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07-CV-01979-CMP

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL
DIVERSITY, and CONSERVATION
NORTHWEST, non-profit corporations,

Plaintiffs,

v.

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE,

Defendant.

Case No.

C 07-1979

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action alleges violations of both the Freedom of Information Act, 5 U.S.C. § 552 *et. seq.* (FOIA), and the Administrative Procedures Act, 5 U.S.C. § 701 *et. seq.* (APA). It challenges the unlawful failure of defendant Office of the United States Trade Representative (USTR) to timely and thoroughly respond to plaintiffs' FOIA request in the manner mandated by FOIA. Congress enacted FOIA to provide that members of the public have the right of access to

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1 federal agency records or information, except for those records (or portions of records) that are
2 protected from disclosure by exemptions and exclusions.

3 2. In March 2007, plaintiffs Center for Biological Diversity and Conservation
4 Northwest submitted a FOIA request to USTR seeking information pertaining to the “meritorious
5 initiatives” funded with \$450 million of the proceeds of the U.S.-Canada Softwood Lumber
6 Agreement (SLA). This FOIA request was generated as part of plaintiffs’ ongoing oversight of
7 how the USTR designated the recipients of the settlement proceeds of the SLA. After initially
8 promising to search for documents and provide a response, it was not until more than eight (8)
9 months later that USTR provided plaintiffs with any documents at all, on November 15, 2007.
10 As of December 10, 2007, USTR has provided plaintiffs with only a dozen documents, totaling
11 42 pages. Given the complexities of distributing \$450 million in U.S. funds to three private
12 entities, and based on USTR’s comments, plaintiffs believe there are responsive, releasable
13 documents that have not yet been provided.

14 3. Prompt access to the requested information is crucial to plaintiffs’ rights to redress
15 government action because the requested information is directly relevant to plaintiffs’ ability to
16 effectively engage in, and provide public oversight of, how the SLA funds are spent.
17 Furthermore, there may be statute of limitation issues relating to potential litigation, another
18 factor which requires prompt production of documents by the USTR. Presently there is very
19 little publicly available information regarding how the USTR chose the organizations that have
20 or will receive funds under the SLA. Accordingly, plaintiffs repeatedly made contact with
21 defendant regarding the FOIA request and urged it to make progress on the FOIA request.
22 Implementation of the “meritorious initiatives” is currently ongoing and defendant’s actions and
23 delay in this case have substantially and adversely affected plaintiffs’ ability to take part in that
24 process. In particular, one of the recipients of “meritorious initiatives” funds, the U.S.
25 Endowment, is a new organization formed for the purpose of receiving these funds, and it is
26 currently in the process of forming its corporate governance structures and policies, with ample
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1 representation for industrial interests on its Board but no representation of conservation interests,
2 so USTR's failure to comply with FOIA is resulting in irreparable harm to plaintiffs' interests.
3 The disposition of the \$200 million portion of the public funds transferred to the newly created
4 U.S. Endowment is a matter of significant public interest.

5 4. The effect of defendant's delay is that defendant is unlawfully withholding public
6 disclosure of information sought by plaintiffs, information to which plaintiffs are entitled and for
7 which no valid disclosure exemption applies. Moreover, defendant failed to comply with the
8 statutory mandates and deadlines imposed by FOIA through its failure to provide a final
9 determination resolving plaintiff's FOIA appeal within the time required by law. Plaintiffs seek
10 declaratory relief that defendant has violated the FOIA and APA. Plaintiffs also seek injunctive
11 relief directing defendant to issue a fee waiver and to promptly provide plaintiffs with the
12 requested material. Based on defendant's actions in this case and the prospect that plaintiffs will
13 be submitting FOIA requests to defendant in the future, plaintiffs further seek injunctive relief
14 ordering defendant to comply with FOIA's response deadlines in all future interactions between
15 plaintiffs and defendant. Finally, to the extent the Court deems appropriate based on its
16 determination of the facts of this matter, plaintiffs seek a written finding that the circumstances
17 surrounding defendant's actions raise questions whether agency personnel acted arbitrarily or
18 capriciously with respect to plaintiffs' FOIA request. 5 U.S.C. § 552(a)(4)(F).

19 5. Plaintiffs also seek their attorneys' fees and costs pursuant to FOIA, 5 U.S.C. §
20 552(a)(4)(E), and the Equal Access to Justice Act, 28 U.S.C. § 2412.

