

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,)	
351 California St., Ste. 600)	
San Francisco, CA 94104)	Civil No: _____
)	
Plaintiff,)	
)	
v.)	COMPLAINT FOR DECLARATORY
)	AND INJUNCTIVE RELIEF
U.S. FISH AND WILDLIFE SERVICE,)	
1849 C Street NW)	
Washington, D.C. 20240)	
)	
Defendant.)	
_____)	

INTRODUCTION

1. This case is concerns the failure of the Defendant, U.S. Fish and Wildlife Service (“FWS”), to conduct an adequate search for all records that concern a federally-endangered species called the northern swift fox (*Vulpex velox hebes*), a once-common, small, bushy-tailed, and remarkably fast fox that lives in the northern Great Plains of the United States and Canada, but whose existence is threatened by the Keystone XL tar sands pipeline and other developments in areas of the northern Great Plains where it still survives.

2. On August 28, 2013, Plaintiff Center for Biological Diversity (“Center”) filed a request (hereinafter “Request”) for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”). Plaintiff requested all records that concern the legal status of the northern swift fox under the Endangered Species Act, 15 U.S.C. §§ 1531-1544 (“ESA” or “Act”). In particular, Plaintiff sought records that concern FWS’s determinations as to the specific, geographic areas of the fox’s range where the northern swift fox is protected under the ESA. Specifically, the Center requested all records “regarding the legal status of the northern

swift fox under the Endangered Species Act” dating back to 1973, when the northern swift fox was first listed under the Act.

3. Although FWS has listed and reclassified the scope of the ESA protections that apply to the northern swift fox on at least three occasions over the past 40 years – even altering the species’ status on the agency’s own website in recent months – FWS claims, in response to the Center’s FOIA Request, that there are no agency records that are responsive to the Center’s Request. FWS’s search for records was patently inadequate, however, as responsive records include, at a minimum, Federal Register notices, a 2009 Memorandum by the Assistant Solicitor for Fish and Wildlife, a petition to list the species in the northern portion of its range and subsequent FWS findings in response to that petition, documents relating to programs to restore the species to areas of its former range in Montana and South Dakota, and records related to changes to FWS’s webpage that documents the scope of the northern swift fox’s ESA protection, as well as records that relate to these materials, such as draft documents as well as related correspondence, memoranda, notes, ensuing actions, and electronic mail messages.

4. Because FWS’s determination that it has no records concerning the legal status of this species is simply not reasonable, the Center challenges FWS’s failure to conduct an adequate search that is reasonably calculated to produce all responsive records. FWS has not even attempted to meet its burden to prove that it conducted an adequate search for all responsive records in accordance with FOIA.

5. To remedy FWS’s violations of the law, Plaintiff seeks an order declaring that FWS has failed to comply with the FOIA and injunctive relief ordering FWS to locate and disclose all responsive records to Plaintiff expeditiously.

JURISDICTION

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346, and 5 U.S.C. § 552(a)(4)(B), because this action arises under the FOIA, and involves the United States as a defendant. An actual, justiciable controversy exists between Plaintiff and Defendant. The requested relief is proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 705-706. The challenged agency actions and/or inactions are subject to this Court's review under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, and 706 ("APA").

VENUE

7. Venue is proper in the United States District Court for the District of Columbia pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because FWS headquarters are found within this district, and a substantial part of the events giving rise to the Center's claim occurred in this district.

PARTIES

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation incorporated in California. The Center maintains offices in San Francisco, California; Tucson, Arizona; Portland, Oregon; Washington, D.C.; and in other cities across the country. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has more than 48,000 active members and 625,000 online supporters. The Center and its members are concerned with the conservation of imperiled species, including the northern swift fox, and with the effective implementation of the FOIA.

9. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency within the Department of the Interior with the mission of conserving, protecting, and enhancing fish,

wildlife, plants, and their habitat for the continuing benefit of the American people. FWS is an agency within the meaning of the FOIA. 5 U.S.C. § 552(f).

