



File: 2064

July 17, 2015

## FREEDOM OF INFORMATION ACT REQUEST

### **Certified Mail/Return, Receipt No. 7013 1710 0002 1316 6821**

Mr. Scott Armentrout, Supervisor ([sarmentrout@fs.fed.us](mailto:sarmentrout@fs.fed.us))  
Levi Broyles, District Ranger, Paonia District ([lbroyles@fs.fed.us](mailto:lbroyles@fs.fed.us))  
Ms. Lee Ann Loupe ([lloupe@fs.fed.us](mailto:lloupe@fs.fed.us))  
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### **Certified Mail/Return, Receipt No. 7013 1710 0002 1316 6814**

Mr. Ken Tu, Regional Environmental Coordinator ([kktu@fs.fed.us](mailto:kktu@fs.fed.us))  
Ms. Marge Gallegos, Regional FOIA Coordinator ([margegallegos@fs.fed.us](mailto:margegallegos@fs.fed.us))  
U.S. Forest Service, Rocky Mountain Region  
740 Simms Street  
Golden, CO 80401

## **Re: Coal Mine Exception to Colorado Roadless Rule, and North Fork Gunnison Coal**

Dear Supervisor Armentrout, Ranger Broyles, Ms. Loupe, Mr. Tu, and Ms. Gallegos:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and implementing regulations, 36 C.F.R. Part 200, we request copies of the **all** records – including **but not limited to** electronic mail messages, maps, draft documents, photos, GIS data, GPS data, handwritten notes, meeting or phone conversation notes, correspondence (including, but not limited to correspondence between any office or staff of the U.S. Forest Service) or **any other records** – generated, modified, or acquired by the Grand Mesa, Uncompahgre and Gunnison (GMUG) National Forest or the U.S. Forest Service Rocky Mountain Region **concerning or relating** to the following:

1. The proposed coal mining exception to the Forest Service's Colorado Roadless Rule, for which a scoping notice was published in the Federal Register on April 7, 2015; and/or
2. Management of coal resources (including but not limited to coal leasing, coal exploration, coal mining, and reclamation) in the North Fork Gunnison Valley of Colorado.

We request only those records created, modified or acquired by the Forest Service since **March 13, 2015**, the date of our last request on related issues.

We specifically omit from this request; (1) any unmodified documents submitted to the Forest Service by Earthjustice; (2) attorney-client communications between Forest Service staff and Forest Service attorneys at the USDA Office of General Counsel or the Department of Justice where those communications were not shared with persons from other agencies or entities; and (3) scoping comments on the proposed coal mining exception to the Forest Service's Colorado Roadless Rule that are available at the Forest Service's "public comment reading room" website, <https://cara.ecosystem-management.org/Public//ReadingRoom?Project=46470>.

Please note that if it is more convenient for the agency, we would be happy to be provided with electronic copies of the requested records (on a CD or thumb-drive, for example). If the agency intends to make records available electronically, we request that the records be made available in word-searchable "pdf" format.

We request that responsive records be released as soon as they are available. To the extent that some subset of the requested records is readily available, we would be happy to receive them while BLM searches for other records.

This request is made on behalf of WildEarth Guardians. WildEarth Guardians is a Santa Fe, New Mexico-based nonprofit organization with offices in Denver and members throughout the American West. WildEarth Guardians is dedicated to protecting and restoring the wildlife, wild places, and wild rivers of the American West, and to safeguarding the Earth's climate. WildEarth Guardians has members throughout the American West, including Colorado, that utilize the region that will be affected by air pollution, habitat disruption, and damage to natural resources that may be caused by mining and burning the coal at issue. WildEarth Guardians and its members work to reduce harmful air pollution to safeguard public health, welfare, and the environment.

#### Background on the Freedom of Information Act

Congress amended FOIA with the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2007, 110 Pub. L. No. 175, 121 Stat. 2524 (to be codified at 5 U.S.C. § 552). In the Congressional findings to the OPEN Government Act, Congress found that "the American people firmly believe that our system of government must itself be governed by a presumption of openness." 110 Pub. L. No. 175 § 2(2). In addition, Congress found that "disclosure, not secrecy, is the dominant objective of [FOIA]." Id. § 2(4) (quoting Dep't of Air Force v. Rose, 425 U.S. 352 (1976)). Thus, under FOIA, there is a "strong presumption in favor of disclosure." Id. § 2(3) (quoting Dep't of State v. Ray, 502 U.S. 164 (1991)).

In a March 19, 2009 memorandum to the heads of executive departments and agencies, Attorney General Eric Holder underscored that agencies should release records requested under FOIA even if the agency might have a technical excuse to withhold them:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can

demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.

Memo. of Attorney General E. Holder (March 19, 2009).

Further, federal courts have held that any record that leaves a federal government agency and goes to another party cannot be withheld under Exemption 5 of the FOIA. See 5 U.S.C. § 552(b)(5) (2009); see also Mead Data Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 253 (D.C. Cir. 1977); Senate of Puerto Rico v. Dep't of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987); Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 1 (2001) (Exemption 5 applies to "inter-agency or intra-agency" communication). Further, any comments from or to other agencies on the environmental impact of any proposed agency action may not be withheld as interagency documents. See 40 C.F.R. § 1506.6(f) (2009).

