



## **JURISDICTION**

2. 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 jurisdiction).

3. Venue is properly before this District Court pursuant to 5 U.S.C. § 552 (a)(4)(B) and 28 U.S.C. § 1391(e).

## **PARTIES**

4. Plaintiff NEW MEXICO WILDERNESS ALLIANCE is a non-profit corporation dedicated to the protection, restoration and continued enjoyment of New Mexico's wild lands and wilderness areas. NMWA members have regularly participated in the preparation of the BLM's land use management plans affecting the Otero Mesa. NMWA and its members seek to protect the Otero Mesa and the wildlife that depend on this unique environment from harm that will result if unrestricted oil and gas development is allowed by the BLM. NMWA has invested substantial resources into cataloging the wilderness values of the Otero Mesa, including the presence of unique desert grassland habitats important to numerous species, including the black-footed ferret, northern aplomado falcon, pronghorn antelope, mule deer, and black-tailed prairie dog. NMWA is also dedicated to contributing to the public understanding of New Mexico's wild lands, including informing the public of the potential impacts to the Otero Mesa and Nutt grasslands and the area's wildlife that that may occur as a result of oil and gas development in the area. As a result of the FWS's refusal to provide public records pertaining to the Otero Mesa, NMWA and its members are deprived of important information essential to their organizational purposes.

5. Defendant U.S. Fish and Wildlife Service is an agency of the United States within the Department of the Interior.

6. Defendant GALE NORTON is sued in her official capacity as the Secretary of the Interior. Norton is the federal official ultimately responsible for ensuring that the FWS complies with its obligations under FOIA.

7. Defendant STEVEN A. WILLIAMS is sued in his capacity as the Director of the U.S. Fish and Wildlife Service. Williams is the federal official responsible for FWS's compliance with federal laws, including FOIA.

8. Defendant H. DALE HALL is sued in his official capacity as the Regional Director for Region 2 of the U.S. Fish and Wildlife Service. Hall is the federal officer responsible for Fish and Wildlife Service Region 2's compliance with federal laws, including FOIA.

### **STATUTORY BACKGROUND**

#### **A. The Freedom of Information Act.**

9. The Freedom of Information Act requires federal agencies to provide requested documents to the public unless one of the statute's exemptions applies. 5 U.S.C. § 552.

10. Upon receiving a FOIA request, an agency has twenty working days to determine and announce what documents the agency will release, what documents the agency plans to withhold, the reasons justifying any such withholding, and the appeal rights available to the requester. 5 U.S.C. § 552(a)(6)(A).

11. Although an agency may grant itself an extension of ten additional days in "unusual circumstances," FOIA does not permit an agency to delay a response indefinitely. 5 U.S.C. § 552(a)(6)(B). The Department of Interior's (DOI) FOIA regulations identify the three specific "unusual circumstances" that may justify a 10-day extension of the 20-day deadline. 43 C.F.R. § 2.13(a). These regulations also require an agency to notify the requester in writing of such an extension, and to state the justification for the extension. 43 C.F.R. § 2.13(b).

12. FOIA provides for fee waivers or reductions in fees if disclosure of the requested information is in the public interest and if disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

13. FOIA provides that a requester "shall be deemed to have exhausted his administrative remedies... if the agency fails to comply with the applicable time limit provisions." 5 U.S.C. § 552(a)(6)(A). Likewise, the DOI's FOIA regulations state that where an agency has failed to

comply with applicable time limits, the requestor may “consider the request denied and file an appeal . . . or file a lawsuit.” 43 C.F.R. § 2.13(c).

14. When an administrative appeal is filed, the agency must respond to the appeal within 20 workdays. 5 U.S.C. § 552(a)(6)(A)(ii); 43 C.F.R. § 2.32(a).

15. FOIA provides this Court with jurisdiction to enjoin DOI “from withholding agency records and to order the production of any such records improperly withheld from” requesters. 5 U.S.C. § 552(a)(4)(B).

**B. The Endangered Species Act.**

16. The purpose of the ESA is “to provide a program for the conservation” of “endangered species and threatened species” and “to provide a means whereby the ecosystems upon which [such] species depend may be conserved.” 16 U.S.C. § 1531(b).

17. To achieve its goals and objectives, the ESA directs FWS to list species that are “threatened” or “endangered” within the meaning of the ESA. 16 U.S.C. § 1533.

