

M. REED HOPPER, No. 131291  
E-mail: mrh@pacificlegal.org  
THEODORE HADZI-ANTICH, No. 264663  
E-mail: tha@pacificlegal.org  
Pacific Legal Foundation  
930 G Street  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

AMY GRANAT; CORKY LAZZARINO; SIERRA  
ACCESS COALITION; CALIFORNIA OFF-ROAD  
VEHICLE ASSOCIATION; THE COUNTY OF  
PLUMAS; and THE COUNTY OF BUTTE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
AGRICULTURE, a federal agency; TOM VILSACK,  
in his official capacity as Secretary of the UNITED  
STATES DEPARTMENT OF AGRICULTURE;  
UNITED STATES FOREST SERVICE, a federal  
agency; THOMAS L. TIDWELL, in his official  
capacity as Chief of the UNITED STATES FOREST  
SERVICE; RANDY MOORE, in his official capacity  
as PACIFIC SOUTHWEST REGIONAL FORESTER;  
ALICE CARLTON, in her official capacity as the  
former PLUMAS NATIONAL FOREST  
SUPERVISOR; and EARL FORD, in his official  
capacity as PLUMAS NATIONAL FOREST  
SUPERVISOR,

Defendants.

No. 2:15-cv-00605-MCE-DAD

**PLAINTIFFS' OPPOSITION TO  
FEDERAL DEFENDANTS'  
MOTION TO DISMISS OR,  
ALTERNATIVELY, FOR  
SUMMARY JUDGMENT  
ON THE FREEDOM OF  
INFORMATION ACT  
(FOIA) CLAIM**

Date: July 9, 2015  
Time: 2:00 p.m.  
Courtroom: 7, 14th Floor  
Judge: Hon. Morrison C. England, Jr.

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF FACTS. ....	2
STANDARD OF REVIEW.....	4
ARGUMENT.....	5
THE COMPLAINT STATES VALID CLAIMS AGAINST THE UNITED STATES DEPARTMENT OF AGRICULTURE FOR VIOLATION OF THE FREEDOM OF INFORMATION ACT, THESE CLAIMS HAVE NOT BEEN MOOTED AND, THEREFORE, THE MOTION TO DISMISS / MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.....	5
CONCLUSION. ....	9

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

## TABLE OF AUTHORITIES

## Page

## Cases

<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).	9
<i>Carter v. Veterans Admin.</i> , 780 F.2d 1479 (9th Cir. 1986).	7-8
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).	5
<i>Cervantz v. Sullivan</i> , 719 F. Supp. 899 (E.D. Cal. 1989) (citing 2A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice, (2d ed. 1987)), <i>reversed on other grounds</i> , <i>Cervantz v. Sullivan</i> , 963 F.2d 229 (9th Cir. 1992).	4
<i>Fiduccia v. U.S. Dep't of Justice</i> , 185 F.3d 1035 (9th Cir. 1999).	8
<i>Gilmore v. U.S. Dep't of Energy</i> , 33 F. Supp. 2d 1184 (N.D. Cal. 1998).	6
<i>Hajro v. U.S. Citizenship &amp; Immigration Servs.</i> , 832 F. Supp. 2d 1095 (N.D. Cal. 2011).	7
<i>Long v. IRS</i> , 693 F.2d 907 (9th Cir. 1982).	6
<i>Munger, Tolles &amp; Olsen, LLP o/b/o Am. Mgmt. Services LLC</i> <i>d/b/a Pinnacle v. United States Dep't of the Army</i> , 58 F. Supp. 3d 1050 (C.D. Cal. 2014).	1, 6-7
<i>Oregon Natural Desert Ass'n v. Guiterrez</i> , 409 F. Supp. 2d 1237 (D. Or. 2006).	6
<i>Papa v. U.S.</i> , 281 F.3d 1004 (9th Cir. 2002).	7
<i>Spencer v. Kemna</i> , 523 U.S. 1 (1998).	8
<i>Sullivan By and Through Sullivan v. Vallejo City Unified Sch. Dist.</i> , 731 F. Supp. 947 (E.D. Cal. 1990) (citing <i>Baker v. Carr</i> , 369 U.S. 186 (1962)).	4-5
<i>Valesquez v. DEA Headquarters Unit</i> , 2013 WL 686727 (S.D. Cal. Feb. 25, 2013).	7
<i>Yonemoto v. Dep't of Veterans Affairs</i> , 305 Fed. Appx. 333 (9th Cir. 1986).	8

