

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

Civil Action No. 08-cv- _____

CITIZENS FOR SAN LUIS VALLEY - WATER PROTECTION COALITION

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE, a federal agency within the U.S. Department of Interior;
REGIONAL SOLICITOR, ROCKY MOUNTAIN REGION, a federal agency within the U.S.
Department of Interior; and, U.S. DEPARTMENT OF INTERIOR, a federal agency;

Defendants.

COMPLAINT

Travis Stills, CO Atty #27509
Brad A. Bartlett, CO Atty # 32816
Energy Mineral Law Center
1911 Main Ave., Suite 238
Durango, Colorado 81301
Phone: (970) 247-9334
FAX: (970) 382-0316

Attorneys for Plaintiff

I. INTRODUCTION

1. The United States Fish and Wildlife Service and the Rocky Mountain Regional Solicitors' Office (both which are federal agencies within the U.S. Department of Interior) and the U.S. Department of Interior (hereinafter, "USFWS" or "Agency" or "Defendants") have violated the fundamental rights of the Citizens for San Luis Valley - Water Protection Coalition ("Coalition" or "Plaintiff") by denying the Coalition's request for timely and full access to agency records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*

2. Defendants have withheld agency records which were requested by Plaintiff on December 11, 2007. The agency records concern the USFWS' activities in carrying out USFWS land management duties regarding the Baca National Wildlife Refuge ("Baca NWR") which is located in the San Luis Valley of Colorado.

3. USFWS land management duties regarding the Baca NWR have been the subject of considerable public controversy concerning the impacts of exploration activities and a pending proposal to drill two 14,000 foot deep wells on the Baca NWR for the purpose of oil and gas exploration and development. The relevant USFWS activities are currently the subject of litigation filed under the National Environmental Policy Act ("NEPA") which has been stayed pending the completion of an ongoing NEPA process. *San Luis Valley Ecosystems Council v. USFWS*, 07-cv-00945-WDM-MEH.

4. Recent FOIA amendments (2007) confirm that Congress, through FOIA, continues to seek to "ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the **fundamental 'right to know.'**" Pub. L. No. 110-175, 121 Stat. 2524, Section 2 ¶6 (2007)(emphasis supplied). This right is protected by

the statutory charge that FOIA litigation receive expedited consideration. 5 U.S.C. 552

(a)(4)(C)(“defendant shall serve an **answer** or otherwise plead [. . .] **within thirty days** [. . .] **unless** the court otherwise directs for **good cause shown.**”)(emphasis supplied).

5. Without timely and full access to the requested records, Plaintiff and the general public are denied the fundamental right to contemporaneous knowledge of the Federal Government’s ongoing activities regarding the Baca NWR. This right is statutorily protected by a twenty (20) - working day limit for the agency to respond to a FOIA request. 5 U.S.C. §552(a)(6)(A)(i).

Where, as here, the requester shows a “compelling need,” the agency must respond within ten (10) days of the request. 5 U.S.C. §552(a)(6)(B)(ii).

6. Judicial review is necessary and appropriate to vindicate the FOIA rights asserted in Plaintiff’s December 11, 2007 FOIA request and to remedy Defendants’ unlawful withholding of agency records. Defendants have withheld records through inaction and Defendants’ April 1, 2008 response, which failed to make a timely, complete and lawful determination on Plaintiff’s FOIA request. Compounding the delay and denial of access, Defendant Department of Interior has unlawfully withheld records by failing to resolve Plaintiff’s May 12, 2008 administrative appeal within the statutorily prescribed twenty (20) days. 5 U.S.C. §552(a)(6)(A)(ii).

7. Over seven months have lapsed since the filing of Plaintiff’s FOIA request and two months have passed since the filing of Plaintiff’s administrative appeal.

8. Plaintiff now seeks judicial review and effective judicial relief from this Court by: 1) finding that the Defendants have repeatedly violated FOIA prohibitions against unlawfully withholding agency records; 2) ordering Defendants to produce all unlawfully withheld records

by a date certain; and, 3) determining which, if any, agency records may be withheld by Defendants under any FOIA exemption. 5 U.S.C. 552(a)(4)(B); 552(b)(5).

II. JURISDICTION AND VENUE

9. 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). FOIA provides “jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. §552(a)(4)(B). The district court “shall determine the matter de novo” and has broad discretion to structure judicial review of the case. *Id.*

10. Venue in this Court is proper. 5 U.S.C. §552(a)(4)(B). Plaintiff is a Colorado non-profit corporation which resides in Colorado. All documents requested by Plaintiff concern issues related to and/or activities conducted by the Federal Government in carrying out land management activities regarding federally owned lands in Colorado which are known as the Baca NWR.

