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Attorneys for Plaintiff

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

**ALLIANCE FOR THE WILD
ROCKIES,**

Plaintiff,

v.

U.S. FISH & WILDLIFE SERVICE, an
agency within the U.S. Department of
Interior.

Defendant.

CV-

**COMPLAINT FOR
DECLARATORY and
INJUNCTIVE RELIEF**

Freedom of Information Act

I. INTRODUCTION

1. Plaintiff Alliance for the Wild Rockies (Alliance) brings this action under the Freedom of Information Act, 5 U.S.C. § 552 et seq. (FOIA) for declaratory, injunctive and other appropriate relief to enjoin Defendant from withholding requested documents and require that Defendant produce those documents.
2. Defendant violated the FOIA by failing to respond to Plaintiff's FOIA request with a determination within the deadline established by the FOIA, as well as by failing to produce requested documents. This action seeks the following: (1) an order declaring that Defendant acted illegally by failing to respond with a determination to Plaintiff's FOIA request; (2) an order declaring that Defendant acted illegally by failing to produce the requested documents; (3) an order enjoining Defendant from withholding the requested documents and requiring Defendant to produce the requested documents; and (4) an order requiring Defendant to pay the expenses of this action, including Plaintiff's costs and reasonable attorney fees.

II. JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court

also has jurisdiction over this action pursuant to 28 U.S.C. § 1331(a) (federal question).

4. Venue in this District is proper under 5 U.S.C. § 552(a)(4)(B) because “the complainant resides” in this District.
5. Declaratory relief is appropriate under 28 U.S.C. § 2201. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. 552(a)(4)(B).
6. This Court has the authority to award costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

III. PARTIES

7. Plaintiff ALLIANCE FOR THE WILD ROCKIES (Alliance) is a tax-exempt, non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Missoula, Montana. Members of the Alliance observe, enjoy, and appreciate Montana’s native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future. Alliance’s members’ interests are directly affected by Defendant’s failure to respond to requests for, and disclose, information regarding wildlife and natural resource management.

8. Defendant UNITED STATES FISH & WILDLIFE SERVICE (FWS or Defendant) is an agency of the United States Department of Interior. FWS is the agency in possession and control of the records sought by Plaintiff, and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(e). FWS has a statutory duty to respond to Plaintiff's information requests, and disclose the requested records. 5 U.S.C. § 552 (a)(6)(A).

IV. FACTUAL AND LEGAL BACKGROUND

9. As set forth in Attachment 1 to this Complaint, on January 10, 2014, Plaintiff's Executive Director sent an email to the following address:

Antoinette Urioste, USFWS Region 6 FOIA Coordinator
P.O. Box 25486
Denver, CO 80225
Phone: 303-236-4473 / Fax: 303-236-7980
Email: fw6_foia@fws.gov

10. The subject line of the email states: "Freedom of Information Act Request."
11. The FOIA request states:

We submit this FOIA request for the entire underlying project file for your ESA consultations regarding the Cabin Gulch project on the Helena National Forest and Helena National Forest species list, which resulted in a species list dated July 2, 2013, a biological assessment dated November 13, 2013, and a letter of concurrence dated December 4, 2013.

We anticipate that the project file will include, at least, the following:

(1) the three analysis documents (7/02/2013 species list, 11/13/2013 biological assessment, and 12/04/2013 letter of concurrence);

(2) all documents cited in, and/or reviewed for, the documents listed in (1), including but not limited to all items cited in the references cited and/or literature cited sections of the documents;

(3) all draft versions of the documents cited in (1), and all agency comments/discussions regarding those drafts or final documents;

(4) all correspondence regarding the documents cited in (1) and/or the analysis therein, including emails, letters, and records of phone calls,

(5) all notes/minutes from meetings discussing the documents cited in (1) and/or the analysis therein, and

(6) all documentation regarding discussions regarding whether to allow public participation in the promulgation of any of the documents listed in (1).

12. Montana is within FWS Region 6.

13. FWS's FOIA website states that for FOIA requests in Region 6 the requests should be addressed to the following individual:

Antoinette Urioste, FOIA Coordinator
P.O. Box 25486
Denver, CO 80225

14. As set forth in Attachment 2 to this Complaint, the FWS Region 6 coordinator acknowledged that she received Plaintiff's FOIA request on January 10, 2014.
15. FOIA requires that an agency determine whether to comply with a request for documents within 20 business days of receipt of the request. If the agency determines not to disclose documents to a requester, it must inform the requester of its decision and inform the requester, at that time, how to appeal the agency's decision. 5 U.S.C. § 552((a)(6)(A)(i).
16. The statutory deadline for Defendant to respond with a determination for Plaintiff's FOIA request was 20 business days from receipt of the request on January 10, 2014, which was February 10, 2014.
17. Defendant did not respond with a determination by February 10, 2014.
18. The FOIA allows 10 additional business days for a determination if the component of the agency that receives the FOIA request is not "the appropriate component of the agency," and must forward the request to the appropriate component of the agency.
19. If that exception applies, the deadline for Defendant's determination to Plaintiff's FOIA request was February 25, 2014.
20. Defendant did not respond with a determination by February 25, 2014.