## Statutes

5 U.S.C. § 552.	1
§ 552(a)(4)(E).	6
§ 552(a)(6)(A)(ii)(I).	5
Fed. R. Civ. P. 56(c).	5

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

1		<b>Page</b>
2	<b>Regulation</b>	
3	2005 Travel Management Rule, 36 C.F.R. Part 212. ....	1
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

## INTRODUCTION

Plaintiffs filed their complaint on March 18, 2015, alleging twelve causes of action against the Federal Defendants, challenging the August 2010 Plumas National Forest Public Motorized Travel Management Plan Record of Decision and Final Environmental Impact Statement, which implements provisions of the 2005 Travel Management Rule, 36 C.F.R. Part 212. Doc. 1. On May 29, 2015, the Federal Defendants filed their Motion to Dismiss / Motion for Summary Judgment with regard to the twelfth cause of action, namely the alleged violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, in connection with FOIA requests made by Plaintiff Sierra Access Coalition on November 21, 2010, November 24, 2010, and September 2, 2011 (the “Three FOIA Requests”). Doc. 11-1. Also on May 29, 2015, the Federal Defendants filed their Partial Answer regarding the other eleven causes of action. Doc. 12.

With their Motion to Dismiss / Motion for Summary Judgment, the Federal Defendants included a declaration of Elizabeth A. Schramel (the “Schramel Declaration”). In her declaration, Ms. Schramel asserts that the Federal Defendants provided timely responses to the Three FOIA Requests. Enclosed herewith is the declaration of Corky Lazzarino, Executive Director of Plaintiff Sierra Access Coalition, challenging those assertions and stating that the information was not provided in a timely manner. Accordingly, there is a genuine issue of material fact regarding whether the Federal Defendants timely responded to the Three FOIA Requests.

The Federal Defendants assert in their motion that, at the very least, they have provided the requested information as part of the Schramel Declaration and that, therefore, the FOIA claim is moot. Assuming *arguendo* that the requested information was provided as part of the Schramel Declaration, the assertion that the FOIA claim is moot is without merit. Plaintiffs are entitled to an opportunity to show that the Federal Defendants failed to supply the requested information in a timely manner, thereby establishing their right to a declaratory judgment on the FOIA claim, as well as the right to concomitant attorneys fees under the FOIA. Accordingly, because a declaratory ruling on the FOIA issue “could change the legal relationship between the parties,” the FOIA claim is not moot. *Munger, Tolles & Olsen, LLP o/b/o Am. Mgmt. Services LLC d/b/a Pinnacle v. United States Dep’t of the Army*, 58 F. Supp. 3d 1050, 1054 n.1 (C.D. Cal. 2014).

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

**STATEMENT OF FACTS**

On November 21, 2010, Plaintiff Lazzarino made a FOIA request to the Forest Service for a copy of the Mixed Use Analysis for all routes within Plumas National Forest that were being reclassified from Maintenance Level 3 to Level 2. Compl. ¶ 194. The Federal Defendants assert that the information was timely produced. Schramel Decl. ¶ 5. The Plaintiffs assert that the information was not timely produced. Lazzarino Decl. ¶ 6. Accordingly, there is a genuine issue of material fact regarding whether the Federal Defendants complied with the FOIA in connection with the request for information dated November 21, 2010, regarding the Mixed Use Analysis.