LEGAL BACKGROUND

10. The FOIA is a disclosure statute that was enacted to facilitate public access to government documents. A federal agency that receives a FOIA request must, within 20 working days, make a determination of whether to disclose the requested records. 5 U.S.C. § 552(a)(6)(A)(i).

11. A FOIA request must provide a reasonable description of the records sought in its FOIA request. 5 U.S.C. § 552(a)(3)(A)(i). The agency is obligated to construe the request liberally and may not narrow the scope of its search to exclude relevant information.

12. The FOIA requires an agency to conduct an adequate search for requested records. A search is adequate if it is reasonably calculated to produce all responsive records. An inquiry into the adequacy of an agency's search is guided by a reasonableness standard that favors disclosure, consistent with the FOIA's broad disclosure mandate.

13. The FOIA provides requesters with the right to appeal an agency's adverse determination. 5 U.S.C. § 552(a)(6)(A)(i). An agency must make a determination on an appeal within 20 working days. *Id.* § 552(a)(6)(A)(ii). A violation of statutory time limits may be construed as a denial.

14. The FOIA allows for the commencement of an action in district court, and provides that the district court has jurisdiction to enjoin an agency from withholding records and to order an agency to produce records that have been improperly withheld. 5 U.S.C. § 552(a)(4)(B). The court may also assess reasonable litigation costs against the United States where the plaintiff has substantially prevailed. *Id.* § 552(a)(4)(E).

15. The agency carries the burden of sustaining its action in FOIA litigation. 5 U.S.C. § 552(a)(4)(B).

16. In evaluating the adequacy of the agency's search, a court reviews the record *de novo*. 5 U.S.C. § 522(a)(4)(B).

FACTUAL BACKGROUND

A. The Northern Swift Fox

17. The northern swift fox is endangered as a result of trapping by private, state, and federal entities. Northern swift foxes are also threatened by habitat loss, as approximately half of the species' historic range has been lost to conversion of prairie habitat to cropland. In addition, northern swift foxes are threatened by new development, including the proposed Keystone XL pipeline ("Keystone XL"). Northern swift foxes currently live along or very near the proposed route for Keystone XL in Montana and South Dakota, as well as in Alberta, Canada.

18. Federal, state, university, and tribal entities are engaged in programs to restore the northern swift fox to areas of its historic range in Montana and South Dakota.

B. The History of the Northern Swift Fox's Legal Status Under the ESA

19. FWS administers the ESA for terrestrial wildlife, including the program to add, reclassify, and delist species under the ESA.

20. In 1970, the northern swift fox was listed as "endangered" throughout its range under the Endangered Species Conservation Act ("ESCA"), the precursor to the ESA. When the ESA was enacted in 1973, species listed under the ESCA were listed under the ESA, in accordance with section 4(c)(3) of the ESA.

21. On several occasions since 1973, FWS has changed the scope of the northern swift fox's protection under the ESA – *i.e.*, the agency has altered the geographic areas it is

protected as endangered under the ESA. Specifically, the agency has changed its determination as to whether the northern swift fox is protected in the territorial United States and in Canada, or whether the species is protected only in Canada. An overview of these occasions illustrates why it is reasonable to conclude that the agency possesses records that are responsive to the Center's FOIA Request.

22. In 1979, FWS published a notice in the Federal Register declaring that the 1970 listing of the northern swift fox under the ESCA had been in error because it violated the ESCA's state notice requirements. 44 Fed. Reg. 43,705 (July 25, 1979) ("1979 Reclassification"). Based on this rationale, FWS announced that the northern swift fox would no longer be protected under the ESA in the United States, and would only be protected as an endangered species in Canada. *Id.* This finding was reiterated in another Federal Register notice that was published one year later. 45 Fed. Reg. 49,844 (July 25, 1980) ("1980 Federal Register notice"). In removing protection of the northern swift fox in the territorial United States, however, FWS did not adhere to the ESA's regulatory procedures for reclassifying the legal status of a species under the ESA. 16 U.S.C. § 1533(b)(4); 50 C.F.R. Part 424.

