

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_AP\_\_\_\_\_

PAGOSANS FOR PUBLIC LANDS,

Plaintiff

v.

U.S. FOREST SERVICE; and,  
U.S. DEPARTMENT OF AGRICULTURE,

Defendants.

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**COMPLAINT**

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## **INTRODUCTION**

1. The U.S. Forest Service (“Forest Service”) and U.S. Department of Agriculture (collectively referred to as the “Agencies” or “Defendants”) violated the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, by withholding agency records from Pagosans for Public Lands (hereinafter, “PPL” or “Plaintiff”) that pertain to a controversial proposal for a land exchange of private and Federal lands known as the Laughlin Park Land Exchange.

2. This lawsuit requests an order declaring that the Defendants have violated FOIA and directing the Defendants to immediately issue determinations on the Plaintiff’s August 26, 2004 FOIA request and subsequent November 8, 2004 FOIA appeal, directing the Defendants to provide Plaintiff with requested agency records withheld, and directing all requested records be provided by a date certain. This lawsuit is necessary because Defendants have failed to make a determination with respect to Plaintiff’s appeal within twenty (20) days. 5 U.S.C.

§552(a)(6)(A)(ii). Agencies may notify requesters of a ten (10) day extension based on unusual circumstances and agencies may seek to limit the request. 5 U.S.C. §552(a)(6)(B). No such determination, notification of an extension, or request for limitation has been made by Defendants.

3. By failing to fully, timely, and lawfully respond to Plaintiff’s FOIA request, Plaintiff’s rights under FOIA as well as its ability to carry out its organizational mission have been severely impaired.

## **II. JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B)(FOIA) and 28 U.S.C. § 1331 (federal question).

5. Venue in this Court is proper under 5 U.S.C. §552(a)(4)(B) as Plaintiff resides in Colorado and all documents requested by Plaintiff concern issues related to and/or activities on or adjacent to National Forest System (“NFS”) lands in the San Juan National Forest, and more specifically the Pagosa Ranger District, of Southwest Colorado.

6. The failure to make a lawful determination on Plaintiff’s November 8, 2004 FOIA appeal within twenty (20) working days is construed as a denial and waives further exhaustion of administrative appeals that ordinarily apply in FOIA cases. 5 U.S.C. §552(a)(6)(C)(i).

7. Plaintiff exhausted its administrative remedies by appealing the October 18, 2004 Forest Service response to PPL’s August 26, 2004 FOIA request. The Agencies failed to make a lawful determination on Plaintiff’s November 8, 2004 FOIA appeal within twenty (20) working days.

8. The FOIA claims made in this Complaint are ripe for judicial review and Plaintiff’s harms can be remedied by an order of this court.

### **III. PARTIES**

9. Plaintiff PAGOSANS FOR PUBLIC LANDS (“PPL”) is a non-profit membership organization incorporated in the State of Colorado. PPL is comprised primarily of Pagosa Springs community members and landowners. PPL advocates for the protection of public land in and around the Pagosa Springs area (including the land within the Laughlin Land Exchange). PPL has an organizational interest in the management of National Forests and monitors legal compliance by the Forest Service by formally and informally commenting and otherwise participating in the Agencies’ public involvement activities. PPL is actively involved in participating in the federal review and approvals related to the proposed Laughlin Land Exchange including the ongoing environmental assessment process mandated by the National

Environmental Policy Act and conducted by the lead agency – the Forest Service. PPL uses FOIA as an important avenue for keeping current with agency activities, and is harmed when it is denied documents to which it is entitled. PPL intends to continue its use of FOIA to access agency records in the possession of Defendants. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. PPL uses FOIA to publicize activities of federal agencies and to mobilize the public to participate in the management of public land. PPL intends to continue using FOIA requests to fulfill its oversight and advocacy role through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. PPL brings this action on its own behalf and on behalf of its adversely affected members.