On November 24, 2010, Plaintiff Lazzarino made a FOIA request to the Forest Service for a copy of the consultations with the U.S. Fish and Wildlife Service regarding the red-legged frog and a copy of the peer review document written by Plumas National Forest. Compl. ¶ 196. The Federal Defendants assert that a CD containing the requested information was hand-delivered to Plaintiff Lazzarino at a meeting on December 7, 2010. Schramel Decl. ¶ 8. The Plaintiffs assert that no such CD was provided to Plaintiff Lazzarino on December 7, 2010, or on any other date, and that no documentation responsive to the request was timely produced. Lazzarino Decl. ¶ 7. Accordingly, there is a genuine issue of material fact regarding whether the Federal Defendants complied with the FOIA in connection with the request for information regarding the red-legged frog.

As part of the FOIA requested dated November 24, 2010, Plaintiff Lazzarino requested backup data for the Visitor Survey (table 12, Sec 3.2.4.1 in the Final Environmental Impact Statement for the Plumas National Forest Travel Management), including the location of the surveys the protocol used. Compl. ¶ 196. The Federal Defendants assert that a document containing the requested information was hand-delivered by Ms. Schramel to Ms. Lazzarino during their meeting on December 7, 2010. Schramel Decl. ¶ 9. The Plaintiffs assert that no such document was provided to Ms. Lazzarino during such meeting or at any other time, and that no documentation responsive to the request was timely produced. Lazzarino Decl. ¶ 8. Accordingly, there is a genuine issue of material fact regarding whether the Federal Defendants timely complied with the FOIA in connection with the request for information regarding the Visitor Survey.

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

1 ///

2 As part of the FOIA request dated November 24, 2010, Plaintiff Lazzarino requested a map  
3 for R.S. 2477 roads in Plumas National Forest. Compl. ¶ 196. The Federal Defendants assert that,  
4 at the December 7, 2010, meeting, Ms. Schramel provided a copy of the 1916 forest map to  
5 Ms. Lazzarino. Schramel Decl. ¶ 10. The Plaintiffs do not dispute that fact. However, the Federal  
6 Defendants also assert that Ms. Schramel suggested to Ms. Lazzarino that Ms. Lazzarino obtain  
7 older maps from the Plumas County Museum and that Ms. Lazzarino informed Ms. Schramel that  
8 she already had copies of those older maps. Schramel Decl. ¶ 10. The Plaintiffs assert that  
9 Ms. Lazzarino did not advise Ms. Schramel that she had copies of any older maps. Lazzarino  
10 Decl. ¶ 9. Further, The Federal Defendants assert that responsive information was provided to a  
11 Mr. Rex Fisher, “another high profile member of the group now known as SAC, in a 2007 FOIA  
12 response by the Forest Service.” Schramel Decl. ¶ 11. The Plaintiffs assert that Mr. Fisher is not  
13 a plaintiff in this case and that any information that may have been provided to him was provided  
14 to him in his individual capacity, and that he has not shared any such information with the  
15 Plaintiffs. Lazzarino Decl. ¶ 10. Accordingly, there is a genuine issue of material fact regarding  
16 whether the Federal Defendants timely complied with the FOIA in connection with the request for  
17 maps predating 1916 relating to R.S. 2477 roads.

18 On September 2, 2011, Plaintiff Lazzarino made a request to the Forest Service for all  
19 contacts, warnings, and citations issued in the Sly Creek reservoir area between August 17, 2011,  
20 and August 31, 2011, relating to OHV use. Compl. ¶ 198. The Federal Defendants assert that “the  
21 FOIA Coordinator believes that she provided this information to Ms. Lazzarino in 2011.”  
22 Fed. Defs.’ Mem. of P. & A. at 4. *See* Schramel Decl. ¶ 15. The document referred to by the  
23 Federal Defendants is, in fact, an internal email of the Forest Service, *id.*, and there is no proof that  
24 it was sent to Plaintiff Lazzarino. Moreover, the Plaintiffs assert that they did not receive the  
25 document. Lazzarino Decl. ¶ 10. Accordingly, there is a genuine issue of material fact regarding  
26 whether the Federal Defendants timely complied with the FOIA in connection with this request.

