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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA, TUCSON DIVISION

Save the Scenic Santa Ritas; Center for
Biological Diversity; Farmers
Investment Co.; and Farmers Water
Co.,

Plaintiffs,

v.

United States Forest Service; James
Upchurch, Supervisor of the Coronado
National Forest,

Defendants.

No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Federal Advisory Committee Act, 5 U.S.C.
Appx. §1 *et seq.*; Freedom of Information
Act, 5 U.S.C. §552 *et seq.*; Administrative
Procedure Act, 5 U.S.C. §701 *et seq.*)

INTRODUCTION

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2 1. Plaintiffs Save the Scenic Santa Ritas (“SSSR”), an Arizona non-profit corporation,
3 Center for Biological Diversity (“CBD”), an Arizona non-profit corporation,
4 Farmers Investment Co. (“FICO”), an Arizona corporation, and Farmers Water Co.
5 (“Farmers Water”) an Arizona corporation, challenge the failure of Defendants
6 United States Forest Service (“USFS”) and James Upchurch (“Upchurch”),
7 Supervisor of the Coronado National Forest (“CNF”), to comply with (a) the
8 Federal Advisory Committee Act (“FACA”), 5 U.S.C. Appx. §1 *et seq.*, and (b) the
9 Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, *as amended*.
- 10 2. This lawsuit involves the environmental review managed by USFS and CNF
11 officials of a proposal by Augusta Resources, Inc. (“Augusta”) and its subsidiary
12 Rosemont Copper Co. (“Rosemont”) for a large, open pit copper mine and
13 associated waste dumping and processing facilities to be located on mostly federal
14 public land in the CNF in the Santa Rita Mountains south of Tucson, Arizona
15 (“Rosemont Project”). Pursuant to the National Environmental Policy Act
16 (“NEPA”), 42 U.S.C. §4321 *et seq.*, the USFS and CNF must conduct an
17 environmental review of the Mining Plan of Operations (“MPO”) for the Rosemont
18 Project. Augusta/Rosemont submitted the initial MPO to the CNF in July 2007.
19 Augusta/Rosemont submitted a revised MPO to the CNF in February 2008. *See*
20 USFS “Notice of Intent to Prepare an Environmental Impact Statement. Rosemont
21 Copper Project, Coronado National Forest, Pima County, Arizona.” 73 Fed. Reg.
22 13627-13529 (March 13, 2008).
- 23 3. This NEPA review will include preparation and issuance of a draft environmental
24 impact statement (“DEIS”), as well as subsequent preparation of a final
25 environmental impact statement (“FEIS”) based on public responses to the DEIS.
26 CNF is the “lead agency” for preparation of the DEIS. The DEIS will include the
27 proposed analysis of the Rosemont Project’s environmental impacts, potential
28 alternatives, and mitigation measures. The proposed analysis will be the product of

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input from federal, state, local, and tribal “cooperating agencies” and a non-governmental NEPA consultant, working under the direction of CNF. The DEIS is the primary document to set the stage for further evaluation of the Rosemont Project.

4. **FACA** requires establishment of a “federal advisory committee” when a “committee, board, etc.” that includes non-governmental employees is convened to provide “advice or recommendations” to officers of the Federal government. 5 U.S.C. Appx. §3(2). For nearly two years, USFS and CNF officials have been meeting regularly with governmental “cooperating agencies” **together with representatives of Rosemont** in order to review and analyze data and advise USFS and CNF officials regarding preparation of the DEIS. The committee of the “cooperating agencies” and Rosemont representatives is a “federal advisory committee” within the meaning of FACA. Nonetheless, this committee was not properly established pursuant to FACA nor have its meetings been conducted consistent with FACA requirements.

