

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

SEP 30 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GREGORY C. LANGHAM
CLERK

Civil Action No. 10-cv-10 - CV - 02386-RPM-CBS

BLACK MESA WATER COALITION, DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT, TO NIZHONI ANI, CENTER FOR BIOLOGICAL DIVERSITY, AND SIERRA CLUB,

Plaintiffs,

v.

WESTERN REGION OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, a federal agency within the U.S. Department of Interior, U.S. DEPARTMENT OF INTERIOR,

Defendants.

COMPLAINT

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INTRODUCTION

1. The Western Region Office of Surface Mining, Reclamation and Enforcement (“OSM”), a federal agency within the U.S. Department of Interior and the U.S. Department of Interior (hereinafter, “OSM” or “Agency” or “Defendant”) violated the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, by withholding agency records requested by the Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity and Sierra Club (hereinafter “BMWC” or “Plaintiffs”) concerning Peabody Western Coal Company’s Kayenta Mine located on Indian lands in Northeastern Arizona.

2. This lawsuit seeks to remedy the agency’s failure to lawfully respond to and conduct a lawful and timely search for responsive records related to a request for information made by Plaintiffs under FOIA on April 9, 2010 (FOIA Request No. OSM-2010-00022).

3. Plaintiffs’ April 9, 2010 FOIA request was submitted to OSM’s Western Region Office in Denver, Colorado.

4. All of the records requested by Plaintiffs concern Peabody Western Coal Company’s Kayenta Mine.

5. On June 4, 2010, OSM ended the public comment period for renewal of Peabody’s operating permit for the Kayenta Mine.¹ The records requested by Plaintiffs under FOIA are integral to public understanding of OSM’s renewal of Peabody’s operating permit and should be readily available for public release by the agency.

6. Plaintiffs’ April 9, 2010 FOIA request sought the following:

¹ http://www.wrcc.osmre.gov/Current_Initiatives/Kayenta_Mine/Renewal.shtml

- (1) A full and complete copy of Peabody's permit renewal application for Kayenta Mine Permit Renewal Permit No. AZ-0001D. *See generally*, 30 C.F.R. §§777, 778, 779, 780 *et seq.* (setting forward application requirements);
- (2) A full and complete copy of Peabody's current operating permit issued under the requirements of Surface Mining Control and Reclamation Act ("SMCRA");
- (3) A full and complete copy of all permit revision authorizations and applications for the Kayenta mine from 2005 to the present;
- (4) Any and all cumulative hydrologic impact assessments ("CHIAs") for the Kayenta mine;
- (5) Any and all National Environmental Policy Act ("NEPA") documents for the Kayenta mine (excluding the "Black Mesa Project Draft and Final Environmental Impact Statement, OSM-EIS-33");
- (6) Any and all notices of violation from 2005 to the present;
- (7) Any and all communication between OSM and Peabody Western Coal Company from December 2008 to the present.
- (8) Any and all communications between OSM and other Federal agencies regarding Peabody's permit application for Kayenta Mine Permit Renewal Permit No. AZ-0001D including, but not limited to, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service and Army Corps of Engineers;
- (9) Any and all communications between the Navajo Nation and Hopi Tribe regarding Peabody's permit application for Kayenta Mine Permit Renewal Permit No. AZ-0001D;
- (10) Any and all communications between the Office of the Solicitor and attorneys for Peabody Western Coal Company from December 2008 to the present.

7. With regard to Plaintiffs April 9, 2010 FOIA request and subsequent administrative appeal on June 14, 2010, Plaintiffs seeks an Order pursuant to FOIA that: 1) finds that the Defendant has unlawfully withheld responsive agency records, in violation of FOIA; 2) orders Defendant to conduct a FOIA compliant search; 3) orders Defendant to produce all unlawfully withheld records by a date certain; 4) enjoins Defendant from withholding the requested agency records. 5 U.S.C. 552(a)(4)(B).

8. Among other things, Plaintiffs seek Court ordered relief that: 1) orders immediate release of all records responsive to Items 2 and 3; and, 2) orders immediate release of all records responsive to Items 7.

9. OSM has violated FOIA by failing to timely respond to Plaintiffs' FOIA request, by failing to conduct a reasonable search for documents responsive to this request and by withholding information from the responsive agency records it has thus far identified without adequately demonstrating that this information was exempt from disclosure under FOIA.

10. This lawsuit is necessary because Defendant continues to violate FOIA by failing to provide a FOIA compliant response to Plaintiffs' April 9, 2010 FOIA request within twenty (20) days. 5 U.S.C. §552(a)(6)(A)(ii).