23. On April 30, 2009, the Department of Interior's Assistant Solicitor for Fish and Wildlife issued a memorandum entitled: "Status of the thick-billed parrot, wood bison, margay, and northern swift fox under the Endangered Species Act" ("2009 Memorandum"). Upon information and belief, the 2009 Memorandum concluded that the northern swift fox is protected under the ESA wherever it occurs – *i.e.*, throughout its range in the territorial United States as well as in Canada. Plaintiff is separately pursuing the 2009 Memorandum under FOIA, including by today filing a related FOIA case that contests FWS's decision to withhold this 2009 Memorandum from disclosure under the attorney-client privilege.

24. On July 14, 2009, FWS published a Federal Register notice concerning the legal status of the thick-billed parrot, a species that, like the northern swift fox: (1) occurs in both the territorial United States and a foreign nation (Mexico); (2) FWS reclassified in 1979, to be protected only in Mexico and not throughout its range in the territorial United States, and (3) is addressed by the 2009 Memorandum. 74 Fed. Reg. 33,957, 33,958 (July 14, 2009).

25. In the July 14, 2009 Federal Register notice regarding the thick-billed parrot, FWS stated that the 1979 reclassification of the parrot had been in error. *Id.* In making this determination, FWS incorporated and discussed the rationale set forth in the 2009 Memorandum – specifically, that the 1979 parrot reclassification had been “without legal effect” because it did not comply with the APA and ESA. *Id.* The 2009 Memorandum further explained that FWS’s “failure to consult with a State under the ESCA did not invalidate the species’ legal status under the [ESA]” in the United States because “[i]n 1973 Congress validated the lists from the prior statutes through its explicit incorporation of them into the [ESA].” *Id.* Therefore, the 2009 Memorandum concluded that the thick-billed parrot was once again protected under the ESA wherever it occurs – *i.e.*, throughout its range in the territorial United States as well as in Mexico.

26. The rationale set forth in the 2009 Memorandum and 2009 Federal Register notice for the thick-billed parrot also applies to the northern swift fox. Thus upon issuance of the 2009 Memorandum, the northern swift fox was protected under the ESA throughout its range in the territorial United States as well as in Canada.

27. FWS maintains a website with a database of species that are listed under the ESA. This database specifies the status of such species – *i.e.*, as “endangered” or “threatened,” or “candidates” for protection – the specific geographic areas where the species are protected, and

other details. This database is maintained at the following web address:

<http://www.fws.gov/endangered>.

28. As indicated by a screenshot, as of August 27, 2013, FWS's webpage for the northern swift fox stated – consistent with the 2009 Memorandum and in apparent correction to the 1979 Reclassification – that the northern swift fox is listed as endangered throughout its range, *i.e.*, wherever found throughout the United States and in Canada.

29. As also indicated by a screenshot, by mid-September, 2013 – after it received the Center's FOIA Request – FWS's webpage for the northern swift fox reflected that the northern swift fox's status had again been changed, in apparent contradiction of the 2009 Memorandum as well as the ESA, to indicate that the northern swift fox is protected as endangered only in Canada, and not where it occurs in the territorial United States.

C. Additional FWS Activity Related to the Northern Swift Fox

30. The FWS activities pertaining to the 1973 listing of the northern swift fox under the ESA, the 1979 Reclassification, the 1980 Federal Register notice, the 2009 Memorandum, and multiple changes to the ESA listing status of the northern swift fox on FWS's website are not the only occasions when FWS has assessed the legal status of the northern swift fox under the ESA.

31. On March 3, 1992, FWS received a "citizen petition" to list the swift fox in the northern portion of its range – a listing that would have encompassed the northern swift fox. 59 Fed. Reg. 28,328 (June 1, 1994). On June 1, 1994, FWS made an initial finding on this petition, concluding that "substantial information exists to support a decision that listing of the swift fox may be warranted throughout its entire range." *Id.* On June 16, 1995, FWS made another finding on the petition, finding that listing was "warranted but precluded" by higher-priority

listing actions, and making the species a “candidate” for ESA protection. 60 Fed. Reg. 31,663 (June 16, 1995). FWS discussed the status of the swift fox as a “candidate” species in three subsequent FWS Federal Register notices. 62 Fed. Reg. 49,398 (Sep. 19, 1997); 64 Fed. Reg. 57,535 (Oct. 25, 1999); 66 Fed. Reg. 1298 (Jan. 8, 2001).