21 JURISDICTION AND VENUE

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24 6. This Court has jurisdiction and the authority to grant the relief requested pursuant
25 to 5 U.S.C. § 552(a)(4)(B) (FOIA); 28 U.S.C. § 1331 (federal question); and 28 U.S.C. § 2201, *et*
26 *seq.* (Declaratory Judgment Act).

1 7. Venue is appropriate in the Western District of Washington under 5 U.S.C. §
2 552(a)(7)(B), which provides venue for FOIA cases in this district.

3
4 PARTIES

5 8. Plaintiff Center for Biological Diversity (CBD) is suing on behalf of itself and its
6 members. CBD is a nonprofit organization organized under §501(c)(3) of the Internal Revenue
7 Code with its principal place of business in Tucson, Arizona. Plaintiff CBD is dedicated to the
8 preservation, protection and restoration of biodiversity, native species, and ecosystems. CBD has
9 more than 60,000 members and activists worldwide, including in Washington, Montana and
10 Idaho. CBD has offices in Tucson and Phoenix, Arizona; Silver City, New Mexico; Washington,
11 D.C.; San Francisco, Los Angeles, San Diego, and Joshua Tree, California; Burlington, Vermont;
12 and Portland, Oregon. A great deal of CBD's work is focused on protecting endangered and
13 threatened species and their critical habitat under the Endangered Species Act. CBD has taken a
14 particular interest in U.S.-border conservation along both the Canadian and Mexican borders.
15 Along the U.S.-Canada border, CBD has taken consistent and long-standing conservation actions
16 with regard to species such as the grizzly bear, bull trout, woodland caribou, lynx and many
17 species of migratory birds. CBD also possesses a forest conservation program and an
18 international program that track and advocate on behalf of viable populations of wildlife as well
19 as economic incentives that promote long-term sustainability. CBD is presently working with its
20 resources to reduce and eliminate impacts to trans-boundary species and ecosystems, and to
21 ensure their survival and recovery. CBD staff have closely followed and analyzed the SLA as
22 well as its negotiations and U.S. administrative history over the past decade. CBD is a
23 membership organization and has members who are injured by defendant's violations of FOIA
24 and the APA. CBD's interests will be violated if the proceeds of the SLA are spent by the
25 beneficiary organizations in a manner contrary to federal environmental laws.
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1 9. Plaintiff Conservation Northwest (CNW) is suing on behalf of itself and its
2 members. CNW is a nonprofit organization organized under §501(c)(3) of the Internal Revenue
3 Code with its principal place of business in Bellingham, Washington. CNW, like its predecessor
4 organization Northwest Ecosystem Alliance, has a long record of working in the public interest
5 on matters related to the Softwood Lumber dispute and forest products trade between Canada and
6 the U.S. CNW fosters educational activities about the nexus of trade and the environment,
7 particularly the lumber trade between Canada and the U.S. and participates in processes for
8 settling the dispute. CNW has published educational documents including *Greening the Trade in*
9 *Trees: Solutions to the Canada-US Softwood Lumber Dispute. A Citizens' Trade Alternative*,
10 which includes discussions of the underlying causes of the lumber trade dispute, range of
11 subsidies to Canadian industry, history of timber tenures in British Columbia, environmental
12 implications and long-term solutions and publishes a quarterly newsletter, *Northwest*
13 *Conservation*, in which softwood dispute and lumber trade issues are commonly reported. CNW
14 staff has and will continue to conduct training sessions, open to the public, on matters of the
15 impacts of the softwood lumber trade on trans-border threatened and endangered wildlife.
16 CNW's predecessor NWEA also participated in processes, meetings and informational forums
17 conducted by USTR and filed submissions with USTR and Department of Commerce and
18 Interior regarding the softwood trade dispute and its settlement and the nexus with trans-border
19 threatened and endangered species. CNW also submitted a brief to USTR outlining how a
20 redirection of collected softwood deposits could provide substantive solutions to the dispute and
21 mitigate environmental harm. CNW is a membership organization and has members who are
22 injured by defendant's violations of FOIA and the APA. CNW's interests will be violated if the
23 proceeds of the SLA are spent by the beneficiary organizations in a manner contrary to federal
24 environmental laws.
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1 10. Defendant Office of the United States Trade Representative (USTR) is an agency
2 of the executive branch of the United States government. USTR is in possession and control of
3 the records sought by plaintiffs, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).
4