5. The USFS and the CNF have illegally allowed, and, upon information and belief, are continuing to allow, designated and identified Rosemont representatives to attend and participate in critical meetings between the USFS, the CNF, and other federal, state, and local government agencies – without notifying, offering, or allowing the public the same opportunities. This violates the fundamental Congressional intent behind FACA: a committee with a mix of governmental and non-governmental interests that is established to advise an agency on matters within its jurisdiction, such as the one formed by Defendants to advise on preparation of the DEIS for the Rosemont Project, must be open to public participation in order to assure a balanced presentation of viewpoints.

6. With respect to **FOIA**, despite repeated attempts by Plaintiff CBD to obtain certain records/documents from the USFS and the CNF, the federal agencies have to date failed to meet the statutory deadlines by producing all of the requested materials.

1 The requested documents specifically relate to communications in the public record
2 between Rosemont and Defendants and meetings of the “cooperating agencies.”
3 Instead, Defendants have provided only a small subset of the requested
4 records/documents (which includes documents that were initially listed on the CNF
5 website but later removed or re-located without explanation) without an adequate
6 justification for failing to provide the materials within the 20-working-day time
7 period mandated by Congress. The agency failed to disclose all responsive records
8 within the statutory timeframes, or even identify – let alone justify – any lawful
9 basis for withholding them from CBD.

10 7. Having learned of Rosemont’s improper participation in these meetings, CBD
11 submitted a letter to the USFS and the CNF on September 30, 2010, which
12 requested, pursuant to FOIA, the agency’s records and documents related to the
13 meetings and advice and recommendations regarding preparation of the DEIS. The
14 agency failed to provide the required information responsive to CBD’s FOIA
15 request within the 20-day timeframe mandated by FOIA. The agency finally
16 provided a small subset of the requested records/documents on December 13, 2010,
17 plus a brief second disclosure on December 29, 2010, but has to date failed to
18 provide the majority of the documents or any justification for refusing to disclose
19 the requested documents.

20 8. The violations by the USFS and the CNF of FOIA and FACA have severely
21 prejudiced review of the proposed Rosemont Project by the “cooperating
22 agencies” because Rosemont, the project proponent, alone and without balancing
23 input from other members of the public, has participated in the advice and
24 recommendations regarding impacts, alternatives, and mitigation. This has
25 compromised the unbiased evaluation of the proposed Rosemont Project leading to
26 preparation of the DEIS, and Plaintiffs’ rights to participate fully in that initial
27 evaluation. Furthermore, the active participation by Rosemont representatives in
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1 the deliberations of the “cooperating agencies” has had a chilling effect on their
2 ability to evaluate the Rosemont Project without the pressure of outside influence.

3 9. To remedy these violations of law, Plaintiffs seek an order declaring that USFS has
4 failed to comply with the FACA and FOIA, and injunctive relief ordering the
5 agency to disclose all responsive records immediately and to comply with FACA’s
6 requirements for the establishment and conduct of a “federal advisory committee”
7 prior to any further review or preparation of the Rosemont DEIS.

8 **JURISDICTION**

9 10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346,
10 and 5 U.S.C. § 552(a)(4)(B), because this action arises under the laws of the United
11 States, including the FACA and FOIA, and involves the United States as a
12 defendant. An actual, justiciable controversy exists between Plaintiffs and
13 Defendants. The requested relief is proper under 28 U.S.C. §§ 2201-02 and 5
14 U.S.C. §§ 705 and 706. The challenged agency actions and/or inactions are subject
15 to this Court’s review under the Administrative Procedure Act, 5 U.S.C. §§ 702,
16 704, and 706 (“APA”), as well as the FOIA, 5 U.S.C. § 552(a).

17 **VENUE**

18 11. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.
19 § 1391(e) because Plaintiffs reside in and maintain office in Tucson, Arizona (CBD
20 and SSSR), and Sahuarita, Arizona (FICO and Farmers Water). Assignment is
21 proper in the Tucson Division because the offices of the Defendant James
22 Upchurch, Supervisor, Coronado National Forest Office, is located in Tucson, and
23 the violations of FACA and FOIA occurred in that office, and the United States
24 Forest Service is the governing agency of Coronado National Forest.