11. This lawsuit is also necessary because the U.S. Department of Interior's ("DOI's") August 3, 2010 response to Plaintiff's June 14, 2010 FOIA Appeal (No. 2010-097) violates FOIA and failed to resolve, either in whole or in part, the issues raised in this litigation.

12. By failing to fully, timely, and lawfully respond to Plaintiff's FOIA requests and related appeal, Plaintiffs' rights under FOIA as well as its ability to carry out its organizational mission have been severely impaired.

JURISDICTION AND VENUE

13. 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).

14. In the alternative, this Court has jurisdiction to review agency action and to order effective relief sought in this civil action pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202 (injunctive relief); and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* There is a present and actual controversy between the parties that is ripe for judicial review.

15. Venue in this Court is proper under 5 U.S.C. §552(a)(4)(B) as all documents requested by

Plaintiffs concern issues related to and/or activities conducted by the federal government in Denver, Colorado.

16. Plaintiffs have exhausted all administrative remedies. Plaintiffs FOIA request was submitted on April 9, 2010. On June 14, 2010, Plaintiffs filed an administrative appeal to the U.S. Department of Interior (“DOI”). U.S. DOI responded to Plaintiff’s June 14, 2010 FOIA Appeal (No. 2010-097) on August 3, 2010. DOI’s response to Plaintiffs’ appeal is final agency action subject to judicial review. 5 U.S.C. §552(a)(4)(B).

17. The FOIA claims made in this Complaint are ripe for judicial review and Plaintiffs’ claims can be remedied by an order of this court.

PARTIES

18. Plaintiff BLACK MESA WATER COALITION (“BMWC”) is a non-profit, nongovernmental organization formed in 2001 by inter-tribal, inter-ethnic people youth dedicated to addressing issues of water depletion, natural resource exploitation and health promotion within Navajo and Hopi communities. BMWC’s mission is to empower tribal people while building healthy and sustainable communities. BMWC has a 4 person staff and a 6 member board of directors, representing an intergenerational, multi-cultural range of perspectives. BMWC’s board is largely Navajo citizens from the Black Mesa region. BMWC has and continues to work organizing Navajo and Hopi communities for the protection of tribal lands, water and future generations, particularly around the Black Mesa/Kayenta coal mining operations. BMWC has and is working to build community awareness and youth involvement on and around Peabody's Black Mesa Project, organizing events in an effort to elevate community voices, and working to build solution pathways through a Navajo Green Jobs program.

19. Plaintiff DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT (“Diné C.A.R.E.”) was founded in 1988 and is a nonprofit, environmental organization based within the Navajo Nation homeland, which rests between mountains in Colorado, New Mexico and Arizona. Diné C.A.R.E. is comprised of all tribal members. Many Diné C.A.R.E. members live in the Black Mesa region. Diné C.A.R.E. has established a reputation for educating, organizing and advocating for their tribal community, medicine and traditional people, and indigenous youth and elders in an effort to empower tribal members to organize, speak out and determine their own destinies.

20. Plaintiff TO’ NIZHONI ANI (“TNA”)(translated from Navajo as “Beautiful Spring that Speaks”) was founded in 2001 and is comprised of all Black Mesa residents and in particular members who live in Pinion, Forest Lake, Big Mountain. TNA provides community education on the Black Mesa mine and mobilizes the Black Mesa community in advocacy for sustainable economic development. TNA’s mission is consistent with the philosophy of traditional Diné and seeks a more sustainable future.

21. Plaintiff SIERRA CLUB has 1.3 million members and supporter who work for a safe and healthy community in which to live, smart energy solutions to combat global warming and an enduring legacy for America's wild places. Since 1892, the Sierra Club has been working to protect communities, wild places, and the planet itself. Sierra Club is the oldest, largest, and most influential grassroots environmental organization in the United States. A national board of directors sets national policy and state chapters organize executive committees of local leaders to set local policies. In Arizona, Sierra Club has over 11,000 members with over 150 members living on or around Black Mesa. It has been a priority of the Sierra Club nationally and locally to

support Navajo and Hopi communities in their efforts to protect the N Aquifer and stop irresponsible coal mining. The Sierra Club has worked since 2000 specifically on issues surrounding the Black Mesa and Kayenta Mines.

22. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3) corporation with offices in Arizona, New Mexico, California, Nevada, Oregon, Alaska, Illinois, Minnesota, Vermont, and Washington, D.C. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center has over 180,000 members and online activist throughout the United States and the world. The Center is actively involved in species and habitat protection issues worldwide, including throughout the western United States. The Center, its employees, and its members use the lands in and near the Black Mesa and/or Kayenta Mine for recreational, scientific, aesthetic, and commercial purposes. They also derive recreational, scientific, aesthetic, and commercial benefits from these lands through wildlife observation, study, and photography. The Center and its members have an interest in preserving the possibility of such activities in the future. As such, the Center and its members have an interest in helping to ensure their continued use and enjoyment of these lands.