11. The Agency failed to make a full and lawful determination on Plaintiff’s December 11, 2007 FOIA request within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(i).

12. The Agency’s April 1, 2008 response to Plaintiff’s FOIA request failed to make a timely, full, and lawful determination and as such is construed as a denial of the request.

13. The Agency failed to make a lawful determination on Plaintiff’s May 12, 2008 FOIA appeal within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(ii).

14. The failure to make a lawful determination on Plaintiff’s appeal within twenty (20) working days is construed as a denial of the appeal and constitutes constructive exhaustion of the administrative remedies that ordinarily apply in FOIA cases. 5 U.S.C. §552(a)(6)(C)(i).

15. Constructive exhaustion of administrative remedies vests this District Court with jurisdiction to resolve all issues regarding Plaintiff's December 11, 2007 FOIA request. 5 U.S.C. §552(a)(4)(B).

16. 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

17. Plaintiff, CITIZENS FOR SAN LUIS VALLEY - WATER PROTECTION COALITION ("Coalition" or "Plaintiff") filed a FOIA request on December 11, 2007 under its previous name - "Citizens for San Luis Valley - Water Preservation Coalition." The Coalition is a Colorado non-profit corporation with offices located at 64 Camino de la Plata, Crestone, Colorado with a mailing address of P.O. Box 351, Alamosa, CO 81131. Any person who files a FOIA request is deemed to have standing to invoke the jurisdiction of the Federal Courts to carry out the judicial review provisions of FOIA.

18. The USFWS recognized the public interest nature of Plaintiff's FOIA request. Defendants granted Plaintiff a waiver of copying fees based on the agency's determination that the request for information is in the public interest and is not primarily in the requestor's commercial interests. In seeking the fee waiver, Plaintiff also demonstrated that the agency records obtained through FOIA would be widely distributed and disseminated. The agency records released to date have been posted on the internet and provided to multiple organizations, including media outlets.

19. The Coalition 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. The Coalition

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. The Coalition uses FOIA to publicize activities of federal agencies and to mobilize the public to participate in the agency decision-making activities and in oversight. The Coalition 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. The Coalition brings this action on its own behalf and on behalf of its adversely affected members.

20. Access to all requested records, including those created and obtained since the filing of the FOIA request, are crucial to the ability of Plaintiff, Plaintiff's members, and the public to carry out its educational, advocacy, and oversight activities regarding the ongoing USFWS management of the Baca NWR.

21. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS") is an agency within the Department of the Interior subject to FOIA mandates. USFWS is responsible for responding to FOIA requests submitted to it and so is sued as a defendant in this action. The USFWS typically processes FOIA requests at the offices where the agency records are kept. USFWS persons who processed the FOIA request include, but are not limited to Cathy Willis, Regional FOIA Officer, Mountain-Prairie Region. The USFWS has withheld agency records by delay and by an incomplete response, each of which constitutes an unlawful denial of access.

22. Defendant REGIONAL SOLICITOR'S OFFICE, ROCKY MOUNTAIN OFFICE, is an agency within the United States Department of the Interior which is subject to FOIA mandates. The Regional Solicitor's Office created and obtained responsive agency records which are not subject to any recognized privilege. The Regional Solicitor's Office including, but not limited

to, Solicitor Steve Hoffman, created and obtained responsive agency records which have not yet been released. The Regional Solicitor's Office both disclosed and obtained information from non-agency third persons which is are responsive to Plaintiff's FOIA request. The Regional Solicitor's Office caused responsive agency records to be provided to non-agency third persons, including, but not limited to, Lexam Exploration Corporation and David Bailey, attorney for Lexam Exploration Corporation.

23. Defendant U.S. DEPARTMENT OF INTERIOR is responsible for responding to FOIA appeals submitted to it and so is sued as a defendant in this action. Among other things, the U.S. Department of Interior failed to make a lawful determination on Plaintiff's May 12, 2008 FOIA appeal within twenty (20) working days and has thus unlawfully withheld agency records.

24. Plaintiff brings this action on their own behalf and on behalf of their adversely affected members.

25. Plaintiff has suffered concrete and particularized injuries by Defendants' unlawful withholding of agency records. Plaintiff's injuries can be redressed by this suit and granting of the remedies requested herein.