32. On January 8, 2001, FWS removed the swift fox from the list of species that warrant (but are awaiting) ESA protection. 66 Fed. Reg. 1298 (Jan. 8, 2001). On December 9, 2004, FWS received a formal “notice of intent to sue” over the agency’s removal of the swift fox from the list of species waiting for ESA protection. On March 21, 2005, FWS sent a letter in response to that formal notice of intent to sue.

33. Since the mid-1990s, FWS has been participating in efforts to restore swift foxes to the northern portion of their range – specifically, to areas of Montana and South Dakota – along with the Bureau of Land Management, tribes, state wildlife agencies, and researchers. These efforts necessarily would require consideration of the legal status of swift foxes in the northern plains under the ESA.

D. The Center’s FOIA Request

34. On August 28, 2013, the Center sent its FOIA Request to FWS for all records concerning the legal status of the northern swift fox under the ESA.

35. FWS did not make a determination on the Center’s FOIA request within 20 working days as required by the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). Several weeks after the statutory deadline had passed, on October 29, 2013, the Center received a final response from FWS stating that no records responsive to the Center’s FOIA Request had been located during the agency’s search for records. By letter received by the FOIA appeals office for the U.S. Department of the Interior on December 3, 2013, the Center appealed FWS’s October 29, 2013

determination.

36. Over a month later, the Center still has received no response to its FOIA Appeal, or even an acknowledgement that FWS received the appeal. Plaintiff has exhausted the applicable administrative remedies with respect to its FOIA request to Defendant.

PLAINTIFF'S CLAIM FOR RELIEF

1. Plaintiff hereby incorporates all preceding paragraphs.
2. FWS has failed to conduct an adequate search for all records that are responsive to the Center's FOIA Request. A reasonable search for records would have produced all records related to the 1973 listing of the northern swift fox as endangered throughout its range in the United States and Canada, the 1979 Reclassification and 1980 Federal Register notice, the 1994 petition to list the swift fox in the northern portion of its range and FWS's findings in response to that petition, the effort to restore northern swift foxes to areas of Montana and South Dakota, multiple changes to FWS's website concerning the species' status, and FWS's handling of the Center's FOIA Request and FOIA Appeal, among other records, such as related records and drafts, notes, intra- and inter-agency communications, electronic mail messages, maps, and GIS layers, FWS's failure to conduct an adequate search violates the FOIA, 5 U.S.C. § 522.

REQUEST FOR RELIEF

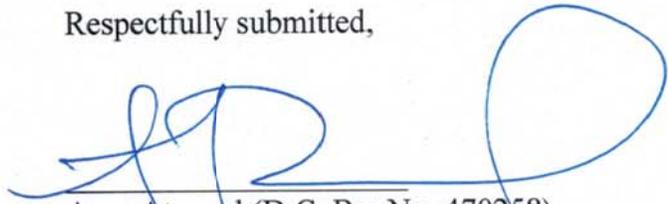
Plaintiff respectfully requests that the Court enter Judgment for Plaintiff, providing the following relief:

1. Declare that Defendant has violated the FOIA by failing to conduct an adequate search for all records that the Center requested;
2. Order Defendant to make the requested records immediately available to Plaintiff;
3. Award Plaintiff its costs and reasonable attorneys' fees in this action;

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

Dated: January 16, 2014

Respectfully submitted,



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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,)	
351 California St., Ste. 600)	
San Francisco, CA 94104)	Civil No: _____
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v.)	COMPLAINT FOR DECLARATORY
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1849 C Street NW)	
Washington, DC 20240)	
)	
Defendant.)	
_____)	

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“Center”) challenges Defendant U.S. Fish and Wildlife Service’s (“FWS”) refusal to disclose a record to Plaintiff pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”). At issue is an April 30, 2009 memorandum entitled “Status of the thick-billed parrot, wood bison, margay, and northern swift fox under the Endangered Species Act” (“Memorandum”). The Memorandum sets forth the legal status of several species – including the thick-billed parrot, wood bison, margay, and northern swift fox – under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), and in particular, whether FWS considers these species to be protected as “endangered” or “threatened” within the territorial United States.