5 STATEMENT OF FACTS

6 11. On September 12, 2006, the United States, through the Office of the U.S. Trade
7 Representative (USTR), and Canada entered into the Softwood Lumber Agreement (SLA).
8 Article XIII, Section A of the SLA provides that the United States will identify, in consultation
9 with Canada, "meritorious initiatives in the United States related to (a) educational and charitable
10 causes in timber-reliant communities; (b) low-income housing and disaster relief; and (c)
11 educational and public interest projects addressing (i) forest management ..., or (ii) ... wildlife
12 habitat..." According to the USTR's official press release, these "meritorious initiatives" will
13 receive \$450 million from "duty deposits currently being held in clearing accounts separate from
14 the general treasury by U.S. Customs and Border Protection." The press release also announced
15 that the USTR has designated three entities to receive the \$450 million: the U.S. Endowment for
16 Forestry and Communities, Inc. (U.S. Endowment); the American Forest Foundation (AFF); and
17 Habitat for Humanity International.
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19 12. By letter dated March 2, 2007, plaintiffs submitted their FOIA request to USTR
20 (Exhibit A filed herewith). The request sought eight categories of information related to USTR's
21 implementation of the SLA, including USTR's designation of the "meritorious initiatives"
22 organizations that will receive \$450 million, as follows:

23 (1) documents written by or to the USTR's office pertaining to the identification of the
24 three "meritorious initiatives" and individuals or organizations consulted for this
25 distribution;

26 (2) documents containing strategies or processes for the distribution of funds for
27 "meritorious initiatives";
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1 (3) documents containing discussion of the USTR's authority to make the distributions to
2 the "meritorious initiatives";

3 (4) correspondence between the USTR and the following entities and persons: the United
4 States Endowment for Forestry and Communities, Inc., the American Forest Foundation,
5 and Habitat for Humanity International; Dick Molpus, Lawrence Wiseman, or Larry
6 Lincoln;

7 (4) documents pertaining to any process, procedure, or hearings that the USTR undertook
8 to identify, distribute, and condition the payments to the United States Endowment for
9 Forestry and Communities, Inc., American Forest Foundation, and Habitat for Humanity
10 International;

11 (5) internal USTR documents pertaining to the negotiations that lead to the \$450 mil.
12 "meritorious initiative" fund;

13 (6) copies of all federal register notices or similar public notices announcing the
14 availability of \$450 mil. for "meritorious initiatives";

15 (7) correspondence between the office of the USTR and the executive and legislative
16 branch of the United States pertaining to the collection, aggregation, or distribution of the
17 \$450 mil. meritorious initiative fund; and

18 (8) grant proposals or similar documents submitted by any organization to the offices of
19 the USTR in applying for the \$450 mil. meritorious initiative fund.

20 *See* Exhibit A filed herewith, at page 2. Plaintiffs' FOIA request also sought a waiver of
21 associated fees based upon the Act's public interest fee waiver provision. *Id.* at pages 3-5, citing
22 5 U.S.C. § 552(a)(4)(A)(iii). Plaintiffs provided ample documentation in their FOIA request
23 letter to substantiate their fee waiver request.

24 13. USTR replied in a letter dated March 6, 2007 (Exhibit B filed herewith) which
25 plaintiffs received on March 19. The USTR letter stated that USTR had initiated a search for
26 responsive records, and "At a later date we will be in contact with you should it appear that we
27 are unable to fully" with no punctuation at the end of that incomplete sentence. The letter also
28 said any questions could be directed to the USTR office by telephone.

29 14. On July 17, 2007, plaintiffs spoke by telephone with USTR's FOIA personnel,
who agreed to inquire about the status of the FOIA request and let plaintiffs know as soon as an

1 answer was obtained about its status. No answer was received from USTR by July 27, 2007, so
2 plaintiffs telephoned again. Plaintiffs' July 27, 2007 confirming letter to USTR (Exhibit C filed
3 herewith) said in part:

4 This confirms our discussion today regarding the status of our March 2, 2007 FOIA
5 request on behalf of Washington Forest Law Center, Conservation Northwest and Center
6 for Biological Diversity. Our FOIA request is for records related to the Softwood Lumber
7 Agreement, including USTR's designation of three organizations that will receive funds.

8 You said that in response to my July 17 request for a status report, you communicated
9 with the USTR personnel who are responding to our FOIA request, they are pulling the
10 requested documents, and you anticipate the documents will be delivered to you next
11 week, possibly later. Once they are received by the USTR FOIA office, the documents
12 will be reviewed by staff and a FOIA attorney, then delivered to us. You said you will
13 phone me next week to provide an update, regardless of whether you have received the
14 documents or not.