25 **PARTIES**

26 12. Plaintiff Save the Scenic Santa Ritas (“SSSR”) is a volunteer-based, non-profit
27 organization, based in Tucson, Arizona. The mission of SSSR is to protect the
28 scenic, aesthetic, recreational, environmental and wildlife values of the Santa Rita

1 Mountains, Patagonia Mountains, Canelo Hills and San Rafael Valley through
2 participation in the permitting process, education and outreach, including
3 protection of these areas from degradation due to mining activities. Among other
4 activities, SSSR is currently working to protect public land from the large, open-pit
5 copper mine known as the Rosemont Project.

6 13. Plaintiff Center for Biological Diversity (“CBD”) is a non-profit corporation with
7 more than 43,000 members dedicated to the preservation, protection, and
8 restoration of biodiversity and ecosystems throughout the world. The Center’s
9 main office is located in Tucson, Arizona. The Center also has an office in
10 Flagstaff, Arizona. The Center works through science, law, and creative media to
11 secure a future for all species, great or small, hovering on the brink of extinction.

12 14. Plaintiff Farmers Investment Co. (“FICO”) is an Arizona corporation and a family-
13 owned farm with approximately 250 employees. It grows pecans on approximately
14 7,000 acres it owns in and around Sahuarita in the Santa Cruz Valley, adjacent to
15 the Santa Rita Mountains. The resources of land, climate, and water make the Santa
16 Cruz Valley a special place for FICO employees and others. The value of FICO’s
17 land, both presently for its ability to continue to farm successfully its pecan crops
18 and for future alternate uses, could be adversely affected by the Rosemont Project.
19 FICO will be significantly affected by the Rosemont Project because of the
20 significant ground water drawdowns that the mine will demand and the devastating
21 effects on the natural and historic environment not only in the area directly
22 impacted by the Project’s footprint but in the penumbra of the surrounding land,
23 air, and visual resources. The Rosemont Project will cast a dark shadow on the
24 future use and enjoyment of the region for many generations.

25 15. Plaintiff Farmers Water Co. (“Farmers Water”), a subsidiary of Farmers
26 Investment Co. (“FICO”), provides water to more than 2,000 customers and
27 maintains a service area that encompasses approximately 11,000 acres in the
28 vicinity of Continental and Sahuarita, Arizona. In serving its customers, Farmers

1 Water Co. relies totally upon the aquifer located in the Upper Santa Cruz sub-
2 basin. As a result, Farmers Water and its many customers stand to be heavily
3 impacted by water availability and quality issues stemming from the proposed
4 Rosemont Copper Company (“Rosemont”) copper mine (the “Rosemont Mine
5 Project”), which will use water from wells within the area of Farmers Water’s
6 Certificate of Convenience and Necessity (“CC&N”).

7 16. Members of CBD and SSSR and FICO and Farmers Water employees regularly
8 use the lands at and adjacent to the site of the proposed Rosemont Project for
9 hiking, aesthetic enjoyment, wildlife viewing, photography, and scientific study.
10 These uses will be adversely and significantly affected by Defendants’
11 consideration of, and/or approval of, the Rosemont Project.

12 17. FICO, Farmers Water, SSSR, and CBD, and their employees and members, have a
13 specific interest in seeing that the USFS process for reviewing and considering the
14 proposed Rosemont Project complies with all substantive and procedural laws and
15 regulations, including FACA. The failure by Defendants to involve the public,
16 including employees and members of Plaintiffs, in the establishment and
17 implementation of the FACA advisory committee for its review of the Rosemont
18 proposal and advice and preparation leading to the preparation of the DEIS, while
19 unilaterally welcoming the participation of the proponent, has already impaired,
20 and will continue to impair in the future, Plaintiffs’ and their employees’ and
21 members’ rights under FACA. The denial of the opportunity for Plaintiffs’
22 members and employees to be considered for membership in the FACA committee
23 established by the CNF also violates Plaintiffs and their members’ and employees’
24 rights under FACA.