23. Public oversight through enhanced understanding and dissemination of information detailing the environmental consequences of a renewed coal mining operations at the Kayenta Mine is absolutely necessary. The requested information will be used to inform the Plaintiffs and the publics' understanding about the environmental consequences of the Kayenta Mine communities, water, air, land and threatened and endangered species. Concurrent with any action which the Plaintiffs may take after obtaining the requested documents, Plaintiffs will

publicize these consequences. This is certain to result in a significant increase in public understanding of government agency activity, and in particular OSM responsibilities. Plaintiffs have publicized agency compliance with the provisions of various environmental laws, as well as the policy costs and benefits of pending activities, many times through information gained from FOIA requests like the request at issue in the present appeal. Plaintiffs intend to use the documents requested in a similar manner.

24. Moreover, Plaintiffs' informational publications supply information not only to Plaintiffs' membership, but also to the memberships of other conservation organizations, locally, regionally, tribally as well as nationally and internationally. Plaintiffs' informational publications continue to contribute information to public media outlets, as well.

25. Defendant WESTERN REGION OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT ("OSM") is responsible for responding to FOIA requests submitted to it and so is sued as a defendant in this action. OSM has a decentralized FOIA program. FOIA requests are typically processed at OSM regional offices. In this case, Plaintiffs' FOIA request was directed to the OSM Western Regional Office in Denver, Colorado.

26. Defendant U.S. DEPARTMENT OF INTERIOR ("DOI") is responsible for responding to FOIA requests and appeals submitted to it and so is sued as a defendant in this action. The DOI, Office of Solicitor, FOIA Appeals Office handles administrative appeals of FOIA matters and so is sued as a defendant in this action.

27. Plaintiffs use FOIA as an important avenue for keeping abreast and informed of Agency activities. Plaintiffs are harmed when they are denied documents to which they are entitled. Plaintiffs intend to continue to use FOIA to access agency records in the possession of

Defendant. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. Plaintiffs use FOIA to publicize activities of federal agencies and to mobilize the public to meaningfully participate in federal decision-making processes regarding Peabody's Kayenta Mine. Plaintiffs intend to continue using FOIA requests to fulfill their oversight and advocacy roles through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. Plaintiffs bring this action on their own behalf and on behalf of their adversely affected members.

28. Defendant's violation of FOIA has denied Plaintiffs access to information contained in agency records to which Plaintiffs are entitled under FOIA. Without this information, Plaintiffs cannot provide themselves or their membership, or the general public, with information regarding the Defendant's activities related to the agency's renewal of Peabody's operating permit. Thus, Plaintiffs are injured in fact by Defendant's violations of FOIA. Plaintiffs' injuries can be redressed by this suit and granting of the remedies requested herein.

IV. FACTS AND LAW

29. This suit challenges Defendant's unlawful withholding of agency records responsive to FOIA requests made on behalf of Plaintiffs.

A. April 9, 2010 FOIA request (Request No. OSM-2010-00022)

30. FOIA Request No. OSM-2010-00022 was sent on the behalf of Plaintiffs by the Energy Minerals Law Center on April 9, 2010.

31. On May 17, 2010, OSM responded to Plaintiffs' April 9, 2010 FOIA request. In response, OSM searched for or provided responsive documents to items (1), (4), (5), (6), (8) and (9).

32. No response was provided to Items (2), (3), (7), and (10).

33. Defendant continues to illegally withhold documents in whole or in part requested by Plaintiff on April 9, 2009. 5 U.S.C. §552(a)(6).

B. June 14, 2010 FOIA Appeal (No. 2010-097)

34. Defendant's response was timely appealed by Plaintiffs to the U.S. Department of Interior, Office of Solicitor, FOIA Appeals Office on June 14, 2010.

35. By filing the June 14, 2010 appeal, Plaintiffs have exhausted all administrative remedies. On June 14, 2010, Plaintiffs appealed Defendant's May 17, 2010 response to Plaintiffs' April 9, 2010 FOIA request to the U.S. Department of Interior, Office of Solicitor, FOIA Appeals Office (hereinafter "DOI Appeals Office"). The DOI Appeals Office identified Plaintiffs' appeal as Appeal Number 2010-097.

36. On April 3, 2010, the DOI Appeals Office issued a response to Plaintiffs' appeal.

37. The FOIA Appeals Office' issued a decision on August 3, 2010.

38. The FOIA Appeal decision: (1) directed OSM to issue a determination on Plaintiffs' request for fee-waiver within 10 workdays; and, (2) directed OSM to provide a schedule that details the dates the agency anticipates release of documents responsive to Item 7.