10. Defendant UNITED STATES FOREST SERVICE (“Forest Service”) is a federal agency under the U.S. Department of Agriculture. The Forest Service is responsible for responding to FOIA requests and appeals submitted to it, and so is sued as a defendant in this action. Among other things, the Forest Service failed to make a lawful determination on Plaintiff’s November 8, 2004 FOIA appeal within twenty (20) working days.

11. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE (“USDA”) is a federal agency. The USDA is responsible for responding to FOIA requests and appeals submitted to it, and so is sued as a defendant in this action. Among other things, the USDA failed to make a lawful determination on Plaintiff’s November 8, 2004 FOIA appeal within twenty (20) working days.

12. Defendants’ violation of FOIA has denied Plaintiff’s access to information contained in agency records to which Plaintiff is entitled under FOIA. Without this information, PPL cannot provide themselves or their membership, nor the general public, with information regarding the

Defendants' activities regarding the San Juan National Forest and the Laughlin Land Exchange that is the subject of the information request, nor can they effectively advocate for lawful management and protection of the National Forests and public lands through administrative and legal processes, key goals of plaintiff PPL. Thus, Plaintiff is injured in fact by the Defendants' violations. Plaintiff's injuries can be redressed by this suit.

#### **IV. FACTS AND LAW**

13. This suit challenges Defendants' actions regarding a FOIA requests made by or on behalf of Plaintiff PPL. The request was made on August 26, 2004.

14. On August 26, 2004, PPL filed a FOIA Request ("August 26 Request").

15. The August 26 Request was submitted on behalf of PPL by Brad A. Bartlett, Esq. The August 26 Request sought information regarding the Laughlin Park, Spiler Canyon, and Job Corps land exchange proposed within Archuleta County, Colorado (hereinafter, "Laughlin Land Exchange" or "exchange"). PPL's FOIA requested all documents generated by both private parties and the Forest Service related to the Laughlin Land Exchange.

16. PPL's August 26 Request was directed to Jo Bridges, District Ranger of the San Juan National Forest. Dave Dallison has succeeded Jo Bridges as District Ranger. The August 26 Request was also directed to Mark Styles, Forest Supervisor of the San Juan National Forest.

17. In a letter dated September 13, 2004, Jo Bridges, former District Ranger of the San Juan National Forest, Pagosa Ranger District acknowledged receipt of PPL's August 26 Request.

18. In a letter dated October 5, 2004, Forest Supervisor Styles acknowledged receipt of PPL's August 26 Request and "forwarded [PPL's] FOIA request to the Regional Office FOIA Coordinator in Denver to complete the review of records and release determinations."

19. In a letter dated October 14, 2004, Gayle Porter, Special Coordinator for the San Juan National Forest, provided an update on the status of PPL's August 26 Request.

20. In a letter dated October 18, 2004, the Forest Service responded to PPL's August 26 Request (hereinafter "October 18, 2004 FOIA response"). The letter was signed by Rick Cables, Regional Forester of U.S. Forest Service Region 2.

21. Defendants' October 18, 2004 FOIA response specifically withheld "Appraisal Review Reports" dated August 18, 2004 for the Federal and non-Federal land involved in the Laughlin Park Land Exchange.

22. An "appraisal report" is defined as "any communication, written or oral, of an appraisal, review, or consulting service that is transmitted to a client upon completion of an assignment." Forest Service Manual ("FSM") 5410.5. An "appraisal" is defined as "a written statement independently and impartially prepared by an appraiser setting forth an opinion of fair market value of the lands or the interests in the lands as of a specific date, supported by the presentation of relevant market information." FSM 5410.5.

23. Defendants' reason for withholding the Appraisal Review Reports was the Agencies' determination that the documents were "predecisional/deliberative" and therefore fell under Exemption 5 of FOIA. *See* 5 U.S.C. §552(b)(5) ("Exemption 5").