25 18. Defendants’ violations of FOIA and FACA have denied Plaintiffs information to
26 which they are entitled. Without this information, Plaintiffs can not provide
27 themselves, their membership and employees, or the general public with
28 information regarding the CNF and the proposed Rosemont Project that is the

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subject of the information request, nor can they effectively advocate for the protection of the CNF through administrative and legal processes, key goals of Plaintiffs. Thus, Plaintiffs are injured in fact by the Defendants' violations, which injuries can be redressed by this suit.

19. Defendants' unlawful use of a FACA advisory committee, especially in its allowance of direct and improper participation by Augusta/Rosemont, has already impaired, and will continue to impair in the future, Plaintiffs' and their employees' and members' rights under FACA. Furthermore, the active participation of Augusta/Rosemont representatives in the deliberative process of the cooperating agencies' meetings has a distinct chilling effect upon the ability of cooperating agencies to speak candidly regarding their evaluations and guidance to CNF.
20. The failure of the USFS to comply with the FOIA, including the failure to produce the requested records/documents within the FOIA-mandated deadlines, has already impaired, and will continue to impair in the future, CBD's and its members' rights under FOIA.
21. Defendant USFS is an agency within the United States Department of the Agriculture ("DOA"), and is responsible for managing federal public lands at the Rosemont site, and is an agency within the meaning of the FOIA. 5 U.S.C. § 552(f).
22. Defendant James Upchurch is the Supervisor of the CNF, which has management and regulatory authority over the public lands at the site of the proposed Rosemont Project. Mr. Upchurch is the responsible official with management authority over the review process for the Rosemont Project, including the preparation of the DEIS for the Project, which would include the establishment of the FACA advisory committee in this case. Mr. Upchurch was and is responsible for the failure of the USFS to produce the records/documents requested in CBD's FOIA letter within the required FOIA deadlines.

STATUTORY BACKGROUND AND FACTUAL ALLEGATIONS

The Federal Advisory Committee Act (FACA)

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- 3 23. FACA was passed by Congress and signed by the President in 1972 to address, in
- 4 part, a concern that advisory committees were not adequately representing the
- 5 public interest. Too often such committee meetings were held in secret, and
- 6 representation was biased towards a particular interest. Advisory groups that work
- 7 with Federal agencies to provide advice leading to a federal decision with respect
- 8 to a private party's proposal must be free of the proponent's inherent bias and must
- 9 not only include input from multiple parties with an interest in the ultimate federal
- 10 decision but must be transparent and open to the public. Congressional Research
- 11 Service, "Federal Advisory Committees – A Primer," at 1 (March 2007).
- 12 24. Thus, FACA requires that any "committee, board, commission, council,
- 13 conference, panel, task force, or other similar group, or any subcommittee or other
- 14 group thereof which is established or utilized by a federal agency "in the interest of
- 15 obtaining advice or recommendations for" ultimate federal agency decision-
- 16 making, 5 U.S.C. Appx. §3, must be formally established and follow the
- 17 procedures set forth in FACA.
- 18 25. In 1995, FACA was amended to exclude groups composed solely of
- 19 representatives of state, tribal, or local government officials who meet with federal
- 20 agencies to exchange official views regarding the implementation of public laws
- 21 requiring shared intergovernmental responsibilities or administration. 5 U.S.C.
- 22 Appx. §5.
- 23 26. In the NEPA context, "cooperating agencies" are governmental agencies at the
- 24 federal, state, local, or tribal levels with special expertise in the subject matter of
- 25 the proposal that is under evaluation. 40 C.F.R §1508.5. The "lead agency," the
- 26 USFS/CNF in the case of the Rosemont Project, convenes the cooperating agencies
- 27 to review potential impacts of the proposal, to identify reasonable alternatives, and
- 28 to discuss possible mitigation measures, leading to advice and recommendations to

