in 1998, requesters were required to request records from specific field offices. McGehee made his request only to FBI headquarters. Approving the adequacy of the agency's search, McFadden pointed out that "the FBI has submitted a detailed declaration explaining why the San Francisco records would not have been at the FBI headquarters when the Plaintiffs submitted their requests back in 1998. And given the Plaintiffs' requests, the FBI had no obligation to process material housed in San Francisco. Even if the Plaintiffs are correct in their bald assertion that the San Francisco documents were at FBI Headquarters in 1998, 'the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.'" McFadden observed that "the FBI has since conducted another search and released more material to the Plaintiffs. This does not undermine the FBI's position here. Rather, this only highlights the FBI's good-faith efforts to locate all responsive records." McFadden agreed with the agency's invocation of Exemption 1. He pointed out that "it is both plausible and logical that the disclosure of the information withheld by the FBI 'reasonably cold be expected to result in damage to the national security.' After all, this FOIA request relates to the murder of a congressman abroad and the second largest single loss of American civilians by a deliberate act in history." The FBI withheld photographs of individuals under Exemption 7(C). McFadden upheld the agency's exemption claim, pointing out that "here, the Plaintiffs do not explain why – and indeed it is hard to see how – this information would shed light on the FBI's performance of its statutory duties." (*Fielding McGehee, et al. v. U.S. Department of Justice*, Civil Action No. 01-01872 (TNM), U.S. District Court for the District of Columbia, Mar. 4)

Judge Timothy Kelly has ruled that the Bureau of Prisons has not shown that a list of employees who work at either the Federal Correctional Complex at Florence, Colorado, Terre Haute, Indiana, or Beaumont, Texas is protected by **Exemption 2 (internal practices and procedures)** or **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to requests from prisoner Dmitry Pronin. Pronin submitted six FOIA requests in all for records about employees at the three facilities and after the agency failed to respond, Pronin filed suit. BOP filed a motion justifying its handling of all six requests, but Pronin told Kelly that the only information he was interested in was a list of employees at the three facilities. Referring to the agency's motion as incoherent, Kelly found that the agency had not yet shown that either Exemption 2 or the privacy exemptions protected the information. Turning to the Exemption 2 claim, Kelly pointed out that "to be sure, 'information need not actually *be* "rules and practices" to qualify under Exemption 2, as the statute provides that matters "related" to rules and practices is also exempt.' But simply stating that a document 'reflects the internal practices of the BOP concerning staffing,' does not by itself bring that document within the cover of Exemption 2. Defendant must further demonstrate that the matter 'related *solely*' to internal personnel rules and practices and that it is not 'subject to a genuine and significant public interest.' Defendant makes no attempt to explain why a list of employee names, whether compiled separately or as part of a broader 'staffing report,' meet those criteria." He added that "to be clear, the Court does not find that these records necessarily fall outside Exemption 2 – or, for that matter, any of the other exemptions – only that Defendant has failed to carry its burden to justify invoking Exemption 2 here." BOP first claimed that it had no record containing employee names for Beaumont, but then later asserted that it was withholding information for privacy concerns. Kelly noted that "either justification – that it uncovered no responsive records after an adequate search, or that it did but such records

are exempt – may be sufficient for summary judgment purposes. But again, Defendant has failed to provide a record sufficient to demonstrate as much. If no records exist – a response the Court doubts, given the existence of staff lists for other BOP institutions – Defendant must aver as much with appropriate declarations. If however, responsive records do exist and Defendant intends to withhold those records on privacy grounds, Defendant must sufficiently describe the nature of the records and cite to the particular exemption or exemptions under which it believes those records fall." (*Dmitry Pronin v. Federal Bureau of Prisons*, Civil Action No. 17-1807 (TJK), U.S. District Court for the District of Columbia, Mar. 1)

Judge Christopher Cooper has ruled that the FBI has failed to show that **Exemption 7(D) (confidential sources)** protects the identity of a witness who testified at Manuel Pena-Martinez's trial. Although Pena had not responded to the agency's summary judgment motion, Cooper indicated that under *Winston & Strawn, LLP v. McLean*, 843 F.3d 503 (D.C. Cir. 2016) district court judges were required to rule on whether the government had carried its burden of showing that it was entitled to summary judgment. Here, based on the record, Cooper noted that the agency had not. He pointed out that the First Circuit's decision upholding Pena's conviction identified Arturo Ortiz-Colon as "an informant and undercover operative." As a result, he observed that "by failing to address facts in the record suggesting Colon testified as a government witness during Pena's trial and was referred to as an informant, the government has failed to meet its burden." (*Manuel Pena-Martinez v. U.S. Department of Justice*, Civil Action No. 18-0022 (CRC), U.S. District Court for the District of Columbia, Feb. 26)

In a per curiam decision, the D.C. Circuit has affirmed that the CIA conducted an **adequate search** for records requested by the Assassination Archives and Research Center and properly withheld information under two different **Exemption 3 (other statutes)** statutes. However, the court rejected the CIA's claim under **Exemption 5 (privileges)**, pointing out that "summary judgment is denied as to whether appellee correctly withheld portions of several intra-agency communications pursuant to FOIA Exemption 5. Because the court has determined that summary disposition is not in order with respect to this issue, the Clerk is instructed to calendar this case for presentation to a merits panel." (*Assassination Archives and Research Center v. Central Intelligence Agency*, No. 18-5280, U.S. Court of Appeals for the District of Columbia Circuit, Feb. 15)

A federal court in Montana has ruled that most of the allegations brought by the Western Organization of Resource Councils against the Interior Department for violations of the **Federal Advisory Committee Act** by the Royalty Policy Committee should be dismissed for **failure to state a claim** but that Western's claims that the department had not shown the committee was properly established and that records of subgroups were publicly available could continue. The Royalty Committee was set up in 2004 to "review and comment on revenue management and other mineral-related policies" stemming from the leasing of federal and Indian lands. Western's primary contention was that the Committee's membership was unfairly balanced because it was made up of representatives from the mineral extraction industry and did not include members from advocacy groups. Western also contended the Committee did not abide by Bureau of Land Management regulations on advisory committees. The court agreed that Western had shown that its potential informational and functional injury were sufficient to find that it had **standing** but then pointed out that its injuries were based on the BLM regulations and that "the Royalty Committee is not governed by the BLM regulations. Thus, this alleged injury does not provide a basis for standing." The court then proceeded to note that under Ninth Circuit precedent, the "fairly balanced" requirement in FACA was **non-justiciable** unless there was some authority other than FACA that provided a sufficient standard for review. Western again argued that the BLM regulations provided that standard. But the court pointed out that "the Committee is administered by the

Office of Natural Resources Revenue, which is independent from BLM. While it is concerning that the Department can structure an advisory committee whose work overwhelmingly involves the administration of BLM lands as to avoid the more stringent BLM advisory committee regulations, it has succeeded in doing so here. As a result, Western cannot rely on the BLM's advisory committee regulations to provide sufficient standards to assess whether the Royalty Committee is 'fairly balanced.'" The court agreed with Western that the agency had offered only a conclusory statement as to why the Committee was originally established. The court observed that 'while Defendants may be correct that the Secretary's decision is unreviewable once an assessment of the public interest [in establishing the committee] is made, the failure to provide a factual basis for that decision is reviewable under the [Administrative Procedure Act]." The court also found that Western's allegation that the agency had failed to provide access to the Committee's records could continue as well. (*Western Organization of Resource Councils v. David Bernhardt*, Civil Action No. 18-139-M-DWM, U.S. District Court for the District of Montana, Jan. 24)