24. Upon information and belief, on or before August 26, 2004 the Appraisal Review Reports were provided to private parties not employed with the Federal Agencies. The Appraisal Review Reports have been provided to persons or parties outside the Agencies.

25. Defendants also withheld the "Land Exchange Feasibility Analysis" dated July 1, 2004. Defendants' reason for withholding the Land Exchange Feasibility Analysis was the Agencies'

determination that the documents were “predecisional/deliberative” and therefore fell under Exemption 5 of FOIA. *See* 5 U.S.C. §552(b)(5) (“Exemption 5”).

26. Upon information and belief, on or before August 26, 2004 the Land Exchange Feasibility Analysis was provided to private parties not employed with the Federal Agencies. The Land Exchange Feasibility Analysis has been provided to persons or parties outside the Agencies.

27. Here, the appraisals, specialist reports, appraisal review reports, and land exchange feasibility analysis are not subject to Exemption 5 of FOIA.

28. Defendants’ FOIA October 18, 2004 response did not disclose, reference, or surrender the appraisals referenced in the Appraisal Review Reports.

29. Defendants’ FOIA October 18, 2004 response did not disclose, reference, or surrender all specialist reports that have significance to the Laughlin Land Exchange properties (e.g. wetlands and floodplains, minerals, hazardous materials, biological evaluation, threatened and endangered species, etc.). These reports were requested by Defendant Forest Service in its January 8, 2004 Land Exchange Valuation Consultation Request.

30. On October 27, 2004, Defendant Forest Service invited public comment regarding the Laughlin Park, Spiler Canyon, and Job Corps land exchange proposed within Archuleta County, Colorado (hereinafter, “Laughlin Land Exchange” or “exchange”). PPL timely submitted comments to the Forest Service on the Laughlin Land Exchange.

31. On November 8, 2004, PPL filed a timely appeal of Defendants’ October 18, 2004 FOIA response.

32. Specifically, PPL appealed “the U.S. Forest Service’s decision to withhold documents

related to appraisal values of properties in the Laughlin Park Land Exchange. In particular, the Forest Service failed to disclose (and surrender) documents that appraised the lands involved in the Laughlin Park Land Exchange as well as specialist reports that are likely to influence property value. Additionally, the Forest Service unlawfully withheld the appraisal review reports for both Federal and non-Federal land involved in the exchange, and the Land Exchange Feasibility Analysis.” Id.

33. PPL’s appeal was filed pursuant to 5 U.S.C. § 552(a)(6), 36 C.F.R. § 200.11, and 7 C.F.R. § 1.8(a), in response to the Agencies’ denial of the PPL’s FOIA request. In the appeal, PPL noted that “time is of the essence in this matter, if this appeal is denied or the Agency’s response is not forthcoming within 20 working days, my clients reserve their rights under FOIA to seek judicial review.”

34. Defendants’ response to PPL’s November 8, 2004 FOIA appeal was due on or before December 6, 2004.

35. In a letter dated November 10, 2004, Rita Morgan, FOIA Officer for USDA Forest Service “acknowledge[d] receipt of your [FOIA] appeal dated November 8, 2004...” and assigned PPL’s appeal “control number 05-2744-A.”

36. In a letter dated February 2, 2005, Rita Morgan, FOIA Officer for USDA Forest Service stated that “[w]e have completed our response to your appeal. However...our final response will require review by USDA Office of General Counsel (OGC) for legal sufficiency. On February 2, 2005, we forwarded our proposed final response to OGC for review. We will forward our final appeal decision to you as soon as the OGC review has been completed.”

37. On February 2, 2005, Rita Morgan, FOIA Officer for USDA Forest Service did not seek



an extension to respond to PPL's appeal. On February 2, 2005, Rita Morgan did not provide unusual circumstances for not finalizing a response to PPL's November 8, 2004 appeal. Review of PPL's November 8, 2004 appeal by OGC does not constitute an unusual circumstance.