- 1 the USFS and the CNF regarding what action to take with respect to fulfilling the
2 NEPA mandate for evaluating the Rosemont Project proposal.
- 3 27. The USFS has not adopted agency-wide guidance regarding compliance with
4 FACA in its deliberative processes, but the CNF website states explicitly that
5 meetings of “the **cooperating agencies or representatives of other government**
6 **agencies** [when] providing information, guidance, or analysis related to their
7 responsibilities or expertise” in the process of “supporting the Forest Service’s
8 project-level activities” are exempt from FACA. (emphasis in original;
9 www.rosemonteis.us/node/307 at FAQs at “cooperating agencies”). The CNF’s
10 statement is *expressly limited to government agencies* and does not include
11 involvement in such meetings by any non-government entity, including Rosemont,
12 the Project proponent. The exemption from FACA applies only when the regular
13 attendees at the meetings are representatives of government agencies.
- 14 28. Between April 1, 2009, and September 15, 2010 (the latest date listing a meeting of
15 the cooperating agencies on the CNF/Rosemont website), 23 meetings of the
16 cooperating agencies occurred; these were regularly scheduled meetings, occurring
17 at least monthly, and, according to the minutes that were posted on the website
18 until removed a few months ago (the minutes were either removed from public
19 viewing or were transposed elsewhere, all without notice or explanation), appeared
20 to provide advice or recommendations to the USFS and CNF officials regarding
21 evaluation of environmental impacts, potential mitigation measures, and
22 consideration of alternatives for use by the USFS and CNF in preparation of the
23 DEIS.
- 24 29. The original posted minutes of the 23 meetings indicate that Rosemont
25 representatives were in regular attendance in at least 18 of the meetings. Thus,
26 because Rosemont is a non-governmental entity, its regular participation in the
27 meetings of the governmental entities constituting the “cooperating agencies”
28 meant that the group of participants were a “federal advisory committee” subject to

- 1 the requirements of FACA. It is disingenuous to claim that the cooperating
2 agencies meetings do not provide guidance, advice, and recommendations to CNF.
- 3 30. FACA requires that “federal advisory committees” be formally chartered by the
4 federal agency to which it reports; FACA lays out extensive requirements for the
5 charter. 5 U.S.C. Appx. §9. More significant, however, FACA requires, among
6 other things, that “federal advisory committee” must be open to the public and
7 properly noticed in the Federal Register. 5 U.S.C. Appx. §10. FACA also requires
8 that: “membership of the advisory committee to be fairly balanced in terms of the
9 points of view represented and the functions to be performed by the advisory
10 committee.” 5 U.S.C. Appx. §5(b)(2), made applicable to federal agencies
11 pursuant to 5 U.S.C. Appx. §5(c). Additionally, FACA requires that: “No
12 advisory committee shall meet or take any action until an advisory committee
13 charter has been filed” with appropriate federal agency officials. 5 U.S.C. Appx.
14 §9(c). Under FACA, “No advisory committee shall be established unless such
15 establishment is – determined as a matter of formal record, . . . with timely notice
16 published in the Federal Register,” among other requirements. 5 U.S.C. Appx..
17 §9(a).
- 18 31. On December 27, 2010, Plaintiffs sent a letter to the CNF advising the agency as to
19 these FACA violations and requesting immediate compliance with all of FACA’s
20 requirements. In a response letter dated January 14, 2011, the CNF stated its belief
21 that the agency had not committed any FACA violations, despite acknowledging
22 Rosemont’s participation in the above-noted meetings.
- 23 32. Defendants have failed to comply with the clear and unambiguous requirements of
24 FACA with respect to regular meetings of the cooperating agencies at which
25 Rosemont representatives have participated as regular attendees, thereby making
26 such meetings FACA advisory committee meetings. This pattern of misconduct by
27 Defendants has resulted in “advice or recommendations” provided to the USFS and
28 CNF in the course of their NEPA-required deliberations leading to preparation of

1 the DEIS that has not included the full range of legitimate interests and concerns
2 regarding the Rosemont Project. Rosemont's participation has also "chilled" the
3 unbiased evaluation and guidance provided to CNF. This is precisely the kind of
4 conduct that FACA was intended to stop since its enactment in 1972.