21. As of the date of the filing of this Complaint on March 4, 2014, Plaintiff has still not received a determination on its FOIA request or any of the requested documents from FWS.
22. Time is of the essence in this matter, as Plaintiff currently has a response brief due regarding the subject matter of the underlying FOIA request on April 1, 2014. *See Alliance for the Wild Rockies v. Krueger*, CV-12-150-M-DLC, Order (February 4, 2014).
23. This is the third time in less than a year that Plaintiff has been forced to file a lawsuit against FWS to compel compliance with FOIA. *See Alliance for the Wild Rockies v. FWS*, CV-13-105-M-DWM, Complaint (May 28, 2013); *Alliance for the Wild Rockies v. FWS*, CV-13-176-M-DWM, Complaint (August 20, 2013).
24. Plaintiff is directly and adversely affected by Defendant's failure to respond and provide all responsive records and documents for its FOIA request.
25. Plaintiff is "deemed to have exhausted [its] administrative remedies" because Defendants "fail[ed] to comply with the applicable time limit provisions" of the FOIA. 5 U.S.C. § 552(a)(6)(C)(I).
26. Plaintiff has been required to expend costs and retain legal representation to prosecute this action.

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Defendant violated FOIA by failing to issue a determination for

Plaintiff's FOIA Request by the statutory deadline.

27. Plaintiff incorporates all previous paragraphs by reference.
28. Defendant violated FOIA's requirement that an administrative agency must respond to a FOIA request within 20 business days with a substantive determination that notifies the requester whether the agency will comply with the request, the scope of the documents the agency will produce, whether any exemptions are being claimed to deny any part of the request, and how to appeal an adverse determination. 5 U.S.C. § 552(a)(6)(A)(I).
29. Alternatively, if the 10 day extension for mis-directed requests applies, Defendants have also violated that deadline.
30. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

SECOND CLAIM FOR RELIEF

Defendant violated FOIA by failing to make requested

records promptly available to Plaintiff.

31. Plaintiff incorporates all previous paragraphs by reference.

32. Defendant violated FOIA because its failure to provide the documents requested by Plaintiff violated the FOIA requirement that every administrative agency “make the records promptly available to any person” who requests records from an administrative agency. 5 U.S.C. § 552(a)(3)(A).
33. Unless enjoined by this Court, Defendant will continue to violate Plaintiff’s legal rights to access the records that it has requested.
34. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

VI. REQUEST FOR RELIEF

THEREFORE, Plaintiff requests that this Court enter judgment providing the following relief:

- A. Declare that Defendant violated FOIA by failing to issue a determination for Plaintiff’s FOIA request in accordance with the statutory deadline;
- B. Declare that Defendant violated FOIA by failing to promptly produce the documents requested in Plaintiff’s FOIA request;
- C. Enjoin Defendant from withholding the requested records, and order Defendant to immediately provide the requested records to Plaintiff;

- D. Award Plaintiff its reasonable costs, litigation expenses and attorneys' fees as provided by 5 U.S.C. § 552(a)(4)(E); and
- E. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 4th Day of March, 2014.

/s/ Rebecca K. Smith

Rebecca K. Smith

Public Interest Defense Center, P.C.

Timothy M. Bechtold

Bechtold Law Firm, PLLC

Attorneys for Plaintiff

ATTACHMENT 1

From: Michael Garrity <garritymichael@yahoo.com>
Subject: Freedom of Information Act Request
Date: January 10, 2014 4:12:18 PM MST
To: "fw6_foia@fws.gov" <fw6_foia@fws.gov>
Reply-To: Michael Garrity <garritymichael@yahoo.com>

January 10, 2014

Antoinette Urioste, USFWS Region 6 FOIA Coordinator
P.O. Box 25486
Denver, CO 80225
Phone: 303-236-4473 / Fax: 303-236-7980
Email: fw6_foia@fws.gov

Pursuant to the federal Freedom of Information Act (5 U.S.C. 552 et. seq.), the Alliance the Wild Rockies, Inc. is filing this request for information. The Alliance for the Wild Rockies is a 501(c)(3) non-profit, public interest, public education organization. Please let us know if you require we submit this request by certified mail.

We submit this FOIA request for the entire underlying project file for your ESA consultations regarding the Cabin Gulch project on the Helena National Forest and Helena National Forest species list, which resulted in a species list dated July 2, 2013, a biological assessment dated November 13, 2013, and a letter of concurrence dated December 4, 2013.