18. Upon listing, the ESA requires that every federal agency must consult with the FWS whenever it undertakes activities that may jeopardize the continued existence of any listed species. 16 U.S.C. § 1536(a)(2); see also 50 C.F.R. §§ 402.10 – 402.16. Federal agencies are also required to “confer” with the FWS on any action which is likely to jeopardize the continued existence of any species proposed for listing under the ESA. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(a). Federal agency actions include those projects "authorized, funded, or carried out by such agency," including land use management plans that authorize the development of oil and gas resources on public lands such as the one at issue here. See id.

19. To facilitate the consultation process, the federal agency proposing a project must prepare a "biological assessment," or BA, which identifies listed species in the area and determines whether the proposed action is likely to affect any listed species. 50 C.F.R. §§ 402.02, 402.12. If FWS issues a written "concurrence" with an action agency's conclusion that a proposed action "is not likely to adversely affect the listed species," then the consultation is complete. See 50

C.F.R. §§ 402.13(a) and 402.14(b). If FWS cannot issue a concurrence, or if the action agency concludes that the proposed action is likely to adversely affect a listed species, the FWS must prepare a more formal and comprehensive "biological opinion," whose purpose is, among other things, to determine whether the proposed action is likely to jeopardize the species continued existence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g).

## **FACTUAL BACKGROUND**

### **A. The Otero Mesa and The Proposed Resource Management Plan Amendment.**

20. The Otero Mesa in south-central Mexico is one of the wilder places in the United States. Rugged fault-block mountain ranges, broad basins, and gentle volcanic landforms make up its landscape. Otero Mesa also contains stretches of Chihuahuan desert grasslands, one of the most endangered ecosystems in North America. These grasslands remain largely unfragmented and provide habitat for pronghorn antelope, mule deer, the northern aplomado falcon, black-tailed prairie dog, and other species. These lands also provide important grazing areas for local ranchers, and the aquifers that underlie them can provide vital water to an arid landscape.

21. BLM's Las Cruces field office in New Mexico is currently preparing an amendment to a Resource Management Plan (RMP) to address fluid mineral leasing and development on about 1.8 million acres of federally-owned lands in Otero and Sierra Counties, which encompasses the Otero Mesa. As provided by the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, the RMP amendment will establish whether, and on what conditions, BLM will allow exploration and the development of natural gas reserves to proceed at Otero Mesa. The substantial natural gas development at Otero Mesa as planned by BLM in the proposed RMP amendment would require miles of new roads, pipelines, transmission lines and hundreds of gas wells.

22. Otero Mesa is also home to numerous species that are listed as threatened or endangered under the ESA, or considered "candidates" for future listing under the ESA. These species included, among others, the black-footed ferret, northern aplomado falcon, the Kuenzler's

hedgehog cactus, the southwestern willow flycatcher, Rio Grande silvery minnow, Todsens' pennyroyal, Sacramento prickly poppy, Sacramento Mountains checkerspot butterfly, bald eagle, Mexican spotted owl, Chiricahua mountain thistle, and mountain plover.

23. State and federal wildlife officials have expressed particular concern with regards to whether oil and gas development within the Otero Mesa and Nutt desert grasslands will destroy habitat that is needed for the recovery of the endangered northern aplomado falcon. The falcon was considered extirpated from New Mexico in 1986 when it was given protection under the ESA, but since 1991 there have been ten (10) confirmed sightings of the falcon within the state.

24. Under Section 7 of the ESA, BLM was obligated to consider, in consultation with the FWS, whether oil and gas development on the Otero Mesa as planned by BLM in the proposed RMP amendment could jeopardize the continued existence of any threatened or endangered species. BLM also was required to "confer" with the FWS if oil and gas development on the Otero Mesa could jeopardize the continued existence of any species that is a candidate for listing under the ESA.

25. On or about April 18, 2003, BLM forwarded to FWS a biological assessment (BA) identifying several species found on the Otero Mesa that could be affected by oil and gas development under the proposed RMP amendment.

26. In the BA, BLM originally determined that oil and gas development at Otero Mesa was "Likely to Adversely Affect" both the northern apolmado falcon and the Krunzler's hedgehog cactus. On or about October 7, 2003, FWS revised this determination for both species to "Not Likely to Adversely Affect."