15 Thank you for your work on our FOIA request. I look forward to hearing from you next
16 week.

17 15. On August 9, USTR's FOIA personnel reported by voicemail message that USTR
18 offices were still searching for documents, and USTR's FOIA personnel had not yet received
19 documents. Plaintiffs telephoned USTR's FOIA personnel on August 23, and were told that the
20 search process would take at least another week. On September 4, plaintiffs attempted to reach
21 USTR's FOIA personnel by telephone, and left a voicemail message inquiring about status. No
22 response was received, so plaintiffs telephoned again on September 20, and for Plaintiffs'
23 October 8, 2007 letter (Exhibit D filed herewith) was sent by fax, *i.e.*, USTR received it on
24 October 8. Plaintiffs' October 8 letter included a good-faith gesture of cooperation, voluntarily
25 offering to segment or prioritize some elements of plaintiffs' information requests so that
26 defendant could review and process them in the most efficient means possible. Plaintiffs'
27 October 8 letter said in part:

28 I left voicemail messages in each of the past two weeks, but I have not yet received a call
29 from your office. Please phone me at 206-223-4088 extension 7. In particular, we need
to discuss whether there are ways to subdivide or segment the responsive documents (*i.e.*,
by date range, or by subject category) so that some could be delivered sooner than others.

1 It has now been almost seven months since our FOIA request. We are concerned about
2 the long delay we have experienced without receiving any of the requested documents
3 from your office. We need prompt access to the requested information.

4 Thank you for responding promptly.

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6 16. As of October 29, 2007, plaintiffs had not received any response from USTR to
7 plaintiffs' September 27 voicemail message, or subsequent voicemail messages, or plaintiffs'
8 October 8 faxed letter.

9 17. On October 29, 2007, plaintiffs telephoned USTR again, and spoke with USTR's
10 FOIA personnel as well as USTR's attorney, as confirmed in plaintiffs' October 29 email
11 (Exhibit E filed herewith) which said in part:

12 This will confirm today's telephone discussion regarding our March 2, 2007 FOIA
13 request (your file # 070300511). It has been pending almost 8 months and we have not
14 yet received any documents. To help you expedite prioritized delivery of at least part of
15 the responsive documents (as proposed in my October 8 letter to Ms. Caldwell), I asked
16 you to prioritize the one-month date range of 9/12/06 through 10/12/06. Among the three
17 "meritorious initiatives" receiving funds, I asked you to prioritize the U.S. Endowment,
18 including but not limited to its Bylaws and Articles of Incorporation. You said you plan
19 to make a delivery to me this week. I will be out of the office Friday, so I would
20 appreciate receiving it by Thursday. Email is preferable, but fax is also acceptable.

21 We have been very patient but the delay is too egregious, and our interests are being
22 harmed. If we do not promptly receive a good faith response consisting of at least a
23 partial production, we will have no choice but to file a lawsuit under FOIA.

24 Thank you for your cooperation in this matter.

25 18. Although USTR's attorney had said on October 29 that he planned to deliver
26 documents to plaintiffs as a partial response before the end of that week, USTR failed to do so. It
27 was not until November 15, 2007 that plaintiffs received the first documents (12 documents
28 comprising 42 pages, plus a cover sheet). On December 10, 2007, plaintiffs received another set
29 of documents (8 documents comprising 28 pages, plus a cover sheet) almost entirely related to

1 AFF, not U.S. Endowment. These are the only documents plaintiffs have received as of
2 December 10, 2007.

3 19. Materials received to date are only partially responsive, and plaintiffs have still
4 not received many other important documents responsive to their March 2, 2007 FOIA request.
5 USTR's attorney has told plaintiffs that there are other responsive documents, including other
6 emails and a USDOJ legal opinion memo regarding the transaction, but these have not yet been
7 delivered to plaintiffs. Other than the Endowment's September 20, 2006 Certificate of
8 Incorporation (a public document from the State of Delaware), and a 25-year-old IRS letter to
9 AFF (unrelated to U.S. Endowment), USTR has failed to produce any documents that pre-date
10 USTR's public announcement on October 12, 2006 that the Endowment had been selected by
11 USTR to receive \$200 million of the SLA funds.

12 20. USTR has never issued a determination granting or denying plaintiffs' March 2,
13 2007 FOIA request.

14 21. USTR has never responded to plaintiffs' March 2, 2007 request for a fee waiver.

15 22. Plaintiffs have fully exhausted all administrative remedies required by FOIA. 5
16 U.S.C. 2§ 552(a)(6)(A), (a)(6)(C).