27 The Federal Defendants assert that, “[o]n December 17, 2010, the FOIA Coordinator  
28 received an email from Ms. Lazzarino thanking her for expediting FOIA requests.” Fed. Defs.’

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

Mem. of P. & A. at 3. But that email had nothing to do with the FOIA requests set forth in the complaint; rather, it refers to an unrelated matter dealing with firewood in the forest. Lazzarino Decl. ¶ 11. As such it has no probative value in connection with the issues raised in the Motion to Dismiss / Motion for Summary Judgment.

Finally, the Federal Defendants assert that, in an email dated January 7, 2011, Ms. Lazzarino “sent another email thanking the FOIA Coordinator and others at the Forest Service for sending documents to her.” Fed. Defs.’ Mem. of P. & A. at 4. But that email was sent at a time when Ms. Lazzarino “believed the Forest Service would properly respond to [her] FOIA requests dated November 21, 2010, and November 24, 2010. It was also written nine months before [her] FOIA request dated September 2, 2011.” Lazzarino Decl. ¶ 12. After the Forest Service refused to respond to her FOIA requests, no such laudatory emails were sent to the Forest Service. Accordingly, the fact that the email was sent at a time when Ms. Lazzarino reasonably expected a response to the Three FOIA Requests at issue here has no relevance to the issue of whether the Forest Service failed to timely respond to those requests.

#### STANDARD OF REVIEW

Generally, where a defendant files a motion to dismiss contending that the allegations of jurisdiction contained in a complaint are insufficient on their face to demonstrate jurisdiction, the factual allegations of the complaint are presumed to be true. Such motions will be granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. *Cervantz v. Sullivan*, 719 F. Supp. 899, 903 (E.D. Cal. 1989) (citing 2A J. Moore, J. Lucas & G. Grotheer, Moore’s Federal Practice, ¶ 12.07, at 12.46-47 (2d ed. 1987)), *reversed on other grounds*, *Cervantz v. Sullivan*, 963 F.2d 229 (9th Cir. 1992).

A complaint alleging federal question jurisdiction will be dismissed for lack of subject matter jurisdiction only in three types of instances: (1) the cause does not “arise under” the United States Constitution or any federal statute or regulation, (2) there is no case or controversy, as required by Article III of the United States Constitution, or (3) the cause is not described by any jurisdictional statute. *Sullivan By and Through Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 949 (E.D. Cal. 1990) (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)).



PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

In turn, summary judgment is appropriate only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986). To prevail, the government must demonstrate the absence of a genuine dispute of material fact. *Id.* at 323. The nonmoving party then bears the burden of showing that there is a genuine dispute of material fact. *Id.*

### ARGUMENT

#### **THE COMPLAINT STATES VALID CLAIMS AGAINST THE UNITED STATES DEPARTMENT OF AGRICULTURE FOR VIOLATION OF THE FREEDOM OF INFORMATION ACT, THESE CLAIMS HAVE NOT BEEN MOOTED AND, THEREFORE, THE MOTION TO DISMISS / MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED**

The FOIA requires agencies to respond to document requests within 20 days of receipt. 5 U.S.C. § 552(a)(6)(A)(ii)(I). As set forth in the Statement of Facts, there is a genuine issue of material fact regarding the issue of whether the Forest Service provided timely responses to the Plaintiffs’ FOIA requests. Accordingly, the Motion to Dismiss / Motion for Summary Judgment should be denied. *See Celotex Corp.*, 477 U.S. at 323-34. Furthermore, as set forth *infra* in this Section, the FOIA claim is not moot and, therefore, there is a controversy regarding the Forest Service’s timely compliance with the FOIA. *See Sullivan*, 731 F. Supp at 949.