2. FWS has refused to disclose the Memorandum pursuant to FOIA Exemption 5, claiming that the attorney-client privilege allows the agency to withhold it from disclosure. This privilege, however, only applies to records that contain confidential attorney-client communications or materials that are generated for the purpose of providing legal advice. FWS

has made no attempt to show that the Memorandum meets this test.

3. Even assuming that the attorney-client privilege could allow FWS to withhold the Memorandum from disclosure, FWS has waived any such privilege, both by disclosing the contents of the Memorandum in a 2009 Federal Register notice, and by adopting and incorporating the Memorandum as the agency's determination of the legal status of the species concerned.

4. FWS also failed to disclose any portions of the Memorandum that may be reasonably segregated from any privileged portions, or even to establish that no reasonably-segregable portions exist, as required under FOIA. 5 U.S.C. § 552(b).

5. To remedy these violations of law, Plaintiff seeks an order declaring that FWS has failed to comply with the FOIA and injunctive relief ordering FWS to release the Memorandum to Plaintiff immediately.

JURISDICTION

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346, and 5 U.S.C. § 552(a)(4)(B), because this action arises under the FOIA, and involves the United States as a defendant. An actual, justiciable controversy exists between Plaintiff and Defendant. The requested relief is proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 705-706. The challenged agency actions and/or inactions are subject to this Court's review under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, and 706 ("APA").

VENUE

7. Venue is proper in the United States District Court for the District of Columbia pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because FWS headquarters are found within this district, and a substantial part of the events giving rise to the Center's claim

occurred in this district.

PARTIES

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation incorporated in California. The Center maintains offices in San Francisco, California; Tucson, Arizona; Portland, Oregon; Washington, D.C.; and in other cities across the country. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has more than 48,000 active members and 625,000 online supporters. The Center and its members are concerned with the conservation of imperiled species, including the northern swift fox and other species affected by the Memorandum, and with the effective implementation of the FOIA.

9. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency within the U.S. Department of the Interior with the mission of conserving, protecting, and enhancing fish, wildlife, plants, and their habitat for the continuing benefit of the American people. FWS is an agency within the meaning of the FOIA. 5 U.S.C. § 552(f).

LEGAL BACKGROUND

10. The FOIA is a disclosure statute that was enacted to facilitate public access to government documents. A federal agency that receives a FOIA request must, within 20 working days, make a determination of whether to disclose the requested records. 5 U.S.C. § 552(a)(6)(A)(i). Although an agency may seek a brief extension of this deadline, *id.* § 552(a)(6)(B), it may only withhold a responsive record if the record falls within one or more of the nine, narrow exemptions to the FOIA's disclosure mandate. *Id.* § 552(b)(1)-(9).

11. The FOIA provides requesters with a right to an appeal of an agency's denial of a request for records. 5 U.S.C. § 552(a)(6)(A)(i). Recognizing the importance of expeditious

action under the FOIA, Congress established a strict timeline for responding to FOIA appeals. When presented with an appeal, the agency must make a determination on the appeal within 20 working days. *Id.* § 552(a)(6)(A)(ii). A violation of the FOIA's statutory time limits may be construed as a denial.

12. The FOIA allows for the commencement of an action in district court, and specifies that a district court has jurisdiction to enjoin an agency from withholding records and to order an agency to produce records that have been improperly withheld. 5 U.S.C. § 552(a)(4)(B). The court may also assess reasonable attorney fees and costs against the United States where the plaintiff has substantially prevailed. *Id.* § 552(a)(4)(E).

13. An agency carries the burden of demonstrating to a court that it has lawfully withheld responsive records consistent with the FOIA. 5 U.S.C. § 552(a)(4)(B). When making a determination to withhold a record that has been requested under FOIA, an agency must show that one of the FOIA's nine exemptions apply. *Id.* §§ 552(b)(1)-(9).