5 The Freedom of Information Act (FOIA)

6 33. The FOIA is a disclosure statute that was enacted to facilitate public access to
7 Government documents. 5 U.S.C. § 552 *et seq.* The Department of Agriculture's
8 FOIA regulations (to which the Forest Service is bound) confirm this statutory
9 goal. 7 C.F.R. Part 1.

10 34. A federal agency that receives a FOIA request must make a "determination" within
11 20 working days whether to release the requested documents. 5 U.S.C. §
12 552(a)(6)(A)(i) ("Each agency, upon any request for records ... shall - (i)
13 determine within 20 days (excepting Saturdays, Sundays, and legal public
14 holidays) after the receipt of any such request whether to comply with such request
15 and shall immediately notify the person making such request of such determination
16 and the reasons therefor....").

17 35. Although an agency may seek a brief extension of this deadline, *id.* § 552(a)(6)(B),
18 it may only continue to withhold responsive records if they fall within one or more
19 of the nine exemptions to the FOIA's disclosure mandate. *Id.* § 552(b)(1)-(9). If
20 the agency decides to withhold access to records pursuant to one of the FOIA's
21 nine, narrowly-construed exemptions, it must identify and describe the records and
22 cite one or more of the exemptions that form the basis of the agency's
23 determination. 5 U.S.C. §§ 552(b)(1)-(9).

24 36. Thus, the FOIA establishes a statutory right of access by any person to federal
25 agency records. The agency bears the burden of proving that a requested document
26 that is being withheld falls within one of the nine exemptions. Even if some
27 portions of a withheld document legitimately fall within one of the nine FOIA
28 exemptions, the agency must release all "reasonably segregable portions" not fully

1 protected from disclosure. 5 U.S.C. § 552(b). The agency's determinations are
2 reviewed *de novo* by a federal district court. 5 U.S.C. § 552 (a)(4)(B).

3 37. Here, the Forest Service failed to make the required determination and failed to
4 produce all requested documents within the deadlines mandated by Congress, in
5 whole or reasonably segregated portions, as required by FOIA.

6 38. CBD filed its FOIA request on September 30, 2010, which was received on that
7 date by the Coronado National Forest. In that FOIA letter, CBD requested:

8 1. The contract between the Coronado National Forest ("CNF") and
9 SWCA Consulting ("SWCA") for preparation of the Environmental Impact
10 Statement regarding the proposed Rosemont Copper Mine ("Rosemont EIS"),
11 executed on or about January 2008.

12 2. All communications between Rosemont Copper Co. ("Rosemont")
13 representatives and SWCA and Augusta Resource Corporation ("Augusta")
14 representatives and SWCA regarding the Rosemont EIS during the period January
15 2008 through August 2010.

16 3. All communications between CNF and Rosemont representatives and
17 CNF and Augusta representatives regarding the Rosemont EIS during the period
18 January 2008 through August 2010.

19 4. A list identifying current representation by an organizational entity of
20 members of the inter-disciplinary team ("ID Team") established by the CNF to
21 conduct and evaluate the Rosemont EIS process, or in the alternative, documents
22 and records that identify such members.