39. All other issues were denied by the FOIA Appeals Office. Specifically, the FOIA Appeals Office: (1) denied release of documents responsive to items 2 and 3; (2) denied release of documents responsive to items 2 and 3 in electronic format; (3) denied Plaintiffs' challenge to OSM's staggered released of documents responsive to item 7; (4) denied Plaintiffs' request for an explanation of the agency's search methodology.

40. The DOI Appeals Office decision states that "[y]ou have the right to seek judicial review

of this decision under 5 U.S.S. §552(a)(4)(B).”

41. The DOI Appeals Office decision violates FOIA by, among other things: (1) unlawfully withholding agency records responsive to items 2 and 3; (2) unlawfully withholding agency records responsive to items 2 and 3 in full and original electronic format; (3) allowing continued withholding by allowing OSM to unreasonably delay release of documents responsive to item 7; and, (4) abusing its discretion by resolving the appeal without establishing any facts regarding the reasonableness of the agency’s search.

42. Defendant continues to illegally withhold documents in whole or in part requested by Plaintiffs on April 9, 2010. 5 U.S.C. §552(a)(6).

C. OSM’s Post-Appeal Response(s)

43. On August 17, 2010, OSM responded to the DOI Appeals Office Decision. The August 17, 2010 agency response states that “OSM had already determined [Plaintiffs] qualified for a fee waiver.” The response did not release responsive records.

44. On August 27, 2010, OSM partially released documents responsive to Item 7.

45. On August September 3, 2010, OSM partially released additional documents responsive to Item 7.

46. OSM continues to violate FOIA by failing to timely respond to Plaintiffs’ FOIA request, by failing to conduct a reasonable search for documents responsive to Item 7 and by withholding information from the responsive agency records it has thus far identified without adequately demonstrating that this information was exempt from disclosure under FOIA.

47. OSM has not released records responsive to Items 2 and 3.

48. OSM has not provided a search description.

49. Defendant continues to illegally withhold documents in whole or in part requested by Plaintiffs on April 9, 2010. 5 U.S.C. §552(a)(6).

FIRST CLAIM FOR RELIEF

Violation of the Freedom of Information Act *Defendant Has Illegally Withheld Documents in Violation of FOIA.*

50. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

51. Defendant continues to violate FOIA by withholding responsive agency records request by Plaintiffs on April 9, 2010. 5 U.S.C. §552(a).

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

SECOND CLAIM FOR RELIEF

Violation of the Freedom of Information Act *Defendant Failed To Search for Responsive Records.*

53. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

54. Defendant continues to violate FOIA by failing to conduct a reasonable search for documents responsive to Plaintiffs' April 9, 2010 FOIA request. 5 U.S.C. §552(a)(3)(C).

THIRD CLAIM FOR RELIEF

Violation of the Freedom of Information Act *Defendant Failed To Timely Respond to Plaintiffs' FOIA Request.*

55. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

56. Defendant continues to violate FOIA by failing to timely respond to Plaintiffs' April 9, 2010 FOIA request. 5 U.S.C. §552(a)(5).

FOURTH CLAIM FOR RELIEF

Violation of the Freedom of Information Act *Defendant Failed To Lawfully Respond to Plaintiffs' FOIA Appeal.*

57. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

58. The DOI Appeals Office decision violates FOIA by, among other things: (1) unlawfully withholding agency records responsive to items 2 and 3; (2) unlawfully withholding agency records responsive to items 2 and 3 in full and original electronic format; (3) allowing continued withholding by allowing OSM to unreasonably delay release of documents responsive to item 7; and, (4) abusing its discretion by resolving the appeal without establishing any facts regarding the reasonableness of the agency's search.

REQUEST FOR RELIEF

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

1. Declare that Defendant continues to violate FOIA by failing to lawfully respond to Plaintiffs' April 9, 2010 FOIA request in accordance with the statutory deadline;
2. Declare that Defendant continues to violate FOIA by failing to conduct a reasonable search for documents responsive to Plaintiffs' April 9, 2010 FOIA request;
3. Declare that Defendant continues to violate FOIA by withholding information from the responsive agency records it has thus far identified without adequately demonstrating that this information was exempt from disclosure under FOIA;
4. Direct by Order that Defendant immediately provide Plaintiff all records responsive to

the April 9, 2010 request identified to date;

5. Direct by Order that Defendant conduct new search and review and release of all responsive documents not subject to a properly asserted FOIA within thirty (30) days of issuance of any Court order;

6. Retain jurisdiction until sixty (60) days after the records have been released;

7. Grant 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 September 30th, 2010,

s/ Brad A. Bartlett

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