17 23. Plaintiffs have been required to expend costs and to obtain the services of a law
18 firm, consisting of attorneys, law clerks, and legal assistants, to prosecute this action.
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21 **CAUSES OF ACTION**

22 **COUNT I**

23 **VIOLATION OF THE FREEDOM OF INFORMATION ACT-FAILURE TO RESPOND**

24 24. Plaintiffs hereby allege and incorporate by reference all of the preceding
25 paragraphs.

26 25. Plaintiffs have a statutory right to the records they seek, and there is no legal basis
27 for defendant to assert that any of FOIA's nine disclosure exemptions, *see* 5 U.S.C. § 552(b)(1)-
28 (9), apply.
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1 26. Plaintiffs have a statutory right to have defendant process their FOIA request in a
2 manner which complies with FOIA. Plaintiffs' rights in this regard were violated when the
3 defendant unlawfully failed to respond to plaintiffs' FOIA request, including their fee waiver
4 request, in effect denying those requests unlawfully.

5 27. Unless enjoined and made subject to a declaration of plaintiffs' legal rights by this
6 Court, defendant will continue to violate the rights of plaintiffs to receive public records under
7 the FOIA.

8 28. Plaintiffs are entitled to reasonable costs of litigation, including attorney fees
9 pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

11 **COUNT II**
12 **VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT**

13 29. Plaintiffs hereby allege and incorporate by reference all of the preceding
14 paragraphs.

15 30. Defendant has failed to act in an official capacity under color of legal authority by
16 failing to comply with the mandates of FOIA consequent to its refusal to provide the information
17 and grant the fee waiver requested by plaintiffs.

18 31. Defendant has unlawfully withheld agency action by failing to comply with the
19 mandates of FOIA consequent to their refusal to provide the information and grant the fee waiver
20 requested by plaintiffs.

21 32. Plaintiffs have been adversely affected and aggrieved by the defendant's failure to
22 comply with the mandates of FOIA. Defendant's refusal to provide the information and grant
23 the fee waiver requested by plaintiffs have injured plaintiffs' interests in public oversight of
24 governmental operations and constitute violation of defendant's statutory duties under the APA.

25 33. Plaintiffs have suffered a legal wrong as a result of the defendant's failure to
26 comply with the mandates of FOIA. Defendant's refusal to provide the information and grant
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1 the fee waiver requested by plaintiffs have injured plaintiffs' interests in public oversight of
2 governmental operations and constitute violation of defendant's statutory duties under the APA.

3 34. Defendant's failure to provide the information and grant the fee waiver requested
4 by plaintiffs constitutes agency action unlawfully withheld and unreasonably delayed and is
5 therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

6 35. Alternatively, defendant's failure to provide the information and grant the fee
7 waiver requested by plaintiffs is in violation of FOIA's statutory mandates and is therefore
8 arbitrary, capricious, and abuse of discretion and not in accordance with law and is therefore
9 actionable pursuant to the APA, 5 U.S.C. § 706(2).

10 36. Plaintiffs are entitled to judicial review under the Administrative Procedure Act, 5
11 U.S.C. §§ 702, 706.

12 37. Plaintiffs are entitled to costs of disbursements and costs of litigation, including
13 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S.
14 § 2412.

15 REQUEST FOR RELIEF

16 WHEREFORE, plaintiffs pray that this Court:

17 1 Order defendant to promptly grant plaintiffs the fee waiver sought in this action
18 and to immediately disclose the requested information.

19 2 Declare that defendant's failure to grant the fee waiver and timely disclose the
20 documents requested by plaintiffs is unlawful under FOIA, 5 U.S.C. § 552(a); constitutes
21 agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1); and/or is
22 arbitrary, capricious, and abuse of discretion and not in accordance with law, 5 U.S.C. § 706(2).

23 3 Issue a written finding that the circumstances surrounding defendant's actions
24 raise questions whether defendant's personnel acted arbitrarily or capriciously with respect to
25 plaintiffs' FOIA request as provided for by 5 U.S.C. § 552(a)(4)(F).
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1 4 Award plaintiffs their costs and reasonable attorney fees pursuant to 5 U.S.C. §
2 552(a)(4)(E) and 28 U.S.C. § 2412.

3 5 Grant such other and further relief as the Court may deem just and proper.

4 RESPECTFULLY SUBMITTED this 10TH day of December, 2007.
5

6 WASHINGTON FOREST LAW CENTER

7 By: Karl F. Forsgaard
8 Peter R. Goldman, WSBA #14789
9 Karl F. Forsgaard, WSBA #12639
10 Paul A. Kampmeier, WSBA #31560

11 Attorneys for Plaintiffs Center for Biological Diversity and
12 Conservation Northwest
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