23 5. Minutes of the "cooperating agencies" meetings regarding the
24 Rosemont EIS process, in addition to the text of notes of meetings already posted
25 on the CNF website, and records of any meetings between employees of CNF and
26 Rosemont and employees of CNF and Augusta, including, but not limited to, the
27 meetings dated as follows:
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- 1 April 1-2, 2009
- 2 May 13, 2009
- 3 May 29, 2009
- 4 June 18, 2009
- 5 July 16, 2009
- 6 August 20, 2009
- 7 September 17, 2009
- 8 October 15, 2009
- 9 November 12, 2009
- 10 November 19, 2009
- 11 December 2, 2009
- 12 December 17, 2009
- 13 December 23, 2009
- 14 January 12, 2010
- 15 January 21, 2010
- 16 February 18, 2010
- 17 March 18, 2010
- 18 April 15, 2010
- 19 April 22, 2010
- 20 May 20, 2010
- 21 June 17, 2010
- 22 July 15, 2010

23 6. Index of documents and records received by CNF for the Rosemont
24 EIS process.

25 7. A privilege log of any documents withheld under the foregoing
26 categories.

27 39. In this case, the Forest Service did not make the “determination” regarding CBD’s
28 FOIA Request within the 20-working-day deadline as required by 5 U.S.C.
§552(a)(6)(A)(i). Nor has the USFS produced the requested records/documents, as
required by FOIA, §552(a). Pursuant to FOIA, the USFS’s deadline to make the
required “determination,” as well as produce the requested records/documents, was
November 24, 2010. FOIA requires that such “determination” be made within 20
business days. §552(a)(6)(A)(i). *See also* 7 C.F.R. §1.7 (USDA FOIA
Regulations).

40. However, this 20-day period may be tolled one time if the agency requests
information regarding a fee waiver request (the case here) or requests clarifying
information regarding the FOIA request. §552(a)(6)(A)(ii)(I and II). In this case,
the USFS submitted such a request letter to CBD on October 15, 2010. CBD

1 responded to that letter, in writing, on November 10, 2010, providing the requested
2 information. Thus, the 20-day period was tolled between October 15 and
3 November 10, 2010. The USFS's receipt of CBD's November 10, 2010, response
4 re-started the 20-day period. "[T]he agency's receipt of the requester's response to
5 the agency's request for information or clarification ends the tolling period."
6 §552(a)(6)(A)(ii)(II).

7 41. Additionally, the failure to provide the required "determination" with the 20-day
8 period precludes the USFS' objection to CBD's request for a fee waiver for the
9 requested documents. §552(a)(4)(A)(viii) ("An agency shall not assess search fees
10 or in the case of a requester described under clause (ii) (II) [noncommercial
11 educational organizations such as CBD] ... if the agency fails to comply with any
12 time limit under paragraph (6), if no unusual or exceptional circumstances ... apply
13 to the processing of the request.").

14 42. Under FOIA, the agency was required to notify CBD, within the 20-day time
15 period noted above, of the existence of any such circumstances which would
16 arguably warrant a minimal delay of ten days in meeting the required FOIA
17 deadlines noted above. In this case, the USFS did not notify CBD that any
18 "unusual or exceptional circumstances" within the meaning of FOIA existed.
19 Thus, the agency is precluded from claiming any such circumstances or associated
20 delay.

21 43. On December 10, 2010, CBD delivered a letter to the USFS notifying the agency
22 that it had failed to comply with the FOIA deadlines and failed to produce the
23 requested records/documents. CBD informed the agency that unless all requested
24 materials were produced to CBD by December 17, 2010, CBD would have no
25 choice but to seek judicial review to order the agency to produce the materials, as
26 required by FOIA, §552(a).

27 44. On December 13, 2010, the Forest Service responded to CBD in a letter which
28 explained that the agency was producing only a limited subset of the requested

1 materials and that further production would be delayed. The December 13, 2010,
2 letter contained a Computer Disk (CD) containing only 13 documents. On
3 December 31, 2010, Plaintiff CBD received from the CNF one additional
4 document in response to CBD's FOIA request. Although the CNF acknowledged
5 that it had failed to produce all of the requested documents, it stated its intention to
6 produce all such documents by January 31, 2011. To date, the CNF has failed to
7 produce the requested documents, in violation of FOIA.