38. On February 2, 2005, Defendants did not make a determination with respect to Plaintiff's appeal. As of February 2, 2005, Defendants did not make a determination with respect to PPL's November 8, 2004 appeal within twenty (20) days.

39. On March 14, 2005, counsel for PPL Brad A. Bartlett, Esq. contacted Nona Jones of the OGC by e-mail requesting "an exact date when we can expect an answer from your office (preferably within the next week)."

40. On March 17, 2005, Nona Jones of the OGC responded to Mr. Bartlett's email by stating that "[y]our appeal is still pending in the Office of the General Counsel. I placed a call this afternoon to see who is the assigned attorney and to get a status of your appeal."

41. On March 18, 2005, Nona Jones of OGC responded again to Mr. Bartlett's email by stating "I am afraid that the [Forest Service] has no control over the response times of OGC and therefore cannot supply you with an exact date as to when you will receive your response." Mr. Bartlett was also informed that "the [OGC] attorney assigned to the case is Maureen O'Brien."

42. On October 5, 2005, PPL contacted Defendants by letter "in an effort to seek settlement of PPL's Freedom of Information Act ("FOIA") appeal which sought to resolve release of documents requested from your office over one year ago." Specifically, "and in an effort to avoid the imposition of court ordered relief, PPL hereby requests that PPL and the Forest Service work to avoid litigation and that the documents PPL requested a year ago be turned over to the organization within seven (7) business days on or before October 14, 2005. In exchange, PPL

will voluntarily withdraw its currently pending appeal.” *Id.* (emphasis in original).

43. In a letter dated February 8, 2006, Rita Morgan FOIA Officer for USDA Forest Service stated that “[w]e completed the first level of review of the records responsive to your appeal. However...our final response requires review by USDA Office of General Counsel (OGC) for legal sufficiency. On February 3, 2005, we forwarded our proposed final response to OGC for review. On November 4, 2005, OGC requested additional information and records regarding your appeal which were located at the Regional Office.” According to Ms. Morgan, the Forest Service “expect[s] to complete our review and forward the revised draft to OGC in early March 2006. We will then forward our final appeal decision to you as soon as the OGC review has been completed. We anticipate that records, either in full or in part, may be released to you.”

44. On February 8, 2006, Rita Morgan FOIA Officer for USDA Forest Service did not seek an extension to respond to PPL’s appeal. On February 8, 2006, Rita Morgan did not provide unusual circumstances for not finalizing a response to PPL’s November 8, 2004 appeal. Review of PPL’s November 8, 2004 appeal by OGC does not constitute an unusual circumstance.

45. On February 8, 2006, Defendants did not make a determination with respect to Plaintiff’s appeal. As of February 8, 2006, Defendants did not make a determination with respect to PPL’s November 8, 2004 appeal within twenty (20) days.

46. Defendants have failed to make a determination with respect to Plaintiff’s appeal within twenty (20) days. 5 U.S.C. §552(a)(6)(A)(ii). Agencies may notify requesters of a 10 day extension based on unusual circumstances and agencies may seek to limit the request. 5 U.S.C. §552(a)(6)(B). No such determination, notification of an extension, or request for limitation has been made by Defendants.

47. Defendants' letters and responses failed to provide Plaintiff with a lawful determination on PPL's November 8, 2004 appeal within twenty (20) days, and therefore Defendants have violated FOIA.

48. Defendants have failed to comply with the FOIA requirement that agencies make a detailed determination within twenty (20) days of receipt of the November 8, 2004 appeal, have not sought to narrow the request, and have not identified unusual circumstances that might require an extension of time not to exceed ten (10) additional days. 5 U.S.C. §552(a)(6).

49. The specific challenges brought in this lawsuit seek to remedy ongoing efforts of Defendants to avoid full and timely compliance with PPL's legally protected attempts to gain information regarding the San Juan National Forest and the proposed Laughlin Land Exchange through formal and informal means, including FOIA requests. PPL's FOIA request and appeal fully complied with the requirements of FOIA. PPL's FOIA request and subsequent appeal that form the basis of this lawsuit were filed in an attempt to access documents not provided or not identified Defendants' FOIA response.