The Federal Defendants argue that, even if the documents had not been provided in a timely manner, they were included as exhibits to the Schramel Declaration, as part of the Motion to Dismiss / Motion for Summary Judgment and that, because they have now been provided in this litigation, the FOIA claim is moot. The argument is without merit.

The Plaintiffs assert that the FOIA responses were not timely, and that they were required to institute this litigation against the Federal Defendants in order to obtain the responses. Lazzarino Decl. ¶ 13. Plaintiffs are entitled to the opportunity to *show* that the responses were not timely and, upon such a showing, to obtain a declaration from this Court that the government did not provide timely responses. If the Plaintiffs were to obtain such a declaration, they would be entitled to their

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

attorneys fees in connection with their efforts to obtain it. 5 U.S.C. § 552(a)(4)(E) (authorizing the award of “reasonable attorneys fees and other litigation costs . . . in which the complainant has substantially prevailed.”). “Thus, a declaratory judgment that the [government] unreasonably delayed responding to Plaintiff’s FOIA request could change the rights and other legal relations between the parties.” *Munger*, 58 Fed. Supp. 3d at 1054. (Internal quotation marks excluded.) Accordingly, there is a continuing case or controversy regarding the issue of whether the Forest Service violated the FOIA by failing to provide timely responses to the Three FOIA Requests. Here, the exhibits to the Schramel Declaration, filed with the Federal Defendants’ Motion to Dismiss / Motion for Summary Judgment, were not filed until nearly five years after the FOIA requests were made. If that was the first time the documents were provided, which the Plaintiffs have asserted, the delay is unreasonable. *See Long v. IRS*, 693 F.2d 907, 910 (9th Cir. 1982) (“[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses.”). Indeed, courts in this Circuit have held that periods much shorter than five years constitute unreasonable delays under the FOIA. *See Oregon Natural Desert Ass’n v. Guitierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (holding that an eight-month delay was a “violation of FOIA, regardless of the final outcome of the request”) (emphasis added); *Gilmore v. U.S. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1188 (N.D. Cal. 1998) (five-month delay violates FOIA).

Moreover, the Complaint asserts that the Forest Service “has continually failed to respond to the [Three FOIA Requests.]” Compl. ¶¶ 194, 196, 198. In this regard, Plaintiff Lazzarino states in her declaration:

I have found the Forest Service to have engaged in a pattern of delay in responding to reasonable requests for information. This has occurred throughout the process leading to the Final Environmental Impact Statement and Record of Decision in this case, as well as through the administrative appeals process. For example, I have repeatedly asked Forest Service employees, including Ms. Schramel, to respond to the three FOIA requests. Each time, I was told that a response would be forthcoming but it never was. That is the reason why we were forced to include the FOIA claim in the complaint.

///

///

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

Lazzarino Decl. ¶ 13. *See Hajro v. U.S. Citizenship & Immigration Servs.*, 832 F. Supp. 2d 1095, 1107 (N.D. Cal. 2011) (“It is undisputed that a plaintiff may bring a claim alleging a pattern and practice of unreasonable delay in responding to FOIA requests.”) (Internal quotation marks omitted.)

The cases cited by the Federal Defendants in support of their Motion to Dismiss / Motion for Summary Judgment are inapposite. In *Papa v. U.S.*, 281 F.3d 1004, 1013 (9th Cir. 2002), the court reversed and remanded the lower court’s dismissal of the FOIA claims, holding that such claims cannot be properly dismissed solely on the ground that the documents were ultimately produced in connection with the litigation. *Id.* at 1013-14. The Federal Defendants conveniently neglect to point out that important holding, while trumpeting a statement made by the *Papa* court<sup>1</sup> that the *Munger* court correctly observed was “dictum in a case where timeliness under FOIA was not at issue.” 58 F. Supp. 3d at 1056. *See* Fed. Defs’ Mem. of P. & A. at 6. Here, timeliness is at issue.