IV. FACTS

26. This lawsuit challenges Defendants' actions regarding a FOIA request made by the Coalition on December 11, 2007.

27. The Coalition sought information to inform its own and the public's participation in the USFWS management of the Baca NWR, including a NEPA comment period on a Draft Environmental Assessment ("Draft EA")(January 2008). The Draft EA was prepared and released for public comment as part of a NEPA process to inform the public and the

decisionmakers as to the environmental impacts, alternatives, mitigation measures, and other matters relevant to a proposal by Lexam Corporation to use and occupy the Baca NWR for purposes of high risk oil and gas exploration and development. The Draft EA and public comments are currently under review by the USFWS. The Lexam Corporation's proposal includes plans to construct roads, build well pads, drill wells, construct associated processing and transportation facilities, along with other facilities and activities necessary for drilling, completion, and operation of two 14,000 foot deep oil and gas wells. Previous attempts to drill oil or gas wells in the region have been abandoned without successfully producing oil or gas.

28. The USFWS is the lead agency regarding the development of the NEPA documentation. The USFWS has employed a third-party consultant ENSR, to prepare the NEPA documentation.

29. The Regional Solicitor's Office was an active participant in the development of the DEA and NEPA documents.

30. Plaintiff's December 11, 2007 FOIA request was submitted by Ceal Smith, Coordinator for the Coalition. The request stated, in part:

Under the Freedom of Information Act, 5 U.S.C. § 552, the Citizens for San Luis Valley Water - Preservation Coalition (WPC) is requesting copies of agency records created or obtained by the USFWS, USFWS agents, and/or USFWS contractors beginning May 1, 2006, up through the time of the USFWS compliance with this FOIA request.

In particular this request seeks any and all agency records that are responsive to the following description:

Any and all communications, and records of communications, related to the Lexam Corporation's exploration and drilling activities (and proposals for exploration and drilling activities) on the mineral estate underlying the Baca National Wildlife Refuge. This request specifically seeks all communications and records of communications between the following:

- *the USFWS and the Lexam Corporation;*

- *the USFWS and the ENSR Corporation; and,*
- *the ENSR Corporation and the Lexam Corporation.*

The reference to each above entity includes any and all employees, contractors, partners, subsidiaries, parent corporations, board members, officers, managers, attorneys, agents, and any other person acting on the entity's behalf.

31. The requested records and categories of records requested by Plaintiff are routinely created or obtained as part of the agency's duties in managing the Baca NWR. The requested records and categories of records are routinely created or obtained as part of the agency's consideration of a series of Lexam proposals to use and occupy the federally owned surface estate on the Baca NWR for seismic studies, exploration, development and production of oil and gas from the underlying mineral estate.

32. On information and belief, the requested records are routinely obtained or created and held at several USFWS offices in Colorado and Washington D.C. On information and belief, the requested records are routinely obtained or created and held at the Regional Solicitors' Office in Denver, Colorado. On information and belief, the requested records are routinely obtained or created and held at and the Office of the Solicitor in Washington, D.C..

33. ENSR Corporation is a non-agency person contracted by the USFWS to assist with the agency's NEPA duties. The ENSR Corporation is assisting the USFWS with preparation of the DEA. The ENSR Corporation is an agency consultant. The ENSR Corporation is an agency contractor. The ENSR Corporation used sub-contractors to assist with its work assisting the agency in preparation of the DEA.

34. ENSR Corporation created and obtained responsive agency records as part of its work assisting the agency in preparation of the DEA. On information and belief, requested records are

routinely obtained or created and held by ENSR Corporation and are subject to USFWS access and control.

35. Lexam Corporation, a.k.a. Lexam Exploration Corporation, is a non-agency person proposing to develop portions of the mineral estate which underly the Baca NWR.

36. USFWS obtained documents from Lexam which became “agency records” responsive to the FOIA request. ENSR obtained documents from Lexam which became “agency records” responsive to the FOIA request. All communications between Lexam and either USFWS or ENSR concerning the Baca NWR are responsive agency records.

37. Any internal agency information which Defendants or ENSR has shared with the Lexam Corporation affects the ability of the Defendants to withhold such information from Plaintiff.

38. The Regional Solicitor’s Office was involved in the preparation of the Draft EA. The Regional Solicitor’s Office acted on the behalf of the USFWS when communicating with the ENSR Corporation and Lexam Corporation.

39. The category of records requested by Plaintiff in their December 11, 2007 FOIA request include communications between the Regional Solicitor’s Office (attorneys for USFWS) and the Lexam Corporation. The Regional Solicitor’s Office caused internal drafts of the DEA to be provided to the Lexam Corporation. The Regional Solicitor’s Office’s disclosure of internal drafts of DEA has waived most, if not all, of the Defendants’ ability to withhold the requested agency records.

40. The Lexam Corporation, ENSR Corporation, and USFWS regularly shared information via e-mails, phone calls, and other means of communication.