We anticipate that the project file will include, at least, the following:

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- (3) all draft versions of the documents cited in (1), and all agency comments/discussions regarding those drafts or final documents;
- (4) all correspondence regarding the documents cited in (1) and/or the analysis therein, including emails, letters, and records of phone calls,
- (5) all notes/minutes from meetings discussing the documents cited in (1) and/or the analysis therein, and
- (6) all documentation regarding discussions regarding whether to allow public participation in the promulgation of any of the documents listed in (1).

If you choose to withhold any of these requested documents, please provide us with a Vaughn index that individually lists the name of each and every withheld document and the specific exemption under FOIA under which you believe you are legally entitled to withhold that document. We prefer electronic copies of all documents.

To the requester's knowledge, this information is not available from any other federal, state, or public agency required to provide it. In addition, the release of this information will not result in financial benefit to the Alliance for the Wild Rockies or any individuals, groups or organizations.

I hereby request a fee waiver for all search and duplication fees under the FOIA regulations [5 U.S.C. Sec. 552 (a) (4) (A) and 36 CFR 2.19(c) (1)]. The information requested will benefit the citizens of the United States and is for the purpose of public education and to encourage public debate on important policy issues. The requested information will be made available to the public through the Alliance for the Wild Rockies' central office and our website. Information available through the Alliance's office and website is used in press conferences and releases, television and radio interviews, and regional and national publications, and reaches a significant number of individuals nationwide.

The language of the FOIA clearly indicates that Congress intended fees not to be a barrier to private individuals or public interest organizations seeking access to government records. In addition, the legislative history of the FOIA fee waiver language indicates that Congress intended a liberal interpretation of the phrase "Primarily benefiting the public." This suggests that all fees are to be waived whenever the release of information contributes to public debate on important policy issues. This has recently been affirmed by the US Court of Appeals for the District of Columbia, in *Better Government Association v. Department of State*, 780 F. 2d 86 (D.C. Cir., 1986). In that case, the Court found that under the FOIA, Congress had explicitly recognized the need for non-profit organizations to have free access to government documents and those government agencies cannot impair this free access by charging duplication or search for FOIA information requests (*Id.* at 89).

I appreciate your help. Thank you for your time.

Sincerely yours,

Michael Garrity
Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, MT 59624
406 459-5936

ATTACHMENT 2

From: Michael Garrity <garritymichael@yahoo.com>
Subject: Fw: Freedom of Information Act Request
Date: January 13, 2014 2:37:31 PM MST
To: Rebecca Smith <publicdefense@gmail.com>
Reply-To: Michael Garrity <garritymichael@yahoo.com>

1 Attachment, 131 KB

On Monday, January 13, 2014 1:02 PM, "fw6_foia@fws.gov" <fw6_foia@fws.gov> wrote:
Hello Mr. Garrity,
Attached is the acknowledgement letter for your request. Please let me know if you have questions.
Thanks,

Antoinette Urioste
U.S. Fish & Wildlife Service
Region 6 FOIA Office
P.O. Box 25486
Denver, CO 80225
303-236-4473

From: Michael Garrity [mailto:garritymichael@yahoo.com]
Sent: Friday, January 10, 2014 4:12 PM
To: fw6_foia@fws.gov
Subject: Freedom of Information Act Request

January 10, 2014

Antoinette Urioste, USFWS Region 6 FOIA Coordinator
P.O. Box 25486
Denver, CO 80225
Phone: 303-236-4473 / Fax: 303-236-7980
Email: fw6_foia@fws.gov

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- (6) all documentation regarding discussions regarding whether to allow public participation in the promulgation of any of the documents listed in (1).

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I appreciate your help. Thank you for your time.

Sincerely yours,

Michael Garrity
Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, MT 59624
406 459-5936



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region



IN REPLY REFER TO:
BA/FOIA
MS 60180

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228-1807

January 13, 2014

Michael Garrity
Alliance for the Wild Rockies
P.O. Box 505
Helena, MT 59624

REF: FWS-2014-00321

Dear Mr. Garrity:

The U.S. Fish and Wildlife Service received your FOIA request dated January 10, 2014 on January 10, 2014 and assigned it Request No. FWS-2014-00321. Please reference this number on correspondence concerning your request. We will advise you of the status of our response within 20 workdays if we anticipate a delay. Unusual circumstances may warrant an additional 10-workday extension.

You will be contacted if there is a need to resolve the subject or time scope of the FOIA request (43 C.F.R. § 2.8).

You also requested a fee waiver which has been granted. Your fee requester category is understood to be "other" based on the information you provided. We will now begin processing your request.

If you have any questions on your request you may contact me at 303-236-4473 or by email at FW6_FOIA@fws.gov.

Sincerely,

Antoinette J. Urioste
antoinette_urioste@
fws.gov
2014.01.13 13:00:05
-0700

Antoinette Urioste
Region 6 FOIA Office

Freedom of Information Act