Furthermore, *Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986), is distinguishable on its facts. In that case, the court held that the plaintiff’s request for *injunctive relief* “was mooted when the V.A. voluntarily mailed copies of the regulations to Carter.” Here, the Plaintiffs ask for a *declaratory judgment* that the Federal Defendants failed to comply with the FOIA in a timely manner. In addition, the *Carter* court stated:

We also hold that Carter’s request for attorneys’ fees and costs was not mooted by the V.A.’s belated compliance with FOIA. We have previously noted that attorney fee issues are ancillary to the underlying action and survive independently under the court’s equitable jurisdiction.

*Id.* Here, the Plaintiffs have requested attorneys fees in connection with the FOIA claim. Accordingly, the attorney fee request survives “independently under the court’s equitable jurisdiction.” *Id.*

Similarly, the Federal Defendants’ citation to *Valesquez v. DEA Headquarters Unit*, 2013 WL 686727 at \*2 (S.D. Cal. Feb. 25, 2013) is inapposite. There, an agency employee submitted

---

<sup>1</sup> [T]he production of all nonexempt material, “however belatedly,” moots FOIA claims. *Papa*, 28 F.3d at 1013.

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

a declaration that a reasonable search of agency records was conducted pursuant to the plaintiff's FOIA request. The Plaintiff claimed that the documents actually provided had been forged. The court held that a judicial inquiry regarding whether the documents were forged is beyond the scope of judicial review under the FOIA, which requires a court to determine whether the documents were timely produced pursuant to a reasonable search of agency records. *Id.* at 2-3. By contrast, here the Plaintiffs make no claim that the documents produced with the Schramel declaration were forged, only that the documents were not timely produced.

In *Yonemoto v. Dep't of Veterans Affairs*, 305 Fed. Appx. 333 (9th Cir. 1986), the Department of Veterans Affairs redacted certain information when it produced documents in response to plaintiff's FOIA request, and plaintiff initiated a lawsuit to require production. Meanwhile, in a related administrative proceeding before the Equal Employment Opportunity Commission (the "EEOC"), the EEOC produced the documents at issue. The court held that because the complaint sought only the production of the documents, the claim was mooted because the documents were actually produced to the plaintiff in the EEOC proceeding. By contrast, here, the Plaintiffs seek a *declaration* that the documents were not timely produced.

The Federal Defendants cite *Spencer v. Kemna*, 523 U.S. 1, 7 (1998), because that case was cited in the *Yonemoto* case. That case had nothing to do with the FOIA but involved the issue of whether an incarcerated person's petition to be released from prison was mooted by his actual release. Accordingly, the case is irrelevant to any issue in the instant proceeding.

Contrary to the inapposite cases cited by the Federal Defendants, the Ninth Circuit addressed head-on the type of issue raised here by holding that "people who file Freedom of Information Act requests in 1986, revised and clarified in 1993, cannot be made to wait until 2001." *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999). Similarly, the people who filed the Three FOIA Requests at issue in this case should not be required to wait for five years to receive the requested information. Such a result here would encourage what the Ninth Circuit has referred to as "the arrogance on the part of some government agencies in complying with Congressionally mandated requirements to furnish citizens with documents appropriate under the FOIA." *Carter*, 780 F.2d at 1481. By denying the Motion to Dismiss / Motion for Summary

Judgment, this Court would send a clear message to the Forest Service and other federal agencies that making FOIA requestors wait five years for the requested documents will not shield the government from declaratory judgment actions and payment of attorneys fees, and that the FOIA requirement to produce *timely* responses is nondiscretionary. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) (administrative agencies must comply with nondiscretionary statutory mandates). Accordingly, because there is a genuine issue of material fact regarding timeliness, and because the issue has not been mooted, the Plaintiffs should be permitted to show that the Forest Service did not provide timely responses to the Three FOIA Requests.

**CONCLUSION**

For these reasons, the Motion to Dismiss / Motion for Summary Judgment should be denied.

DATED: June 24, 2015.