8 ***PLAINTIFFS' FIRST CLAIM FOR RELIEF***

9 **Violation of FACA**

- 10 45. Plaintiffs reallege and incorporate all previous paragraphs as if stated herein.
11 46. The Defendants have violated FACA by establishing a FACA advisory committee
12 without complying with the requirements for: (1) public notice and participation, 5
13 U.S.C. Appx. §§ 9 & 10; (2) charter enactment and filing, *Id.* § 9; and (3) that all
14 FACA advisory committees be "fairly balanced in terms of points of view
15 represented and the functions to be performed by the advisory committee," *Id.* § 5,
16 among other errors noted herein.
17 47. The Defendants' actions and inactions are agency actions unlawfully withheld or
18 unreasonably delayed, and/or agency actions that are arbitrary and capricious, an
19 abuse of discretion, not in observance of procedure required by law, in excess of
20 statutory jurisdiction, authority, or limitations, within the meaning of the judicial
21 review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§
22 706(1) & (2).

23 ***PLAINTIFFS' SECOND CLAIM FOR RELIEF***

24 **Violation of FOIA**

- 25 48. Plaintiffs reallege and incorporate all previous paragraphs as if stated herein.
26 49. The Defendants have violated FOIA by failing to meet the required FOIA
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1 deadlines and by failing to produce all records/documents requested in CBD's
2 September 30, 2010, FOIA letter. 5 U.S.C. § 552 *et seq.*

3 50. The Defendants' actions and inactions are agency actions unlawfully withheld or
4 unreasonably delayed, and/or agency actions that are arbitrary and capricious, an
5 abuse of discretion, not in observance of procedure required by law, in excess of
6 statutory jurisdiction, authority, or limitations, within the meaning of the judicial
7 review provisions of the APA and FOIA. 5 U.S.C. §§ 706(1), 706(2); 5 U.S.C. §
8 552(a).

9 REQUEST FOR RELIEF

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

12 1. Declare that Defendants violated FOIA by failing to meet the required FOIA
13 deadlines and by failing to produce all requested records/documents;

14 2. Direct by injunction that Defendants immediately provide Plaintiffs with the
15 records they have requested pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 701 *et*
16 *seq.*;

17 3. Declare that Defendants have violated FACA by establishing a FACA
18 advisory committee without complying with the requirements for: (1) public notice and
19 participation, 5 U.S.C. Appx. §§ 9 & 10; (2) charter enactment and filing, *Id.* § 9; and (3)
20 that all FACA advisory committees be "fairly balanced in terms of points of view
21 represented and the functions to be performed by the advisory committee," *Id.* § 5, among
22 other errors noted herein.

23 4. Direct by injunction that Defendants can not utilize, publish, or rely upon
24 the DEIS prepared to date for the Rosemont Project and the advice and recommendations
25 from the "cooperating agencies" meetings and that any future meeting of the FACA
26 advisory committee established to prepare a new DEIS (and subsequent FEIS) meet the
27 public notice/participation and "fairly balanced" requirements of FACA (including that
28 Plaintiffs' members and employees be considered for membership in such committee with

1 all rights and responsibilities on such committee). In the alternative, if the DEIS can be
2 utilized or relied upon by Defendants in their review of the Rosemont Project, direct by
3 injunction that all work on the DEIS (and subsequent FEIS) stop until the agency
4 immediately reconstitutes its FACA advisory committee to include Plaintiffs as full
5 committee members along with Augusta/Rosemont.

6 5. Grant the Plaintiffs their costs of litigation, including reasonable attorneys
7 fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E), and/or the Equal Access to Justice
8 Act, 28 U.S.C. § 2412; and

9 6. Provide such other relief as the Court deems just and proper.

10 RESPECTFULLY SUBMITTED this 7th day of February, 2011.

11 SNELL & WILMER L.L.P.

12 By: s/ G. Van Velsor Wolf Jr.

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