### Fee Waiver Request

Release of the records described in this request will primarily benefit the public and substantially contribute to its understanding of the government's policies and activities concerning management of the public lands and wildlife of the North Fork Valley, where the Mountain Coal Company intends to bulldoze roadless lands to explore and mine for coal to expand its mining operations, as well as concerning policies related to climate change and coal mining and coal combustion, and the Forest Service's policies and activities concerning roadless lands and environmental protection.

WildEarth Guardians has participated in the public involvement opportunities with regard to coal mining on roadless lands in the North Fork Valley, and currently operating mines on public land in Colorado, and has made available information about protecting lands as well as the global climate that is threatened by uncontrolled methane releases from coal mines through the presentation of public comment, the preparation of action alerts, press releases, the filing of administrative appeals, and litigation. WildEarth Guardians will make the information obtained from this request available to members and other groups (including but not limited to Sierra Club) concerned with protecting the public lands, wildlife, and climate at risk from uncontrolled methane venting at coal mines. WildEarth Guardians will also make available to the media newsworthy summaries of the requested documents, as well as newsworthy documents themselves. Finally, release of the information may empower WildEarth Guardians or other organizations or citizens to present comment on and, if warranted, participate in litigation concerning coal mining and coal exploration in Colorado and across the West.

Release of the information will also empower members of WildEarth Guardians, and members of the public, to engage in public advocacy efforts to protect and conserve the federal public lands, roadless areas, wildlife, and the global climate at risk from coal mining, and to more effectively evaluate the need for litigation or grassroots action. WildEarth Guardians, a not-for-profit corporation, does not seek these documents for commercial use.

Accordingly, we request that you grant a waiver of fees pursuant to § 552(a)(4)(A) and 7 C.F.R. Part 1, Appendix A, Section 6. We note that the Forest Service has repeatedly granted WildEarth Guardians a fee waiver for similar requests in the past. However, if a waiver is not granted, please inform the undersigned of the cost of disclosing the above-described records if such fees exceed \$15.00.

#### Additional Information Concerning Fee Waiver: Legal Background

In 1974, Congress amended the judicial review section for fee waivers under FOIA, replacing the “arbitrary and capricious” threshold of review, by which courts are required to grant deference to agencies, with the more rigorous *de novo* review standard. See § 552(a)(4)(A)(vii) (when review is limited to the administrative record before the agency at the time of the decision). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information....

132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy).

FOIA’s amended fee waiver provision was intended specifically to facilitate access to agency records by citizen “watchdog” organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Gov’t Ass’n v. Dep’t of State, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Fee waivers are essential to such groups, which

[R]ely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions ....

[The fee waiver] provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups.

Id. at 93-94 (quoting Ettlinger v. FBI, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added)). Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations that actively challenge agency actions and policies.

Public interest fee waivers are to be “liberally construed in favor of waivers for noncommercial requesters.” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sen. Leahy)). “[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.” Ettlinger, 596 F. Supp. at 873 (quoting legislative history). An agency may not refuse a fee waiver when “there is nothing in the agency’s refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public.” Id. at 874 (quoting Fitzgibbon v. CIA, Civ. No. 76-700 (D.D.C. Jan. 10, 1977)). “Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver.” Id. (citing 5 U.S.C. § 552(a)(4)(B)).

In light of these principles, and based on this FOIA request, WildEarth Guardians – a non-profit group interested in oversight of the Forest Service’s management of the public lands and natural resources – is entitled to a fee waiver for the documents requested. The Forest Service has routinely granted such fee waiver requests for other WildEarth Guardians’ FOIA requests concerning coal mining-related activities in the North Fork area. The factors identified in the Department of Agriculture’s (USDA’s) regulations concerning fee waivers are addressed specifically below.

Whether disclosure of the requested information is “likely to contribute” to an understanding of government operations or activities. See 7 C.F.R. Part 1, Appendix A, Section 6(a)(1)(ii).

As an initial matter, “courts have consistently overturned agency denials of fee waivers when requestors have made a legitimate, objectively supportable showing of using the requested information for scholarly research into political and historical events.” Ettlinger, 596 F. Supp. at 875; see also Weisberg v. Dep’t of Justice, 705 F.2d 1344, 1360 (D.C. Cir. 1983).

The informative value of the documents requested is high. Disputes over climate change, coal mining, and coal-fired power plants have been highly public affairs, drawing Forest Service and IBLA appeals, comments from scores of citizens, and federal litigation. The same can be said for Forest Service decisions to permit or otherwise facilitate road construction in inventoried roadless areas. WildEarth Guardians will use this information to better inform the public, legislators, and the organization’s staff as to the potential for the Forest Service’s decision to harm or benefit the climate, roadless lands, wildlife, and taxpayers, and to understand how the Forest Service understands its duties to protect the resources of America’s public lands at risk from the agency’s actions.