Respectfully submitted,

THEODORE HADZI-ANTICH  
M. REED HOPPER

By /s/THEODORE HADZI-ANTICH  
THEODORE HADZI-ANTICH

Attorneys for Plaintiffs

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

**CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of California through the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/THEODORE HADZI-ANTICH  
THEODORE HADZI-ANTICH

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

1 M. REED HOPPER, No. 131291  
E-mail: mrh@pacificlegal.org  
2 THEODORE HADZI-ANTICH, No. 264663  
E-mail: tha@pacificlegal.org  
3 Pacific Legal Foundation  
930 G Street  
4 Sacramento, California 95814  
Telephone: (916) 419-7111  
5 Facsimile: (916) 419-7747

6 Attorneys for Plaintiffs

7  
8  
9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11

12 AMY GRANAT, CORKY LAZZARINO, SIERRA  
ACCESS COALITION; CALIFORNIA OFF-ROAD  
13 VEHICLE ASSOCIATION; THE COUNTY OF  
PLUMAS; AND THE COUNTY OF BUTTE,

14 Plaintiffs,

15 v.

16 UNITED STATES DEPARTMENT OF  
17 AGRICULTURE, a federal agency; TOM VILSACK,  
in his official capacity as Secretary of the UNITED  
18 STATES DEPARTMENT OF AGRICULTURE;  
UNITED STATES FOREST SERVICE, a federal  
19 agency; THOMAS L. TIDWELL, in his official  
capacity as Chief of the UNITED STATES FOREST  
20 SERVICE; RANDY MOORE, in his official capacity  
as PACIFIC SOUTHWEST REGIONAL FORESTER;  
21 ALICE CARLTON, in her official capacity as the  
former PLUMAS NATIONAL FOREST  
22 SUPERVISOR; AND EARL FORD, in his official  
capacity as PLUMAS NATIONAL FOREST  
23 SUPERVISOR,

24 Defendants.  
25  
26  
27  
28

No. 2:15-cv-00605-MCE-DAD

**DECLARATION OF CORKY  
LAZZARINO IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
THE FEDERAL DEFENDANTS'  
MOTION TO DISMISS OR,  
ALTERNATIVELY, FOR  
SUMMARY JUDGMENT  
ON THE FREEDOM OF  
INFORMATION ACT  
(FOIA) CLAIM.**

Date: July 9, 2015  
Time: 2:00 p.m.  
Courtroom: 7, 14th Floor  
Judge Hon. Morrison C. England, Jr.

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747



PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

1 I, Corky Lazzarino, hereby declare as follows:

2 1. I have personal knowledge of the following facts and, if called upon to do so, could  
3 competently testify thereto under oath. As to those matters which reflect a matter of opinion, they  
4 reflect my personal opinion and judgment upon the matter.

5 2. I am the Executive Director as well as a member of the Sierra Access Coalition, and  
6 I am authorized to sign this declaration on its behalf and on behalf of its members.

7 3. I worked for the United States Forest Service (the "Forest Service") from 1976 - 2009  
8 as an Engineering Tech, and I am familiar with the procedures used by the Forest Service in  
9 responding to requests for information made under the Freedom of Information Act ("FOIA").

10 4. Sierra Access Coalition is a regional group composed of more than 1,450 individuals,  
11 user groups, and local businesses that work to protect access to public lands for a multitude of  
12 diverse uses including cutting and retrieving firewood, hunting, fishing, camping, hiking, viewing  
13 wildlife and plants, rockhounding, horseback riding, driving jeeps and trucks, riding bicycles,  
14 motorcycles, and other recreational and aesthetic activities.

15 5. Members of Sierra Access Coalition have enjoyed, and hope for themselves and future  
16 generations to enjoy, a variety of recreational, aesthetic, and commercial activities within Plumas  
17 National Forest.