14. FOIA Exemption 5 provides a narrow exemption to FOIA's disclosure mandate, for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 has been interpreted to incorporate several common law discovery privileges that apply to the government in litigation, including the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege (among others).

15. At issue here is the attorney-client privilege, which protects communications between attorneys and their clients that contain confidential information. This privilege does not allow an agency to withhold a record simply because it involves communication with or from the government's counsel. The privilege only applies to records containing communications

concerning a legal matter for which the client sought the confidential advice of its attorney.

16. Even if the agency carries its burden to demonstrate that the requested material is covered by the attorney-client privilege, an agency may not withhold a record if it has waived the privilege. The privilege is waived when an agency discloses the confidential communication to a third party. The privilege is also waived when the agency adopts or incorporates the record in setting forth agency position or policy on a matter.

17. Even if an agency can meet its burden to prove that a responsive record contains attorney-client information, and it has not waived the privilege, the agency must nevertheless disclose any non-exempt, “reasonably segregable portion of a record.” 5 U.S.C. § 552(b). As with the applicability of FOIA’s exemptions, the agency carries the burden to prove that responsive records include no reasonably-segregable portions.

18. Hence, an agency that wishes to withhold a responsive record from the FOIA’s disclosure mandate pursuant to the attorney-client privilege must prove that the record contains confidential legal information regarding a legal matter for which the agency sought its attorney’s advice, that the agency did not waive the privilege by disclosing the information to a third party or incorporating it into agency policy, and that the record contains no reasonably-segregable portions which must be disclosed.

FACTUAL BACKGROUND

19. On April 30, 2013, Michael J. Robinson, a member the Center’s staff, sent a request for the Memorandum to FWS’s Washington D.C. office pursuant to the FOIA (“FOIA Request”). Mr. Robinson requested the Memorandum in order to understand FWS’s classification of certain species in the territorial United States under the ESA. The Memorandum sets forth the legal status of these species under the ESA in the territorial United States. As FWS

is the federal agency that administers the federal program to list, reclassify, and delist species pursuant to the ESA, Mr. Robinson sent the FOIA Request in order to learn whether FWS classifies these species as endangered or threatened under the ESA in the territorial United States. Classification of a species as endangered or threatened carries substantive legal protections under the ESA that are designed to ensure species' survival and recovery from the threat of extinction.

20. The history of FWS's regulatory treatment of one of these species, the northern swift fox (*Vulpes velox hebes*), illustrates why the Memorandum would clarify FWS's position as to the status of these species under the ESA within the territorial United States.

21. The northern swift fox is a small, and remarkably fast fox that lives in the northern Great Plains of the United States and Canada.

22. In 1970, the northern swift fox was listed as "endangered" throughout its range under the Endangered Species Conservation Act ("ESCA"), the precursor to the ESA. When the ESA was enacted in 1973, species listed under the ESCA were listed under the ESA; thus, the northern swift fox was placed on the endangered species list upon the ESA's enactment in 1973.

23. In 1979, FWS published a notice in the Federal Register in which it declared that the 1970 listing of the northern swift fox under the ESCA had been in error, because this listing had violated the ESCA's state notice requirements. 44 Fed. Reg. 43,705 (July 25, 1979). Based on this rationale, in the 1979 notice FWS declared that the northern swift fox would no longer be protected under the ESA in the United States, but that the fox's status as "endangered" in Canada would be maintained. *Id.* However, in making this change to the status of the northern swift fox, FWS did not adhere to the rulemaking procedures for reclassifying species that are set forth in section 553 of the APA and section 4 (b)(4) of the ESA.

24. On April 30, 2009, the Department of Interior's Assistant Solicitor for Fish and Wildlife issued the Memorandum.

25. On July 14, 2009, FWS issued a Federal Register notice concerning the status of the thick-billed parrot under the ESA. 74 Fed. Reg. 33,957, 33,958 (July 14, 2009). Like the northern swift fox, the parrot occurs in both the U.S. and a foreign nation (Mexico), and FWS reclassified the parrot's status in 1979 to remove ESA protection within the territorial United States. 44 Fed. Reg. at 43,705.