50. Plaintiff PPL has brought this case seeking court orders compelling timely and lawful compliance with the PPL's FOIA request and appeal detailed in this complaint. In addition to indicating PPL's right to access specific agency records sought by in this request and appeal, Plaintiff also seeks declaratory judgment and permanent injunction in order to halt any future pattern and practice by Defendants to frustrate, stonewall, and evade PPL's lawful FOIA requests.

51. PPL intends to continue its use of FOIA to access agency records in the possession of Defendants. One of the purposes of FOIA is to promote the active oversight role of public

advocacy groups. PPL uses FOIA to publicize activities of federal agencies and to mobilize the public to participate in the management of public land. Declaratory and injunctive relief is necessary to protect PPL's continued oversight and advocacy through the well-established practice of scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA.

#### **V. FIRST CLAIM FOR RELIEF**

**Violation of the Freedom of Information Act** *Defendants Have Failed To Timely Respond To Plaintiff's November 8, 2004 FOIA Appeal Within the Statutorily Prescribed 20 Working Days*

52. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

53. On November 8, 2004, Plaintiff Pagosans for Public Lands filed PPL filed a timely appeal of the Defendants' October 18, 2004 FOIA response pursuant to 5 U.S.C. § 552(a)(6), 36 C.F.R. § 200.11, and 7 C.F.R. § 1.8(a).

54. Defendants have violated FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), by failing to timely and lawfully respond to Plaintiff's November 8, 2004 appeal and request for agency records.

55. Defendants continue to violate FOIA 5 U.S.C. §552(a) by failing to fulfill Plaintiff's August 24, 2004 request for agency records.

#### **VI. SECOND CLAIM FOR RELIEF**

**Violation of the Freedom of Information Act** *Defendants Have Illegally Withheld Documents in Violation of FOIA Exemption 5.*

56. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

57. Defendants' October 18, 2004 FOIA response to Plaintiff Pagosans for Public Lands' August 26, 2004 FOIA request withheld "Appraisal Review Reports" dated August 18, 2004 for the Federal and non-Federal land involved in the Laughlin Park Land Exchange and "Land Exchange Feasibility Analysis" dated July 1, 2004. Further, Defendants failed to disclose, reference, or surrender all specialist reports that have significance to the properties (e.g. wetlands and floodplains, minerals, hazardous materials, biological evaluation, threatened and endangered species, etc.).

58. Defendants have violated FOIA by illegally withholding documents through improper application of FOIA Exemption 5, 5 U.S.C. § 552(b)(5).

59. Defendants continue to violate FOIA by illegally withholding documents through improper application of FOIA Exemption 5, 5 U.S.C. § 552(b)(5).

## **VI. REQUEST FOR RELIEF**

FOR THESE REASONS, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

1. Declare that Defendants violated FOIA by failing to lawfully respond to Plaintiff's November 8, 2004 appeal of Defendants' October 18, 2004 FOIA response in accordance with the statutory deadline;
2. Declare that Defendants violated FOIA on by failing to lawfully respond to Plaintiff's August 24, 2004 request for agency records;
3. Declare that Defendants' October 18, 2004 FOIA response violated FOIA by illegally withholding documents through improper application of FOIA Exemption 5, (5 U.S.C. § 552(b)(5));

4. Declare that Defendants continue to violate of FOIA by failing to lawfully respond to Plaintiff's FOIA requests dated August 24, 2004;

5. Direct by injunction that Defendants immediately provide Plaintiff a lawful determination on its November 8, 2004 appeal;

6. Direct by permanent injunction that Defendants provide timely, full, and lawful responses to Plaintiff's ongoing use of FOIA to access agency records.

7. Grant the Plaintiffs their costs of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and

8. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED March 27, 2006

*s/Brad A. Bartlett*

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