Whether disclosure of the requested information will contribute to an understanding of the subject by the general public. See 7 C.F.R. Part 1, Appendix A, Section 6(a)(1)(iii).

Public interest groups satisfy this requirement where requestors show the “ability to understand and disseminate the information.” Judicial Watch, Inc. v. Dep’t of Justice (Judicial Watch I), 122 F. Supp. 2d 5, 10 (D.D.C. 2000). In addition, a description of past successful methods of informing the public combined with a “firm intent to disseminate” the information has been held

to meet this test. Judicial Watch, Inc. v. Dep't of Justice (Judicial Watch II), 185 F. Supp. 2d 54, 59-60 (D.D.C. 2002) (quoting Judicial Watch I, 122 F. Supp. 2d at 13).

WildEarth Guardians meets this test. First, the information will enable WildEarth Guardians to provide information to the public at large as to past and pending Forest Service proposals to permit bulldozing and additional coal mining on roadless public lands that may harm the climate, air quality, wildlife, and wilderness lands. WildEarth Guardians has expertise in communicating with the public and the media on issues related to the protection of wild lands, wildlife, clean air and global climate change in Colorado and across the West. WildEarth Guardians has staff recognized as experts on the policy and politics of energy development, wildlife, air quality, climate change, and coal mine methane to which this request relates. Numerous articles, press releases, and websites that attest to WildEarth Guardians' expertise in communicating with the media on these issues can be found on the internet, and WildEarth Guardians' website.<sup>1</sup>

Second, WildEarth Guardians intends to publish summaries of the information sought here to the media as well as make available the information itself.

Whether the disclosure is likely to contribute 'significantly' to public understanding of government operations or activities. See 7 C.F.R. Part 1, Appendix A, Section 6(a)(1)(iv).

The legislative history of FOIA makes clear that the 'significance' test is met where, as here, the information requested will support "public oversight of agency operations":

A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.

132 Cong. Rec. H9464 (Reps. English and Kindness); see also McClellan Ecological Seepage Situation, 835 F.2d at 1284-86.

The requested records will support public oversight by allowing the public to better understand how the Forest Service's actions and decisions have in the past and may in the future impact public lands, roadless areas, wildlife, air pollution and climate change. WildEarth Guardians specifically intends to use the information provided to educate the public concerning a proposal

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<sup>1</sup> See, e.g., [www.wildearthguardians.org](http://www.wildearthguardians.org) (WildEarth Guardians' website, with links to numerous reports, studies, alerts); <http://climatewest.org/> (WildEarth Guardians blog addressing climate change issues with numerous posts concerning the Lease Modifications); <https://twitter.com/wildearthguard> (WildEarth Guardians' Twitter feed); <http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=5974> (Oct. 2008 press release on WildEarth Guardians lawsuit on coal mine methane); <http://www.youtube.com/watch?v=v-7cdXLgGhc> (WildEarth Guardians video alert re: Powder River Coal leasing); [http://www.youtube.com/watch?v=Hj1BooeqC6A&feature=channel\\_page](http://www.youtube.com/watch?v=Hj1BooeqC6A&feature=channel_page) (WildEarth Guardians video alert re: Red Cliff Mine); <http://coloradoindependent.com/79456/blm-rethinking-climate-change-impacts-of-coal-mine-methane-on-colorados-western-slope> (WildEarth Guardians' spokesman quoted on Elk Creek mine expansion); <http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=8669#.VOY-0WXn-Uk> (2012 press release concerning West Elk mine expansion); [http://www.denverpost.com/ci\\_21637779/environmental-groups-challenge-expansion-colorados-west-elk-mine](http://www.denverpost.com/ci_21637779/environmental-groups-challenge-expansion-colorados-west-elk-mine) (2012 Denver Post article on challenge to West Elk lease modifications).

to amend the Colorado Roadless Rule to permit road construction for coal mining. Debate and oversight of the Forest Service's rulemaking and NEPA processes and ultimate decision will be better informed by the release of these records, many of which have never been divulged or presented to the public. WildEarth Guardians has previously used information obtained through FOIA on the West Elk mine to support the filing of comments, public appeals, administrative appeals and litigation. WildEarth Guardians therefore meets this standard.

In addition, Forest Service cannot deny a fee waiver on the basis that any of the requested information is reasonably available to WildEarth Guardians through means other than this FOIA request. See Project on Military Procurement v. Dep't of the Navy, 710 F. Supp. 362, 365-66 (D.D.C. 1989) (rejecting Navy's argument that overlapping information may be found in other Navy documents which other members of the public have; "the substantive contents of even a single document may substantially enrich the public domain and justify a fee waiver"). Thank you for your prompt attention to this request. I look forward to your response as soon as possible, but not later than 20 days, as required by law. If you have any questions in this matter, please contact me at 303-996-9622.

Sincerely,



Edward B. Zukoski, Staff Attorney

cc: Jeremy Nichols, WildEarth Guardians  
Lois Witte, USDA Office of General Counsel ([Lois.Witte@ogc.usda.gov](mailto:Lois.Witte@ogc.usda.gov))