26. In the 2009 Federal Register notice regarding the thick-billed parrot, FWS stated that the 1979 reclassification of the parrot had been in error. 74 Fed. Reg. at 33,958. FWS relied on, quoted, and discussed the Memorandum, to clarify that the 1979 reclassification of the parrot had been "without legal effect" because it had not been issued in accordance with the APA and ESA. *Id.* The Memorandum further explained that FWS's "failure to consult with a State under the ESCA did not invalidate the species' legal status under the [ESA]" in the United States because "[i]n 1973 Congress validated the lists from the prior statutes through its explicit incorporation of them into the [ESA]." *Id.*

27. Upon information and belief, the rationale set forth in the Memorandum and the 2009 Federal Register notice regarding the thick-billed parrot – *i.e.*, that the parrot is protected under the ESA in the entirety of its range, including in the United States as well as Mexico, because the 1979 reclassification was wrong – applies to other similarly-situated species as well, including the northern swift fox. Thus, it follows that these species are all protected under the ESA in both the United States and foreign nations, wherever they occur.

28. After learning of the Memorandum from the 2009 Federal Register notice regarding the thick-billed parrot, Mr. Robinson submitted the Center's FOIA Request for the

Memorandum, in order to better understand how FWS classified species like the northern swift fox under the ESA.

29. After receiving the Center's FOIA Request, FWS did not provide a determination within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). After the statutory time period had passed, Mr. Robinson allowed an additional five weeks to pass before inquiring as to the status of his request on July 11, 2013. After multiple attempts to determine the status of his request for the Memorandum, on July 24, 2013 Mr. Robinson finally received a final determination. FWS stated that it was "withholding the April 30, 2009 memorandum from this response [in its entirety] pursuant to the attorney-client privilege provision under Exemption 5 of the FOIA (5 U.S.C. 552(b)(5))."

30. By email and letter dated August 15, 2013, the Center appealed FWS's withholding of the Memorandum. Defendant received the letter via certified mail on August 23, 2013.

31. As of today's date, FWS has failed to acknowledge the Center's appeal or make any attempt to resolve this matter without litigation.

32. Plaintiff has exhausted the applicable administrative remedies with respect to its FOIA request to Defendant.

PLAINTIFF'S CLAIM FOR RELIEF

33. Plaintiff hereby incorporates all preceding paragraphs.

34. FWS has violated the FOIA by withholding the Memorandum from disclosure under the attorney-client privilege.

35. FWS has failed to show that the Memorandum contains confidential information that had been provided by FWS to the Assistant Solicitor relating to a legal matter for which

FWS sought advice.

36. Even assuming that the attorney-client privilege would allow FWS to withhold the Memorandum from disclosure, FWS waived any such privilege when it disclosed the contents of the Memorandum in the 2009 Federal Register Notice and adopted and incorporated the Memorandum's rationale in setting forth the agency's position regarding the legal status of several species under the ESA.

37. Even if FWS could show that the attorney-client privilege allowed it to withhold the Memorandum and that FWS had not waived the privilege, FWS failed to carry its burden to prove that no reasonably-segregable portions of the Memorandum exist which must nevertheless be disclosed to the Center.

38. FWS's improper reliance on the attorney-client privilege under FOIA Exemption 5 to withhold the Memorandum violates the FOIA. 5 U.S.C. § 552.

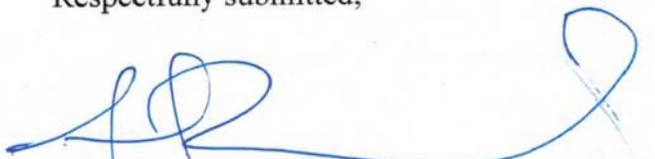
REQUEST FOR RELIEF

Plaintiff respectfully requests that the Court enter Judgment for Plaintiff providing the following relief:

1. Declare that Defendant has violated the FOIA by improperly withholding the record requested by Plaintiff;
2. Order Defendant to make the requested record immediately available to Plaintiff;
3. Award Plaintiff its costs and reasonable attorneys' fees in this action;
4. Grant such other and further relief as the Court may deem just and proper.

Dated: January 16, 2014

Respectfully submitted,



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