41. Plaintiff's December 11, 2007 FOIA request met the basic legal requirement set out in FOIA. *See* 5 U.S.C. 552(a)(3)(A).

42. The 20 working-day deadline to respond to Plaintiff's FOIA request ran on January 11, 2008. *See* 5 U.S.C. 552(a)(6)(A)(i).

43. On or about January 19, 2008, the USFWS released a Draft EA for public review and comment.

44. During the comment period on the Draft EA, Plaintiff contacted USFWS on numerous occasions to emphasize the need for the timely release of the requested agency records.

45. On February 26, 2008, Plaintiff requested by letter to the USFWS, that the public review and comment period be extended until such time as Plaintiff's FOIA request was fulfilled.

46. USFWS denied Plaintiff's request.

47. The NEPA comment period closed on March 3, 2008 without release of the agency records.

48. In March and April of 2008, Defendants carried out an as-yet uncompleted search for responsive records. *See* 5 U.S.C. 552(a)(3)(C&D).

49. On April 1, 2008, the USFWS provided a partial response to Plaintiff's FOIA request which: 1) released some agency records; 2) withheld two records created by the Regional Solicitors Office by asserting the "deliberative process" privilege, and, 3) improperly withheld an undisclosed number of other responsive agency records by asserting that "additional documents not included in this response are still under review."

50. No agency records have been released to Plaintiff since the April 1, 2008 response.

51. On May 12, 2008, the Energy Minerals Law Center timely appealed Defendants' April 1, 2008 response on behalf of the Coalition.

52. The Department of Interior confirmed by letter dated June 3, 2008 that Plaintiff's appeal was timely filed and referenced the appeal as "Appeal Number 2008-138."

53. Plaintiff, through counsel, contacted the Department of Interior by leaving phone and/or voice messages during June 2008. Defendants, through LaRima Lane, discussed the matter with Plaintiff's counsel briefly on June 18, 2008. At that time, Ms. Lane stated she lacked information to discuss the matter and agreed to look into the matter further and to call counsel at a later time to discuss the matter.

54. On June 19, 2008, Ms. Lane sent a letter to Plaintiff's counsel stating that the Department of Interior would not respond to Plaintiff's appeal within the statutorily required twenty (20)-working day period. Among other things, the Ms. Lane's letter stated that "[s]ince the Department has not made a determination on your appeal within the time limited set in the FOIA, you may seek judicial review under 5 U.S.C. §552(a)(4)(B)." Neither Ms. Lane nor the Department of Interior attempted any further discussions with Plaintiff or their counsel.

55. On July 8, 2008, in a final attempt to avoid litigation, Plaintiff's counsel left a phone message with LaRima Lane requesting that the Department of the Interior's Office of the Solicitor provide a date certain by which the May 12, 2008 appeal would be resolved. Ms. Lane returned the call on July 9, 2008, and stated that her superiors in the Department of the Interior's Office of Solicitor could not provide a date certain by which the appeal would be resolved.

56. Many of the requested records are documents prepared under the mandate of the National Environmental Policy Act ("NEPA"). 42 U.S.C. § 4332(2)(C). The Council of Environmental

Quality has promulgated regulations which confirm that NEPA Process records are subject to release pursuant to FOIA requests, “without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action.” 40 C.F.R. § 1506.6(f).

57. On April 1, 2008 the USFWS sent a letter which denied Plaintiff’s access to an undisclosed number of responsive records. The letter provided some agency records which were responsive to the Plaintiff’s FOIA request. Defendants’ April 1, 2008 denial letter asserted Exemption 5 as a basis to withhold two documents created by Regional Solicitor Steven Hoffman.

58. Among the responsive records which were released was a partial set of e-mail communications made in December 2007 between the Regional Solicitor’s Office and Lexam Corporation.

59. On at least one occasion, the DOI Regional Solicitor caused internal drafts of the Draft EA to be provided to Lexam Corporation.

60. On at least one occasion, Lexam Corporation provided the DOI Regional Solicitor’s Office with edits to internal drafts of the USFWS Draft EA.

61. The USFWS had scheduled December 7, 2007 for release of the Draft EA.

62. The release of the Draft EA for public comment was delayed until January 19, 2008, to allow time for USFWS to consider and act upon comments on the internal drafts of the Draft EA, including, among other things, the comments which were provided by Lexam Corporation. Neither the Plaintiff nor the public have been provided with copies of the Draft EA which was provided to Lexam Corporation.