18 6. Pursuant to the FOIA, by letter dated November 21, 2010, Sierra Access Coalition  
19 requested, from Forest Service, a copy of the Mixed-Use Analysis for the routes that were being  
20 reclassified from Level 3 to Level 2 roads. Contrary to the assertions in Paragraph 5 of the  
21 Schramel Declaration, I did not receive any documents from the Forest Service responsive to this  
22 request.

23 7. Pursuant to the FOIA, by letter dated November 24, 2010, Sierra Access Coalition  
24 requested, from Forest Service, a copy of the consultations within the U.S. Fish and Wildlife  
25 Service regarding the red-legged frog, and a copy of the peer review document written by the  
26 Plumas National Forest. Contrary to the assertions in Paragraph 8 of the Schramel Declaration,  
27 Ms. Schramel did not deliver to me on December 7, 2010, or at any other time a CD or any other  
28 document responsive to this request.



PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

1           8. Pursuant to the FOIA, by letter dated November 24, 2010, Sierra Access Coalition  
2 requested, from Forest Service backup data for the Visitor Survey (Table 12, Sec. 3.2.4.1 in the  
3 FEIS for the Plumas N.F. Public Motorized Travel Management), including where the surveys were  
4 taken and the protocol used for the surveys. Contrary to the assertions in Paragraph 9 of the  
5 Schramel Declaration, Ms. Schramel did not provide me with any document at the December 7,  
6 2010, meeting, or at any other time, responsive to this request.

7           9. Pursuant to the FOIA, by letter dated November 24, 2010, Sierra Access Coalition  
8 requested, from Forest Service, a map of the R.S. 2477 roads in the Plumas National Forest. It is  
9 true that Ms. Schramel provided me with the 1916 map. I told her I already had that map. Contrary  
10 to the assertions in Paragraph 10 of the Schramel Declarations, I did not tell Ms. Schramel that I  
11 had copies of any older maps regarding R.S. 2477 roads. Moreover, any information that may have  
12 been provided to Rex Fisher was provided to him in his individual capacity, and he has not shared  
13 any such information with me.

14           10. Pursuant to the FOIA, by letter dated September 2, 2011, Sierra Access Coalition  
15 requested, from Forest Service, all contacts, warnings, and citations issued in the Sly Creek  
16 Reservoir area between August 17, 2011, and August 31, 2011, that relate to OHV use. Contrary  
17 to the beliefs asserted in Paragraph 15 of the Schramel Declaration, Ms. Schramel did not provide  
18 me with any information, documentary or oral, responsive to this request, and the internal email  
19 discussed in Paragraph 15 of the Schramel Declaration was never provided to anyone in Sierra  
20 Access Coalition, to the best of my knowledge and belief.

21           11. The email dated December 17, 2010, described in Paragraph 12 of the Schramel  
22 Declaration, had nothing to do with the FOIA requests set forth in the Complaint. It referred to an  
23 unrelated matter dealing with firewood.

24           12. The email dated January 7, 2011, described in Paragraph 13 of the Schramel  
25 Declaration, was written at a time when I believed the Forest Service would properly respond to  
26 my FOIA requests dated November 21, 2010, and November 24, 2010. It was also written  
27 approximately nine months before my FOIA request dated September 2, 2011.

28    ///

1 13. Since making the three FOIA requests discussed in this declaration, I have found the  
2 Forest Service to have engaged in a pattern of delay in responding to reasonable requests for  
3 information. This has occurred throughout the process leading to the Final Environmental Impact  
4 Statement and Record of Decision in this case, as well as through the administrative appeals  
5 process. For example, I have repeatedly asked Forest Service employees, including Ms. Schramel,  
6 to respond to the three FOIA requests. Each time, I was told that a response would be forthcoming  
7 but it never was. That is the reason why we were forced to include the FOIA claim in the  
8 complaint.

9 I declare under penalty of perjury that the foregoing is true and correct, to the best of my  
10 knowledge, and that this declaration was executed this 22 day of June, 2015, at Quincy  
11 California.

12   
13 CORKY LAZZARINO  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747