27. BLM's change of this determination for the northern apolmado falcon and the Krunzler's hedgehog cactus significantly alters the FWS's obligations under Section 7 of the ESA. The original determination in the BA required the FWS to prepare a biological opinion to formally evaluate whether oil and gas development under the proposed RMP amendment would

jeopardize the continued existence of these two species. The revised “Not Likely to Adversely Affect” determination eliminates this requirement.

**B. NMWA’s FOIA Request and the FWS’s Failure to Respond.**

28. On January 12, 2004, NMWA sent a FOIA request to FWS in which it asked for a copy of the April 18, 2003 BA prepared by BLM, as well as certain records (including, but not limited to, notes, memoranda, letters, meeting agenda, electronic mail and any written summaries of telephone conversations) relating to or discussing the BA or species that could be affected by BLM’s proposed RMP amendment.

29. The FOIA request also demonstrated that the NMWA was entitled to a fee waiver because the disclosure of the information requested would be in the public interest since it would contribute significantly to the public’s understanding of both (1) the BLM’s compliance with the ESA and (2) the potential adverse impacts to various species protected under the ESA that may result from proposed oil gas development on the Otero Mesa. NMWA’s letter also explained that the requested information is not in the commercial interest of NMWA.

30. According to the U.S. Postal Service’s return receipts, the FWS’s Regional FOIA Officer received a copy of the request on January 15, 2004.

31. The Region 2 FWS Office in Albuquerque, New Mexico responded to the FOIA request in a letter dated February 13, 2004. That letter acknowledged receipt of NMWA’s FOIA request and stated that “[w]e are unable to respond to your request within the time limits established by the FOIA due to a backlog of requests and other unforeseen circumstances.” The FWS letter continues with a statement that “[w]e expect to complete our response by March 15, 2004.”

32. Without identifying and explaining which of the three “unusual circumstances” set forth in FOIA’s regulations for 10-day extensions applied to the request, FWS took an extension beyond the 20-day time limit to reply to the request.

33. After the February 13, 2004 letter, no further communication has been received by NMWA from FWS regarding the request. On behalf of NMWA, Earthjustice attorney Mike

Harris left a phone message with the FWS Region 2 FOIA Coordinator, Ms. Tatiana Engleman, during the week of March 22, 2004. This message was not returned.

34. On April 12, 2004, NMWA filed an appeal, pursuant to 43 C.F.R. § 2.28(a)(3), with the Department of Interior's FOIA Appeals Officer seeking an order directing FWS to comply with the request for records. A response to the appeal was due May 4, 2004, but, as of the date of filing of this Complaint, no response to the appeal or the original FOIA request has been received by NMWA.

### **FIRST CLAIM FOR RELIEF**

(Violation of the Freedom of Information Act)

35. The allegations contained in paragraphs 1-34 are incorporated herein by reference.

36. FOIA requires that a federal agency make available records "promptly" upon request, 5 U.S.C. § 552(a)(3)(A), that a federal agency determine "within 20 days" whether to comply with a request, that the agency make a determination upon an appeal within 20 working days, 5 U.S.C. § 552(a)(6)(A)(ii), and grant a waiver or reduction of fees if disclosure of the requested information is in the public interest and if disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

37. Defendants have failed to make available the records requested on January 12, 2004 by NMWA, have failed to make a determination as to whether FWS would provide or withhold requested records, and have failed to make a determination concerning NMWA's request for a fee waiver.

38. Defendants' failure to comply with its above-described duties violates FOIA, 5 U.S.C. §552(a)(6), and Department of Interior regulations, 43 C.F.R. § 402.01 et seq., is arbitrary, capricious, and otherwise not in accordance with law, and/or constitutes final agency action unlawfully withheld or unreasonably delayed.

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## **PRAYER FOR RELIEF**

The New Mexico Wilderness Alliance respectfully requests that this Court:

- (1) Declare that Defendants' failure to provide NMWA with all of the information requested in its January 12, 2004 FOIA request letter violated FOIA as set forth above;
- (2) Declare that Defendants' failure to grant NMWA a waiver of fees with respect to the information requested in its January 12, 2004 FOIA request letters violated FOIA as set forth above;
- (3) Order Defendants to immediately provide NMWA with copies of all of the requested documents without charge;
- (4) Grant NMWA such other injunctive and declaratory relief as this Court deems just and proper;
- (5) Retain jurisdiction over this case to ensure compliance with this Court's decree; and,
- (6) Award NMWA its reasonable attorney fees, costs and expenses incurred in pursuing this action.

Respectfully submitted,

Dated: May 13, 2004

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