63. The Regional Solicitor's Office was acting as an agency official when creating and obtaining agency records responsive to Plaintiff's request. The Regional Solicitor's Office was not acting as legal counsel to which any attorney work product, attorney/client, or other recognized litigation privilege may attach when creating and obtaining agency records responsive to this request.

64. Any potentially applicable privileges regarding the internal drafts of the internal drafts of the Draft EA were waived when the Regional Solicitor's Office deliberately caused copies of internal drafts of the Draft EA to be provided to Lexam Corporation's attorney David Bailey.

65. On information and belief, the Regional Solicitor's Office used phone communications to provide information regarding internal drafts of the Draft EA to Lexam Corporation's attorney David Bailey.

66. Any potentially applicable privileges regarding the subject matter of the internal drafts of the Draft EA were waived by the Regional Solicitor's Office communicating this information by phone calls to Lexam Corporation's attorney David Bailey.

67. The USFWS has not released any phone logs which describe or serve as records of the communications sought by the FOIA request. Defendants' phone logs are agency records which are responsive to Plaintiff's request.

68. The USFWS withheld records created by the Regional Solicitor's Office pursuant to FIOA Exemption 5. *See*: 5 U.S.C. 552(b)(5). On information and belief, a significant portion of the information in the withheld records was communicated to third parties, in particular Lexam Corporation, by the Regional Solicitor's Office. Based on the facts and circumstances of the

present case, the withheld records are not subject to withholding and must be immediately disclosed.

69. The USFWS has provided no description or explanation of its search for responsive records.

70. Defendants' April 1, 2008 denial did not identify any search for records involving the agency contractors, subcontractors, and or consultants which are preparing the NEPA analysis and documentation on behalf of the USFWS, including the ENSR Corporation.

71. By failing to fully, timely, and lawfully respond to Plaintiff's FOIA requests, Plaintiff's rights under FOIA as well as its ability to carry out its organizational mission have been severely impaired. The relief sought in this lawsuit would remedy the impairment of Plaintiff's FOIA rights.

VI. FIRST CLAIM FOR RELIEF

Violation of the Freedom of Information Act *Defendant has Unlawfully Withheld Agency Records which Plaintiff's requested pursuant to FOIA.*

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

73. Defendants withheld agency records based on an untimely and incomplete April 1, 2008 response to Plaintiff's December 11, 2007 FOIA request.

74. On May 12, 2008, the Coalition, through counsel, filed a timely appeal of Defendants' April 1, 2008 FOIA response pursuant to 5 U.S.C. § 552(a)(6).

75. Defendants have violated FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), by failing to timely and lawfully respond to Plaintiff's May 12, 2008 appeal and request for agency records.

76. Defendants continue to violate FOIA 5 U.S.C. §552(a) by failing to fulfill Plaintiff's December 11, 2007 request for agency records.

77. Defendants continue to violate FOIA by illegally withholding agency records which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

VIII. REQUEST FOR RELIEF

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

1. Enter judicial findings that Defendants violated FOIA by failing to lawfully respond to Plaintiff's May 12, 2008 FOIA appeal in accordance with the statutory deadline;
2. Declare that Defendants violated FOIA by failing to produce requested agency records responsive to Plaintiff's December 11, 2007 FOIA request in accordance with the statutory deadline;
3. Declare that Defendants continue to violate FOIA by illegally withholding documents that are not subject to a lawful FOIA Exemption (5 U.S.C. § 552(b));
4. Declare that Defendants continue to violate of FOIA by failing to lawfully respond to Plaintiff's FOIA request;
5. Direct by Order that Defendants immediately conduct a full search for records responsive to Plaintiff's FOIA request which were created or obtained beginning May 1, 2006, and through the date of the Order;
6. Direct by Order that Defendants immediately provide Plaintiff a lawful determination on Plaintiff's FOIA request;

7. Direct by Order that Defendants immediately provide Plaintiff with all records responsive to the December 11, 2007 request;
8. Retain jurisdiction until sixty (60) days after the records have been released and Plaintiff's December 11, 2007 FOIA request has been processed;
9. Grant the Plaintiff their costs of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and
10. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED July 10, 2008,

Travis E. Stills

Travis Stills, CO Atty #27509

Energy Minerals Law Center

1911 Main Ave., Suite 238

Durango, Colorado 81301

(970) 247-9334

FAX: (970) 382-0316

E-mail: stills@frontier.net

Brad A. Bartlett

Brad A. Bartlett, CO Atty #32816

Energy Minerals Law Center

1911 Main Ave., Suite 238

Durango, Colorado 81301

(970) 247-9334

FAX: (970) 382-0316

E-mail: brad.bartlett@frontier.net

Attorneys for Plaintiff