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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA

18 AMY GRANAT, *et al.*

19 Plaintiffs,

20 v.

21 UNITED STATES DEPARTMENT OF
22 AGRICULTURE, *et al.*,

23 Federal Defendants.
24
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Case No. 2:15-cv-0605-MCE-DAD

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION TO DISMISS OR,
ALTERNATIVELY, FOR SUMMARY
JUDGMENT ON THE FREEDOM OF
INFORMATION ACT (FOIA) CLAIM**

[Fed. R. Civ. P. 12(b)(1), 56(a)]

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

I.

INTRODUCTION

This case involves plaintiffs’ challenge to the August 2010 Plumas National Forest Public Motorized Travel Management Record of Decision, which implements provisions of the 2005 Travel Management Rule, 36 C.F.R. Part 212. Plaintiffs’ twelfth cause of action, which is the subject of this motion, alleges violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, in connection with FOIA requests made by plaintiff Sierra Access Coalition (“SAC”) to the United States Forest Service on November 21, 2010, November 24, 2010, and September 2, 2011.

The Forest Service responded and produced information and documents responsive to all of the FOIA requests identified in plaintiffs’ complaint back in 2010 and 2011, and it is producing the requested information once again in connection with this litigation. Therefore, the FOIA claim is moot, and the Court should dismiss the FOIA claim for lack of subject matter jurisdiction.

Alternatively, the Court should grant Federal Defendants summary judgment on the FOIA claim because the evidence supporting this motion proves that the Forest Service did not withhold any of the requested documents or information from plaintiffs. Therefore, plaintiffs cannot establish an essential element of their FOIA claim, and the claim fails on the merits.

II.

PROCEDURAL HISTORY

On March 18, 2015, plaintiffs filed their complaint, asserting violations of the National Environmental Policy Act (“NEPA”); the National Forest Management Act (“NFMA”); the Travel Management Rule, 70 Fed. Reg. 68,264 (Nov. 9, 2005), and regulations; the Administrative Procedure Act; and FOIA. ECF No. 1.

Federal Defendants were served on March 30, 2015. Their deadline to respond to the FOIA claim was extended to May 29, 2015 by stipulation and order. ECF Nos. 8, 9. Concurrently herewith, Federal Defendants are filing an answer to all of the non-FOIA claims in the complaint.

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III.

STATEMENT OF FACTS

A. November 21, 2010 FOIA Request

On November 21, 2010, Corky Lazzarino, Executive Director of plaintiff Sierra Access Coalition (“SAC”) made a FOIA request to the Forest Service for a copy of the Mixed Use Analysis for all the routes within the Plumas National Forest that were being reclassified from Maintenance Level 3 to Level 2. Complaint, ¶ 194; Schramel Decl., ¶ 4 and Ex. A.

In response to this FOIA request, on December 21, 2010, the Forest Service produced by email to SAC the following documents regarding mixed use analyses for Roads 28N01, 23N28, and 24N28, which comprise all of the documents responsive to the FOIA request:

- Mixed Use Analysis NFS Road 23N28
- Engineering Report, Plumas National Forest, Feather River Ranger District, Analysis of Road #23N28 for motorized mixed use designation
- Mixed Use Analysis NFS Road 24N28
- Engineering Report, Plumas National Forest, Mt. Hough Ranger District, Analysis of Road #24N28 for motorized mixed use designation
- June 3, 2009 Memorandum from Randy Moore, Regional Forester to the Forest Supervisor, Plumas National Forest approving Road 24N28 for Mixed Use
- Mixed Use Analysis NFS Road 28N01
- Engineering Report, Plumas National Forest, Beckwourth Ranger District, Analysis of Road #28N01 for motorized mixed use designation

Schramel Decl., ¶ 5 and Ex. B.

B. November 24, 2010 FOIA Request

On November 24, 2010, SAC made a FOIA request to the Forest Service for: (1) 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 the Plumas National Forest; (2) backup data for the Visitor Survey (Table 12, Sec. 3.2.4.1 in the FEIS for the Plumas National Forest Public Motorized Travel Management) including where the surveys were taken and the protocol used for the surveys; and (3) a map of the R.S. 2477 roads on the Plumas National Forest. Complaint, ¶ 196; Schramel Decl., ¶ 6 and Ex. C.

Red-Legged Frog: Regarding SAC’s request for consultations with the U.S. Fish and Wildlife Service (“FWS”) on the red-legged frog and the peer review document, prior to a Travel Management public meeting held at the Mt. Hough Ranger District on December 7, 2010, the Plumas National

1 Forest's FOIA Coordinator, Elizabeth Schramel, met in person with Ms. Lazzarino and handed her a CD
2 which contained the responsive documents. Schramel Decl., ¶¶ 7, 8. The CD given to Ms. Lazzarino
3 included draft and final Environmental Impact Statements, an FWS Biological Opinion, FWS and Forest
4 Service concurrence letters, and letters regarding consultation, which comprise all documents responsive
5 to the FOIA request. *Id.*, ¶ 8 and Ex. D.

6 Visitor Survey Data: Regarding the request for backup data for the Visitor Survey, on December
7 7, 2010, FOIA Coordinator Schramel provided Ms. Lazzarino with a document that included written
8 instructions and a link address for the protocol used for the requested surveys and a description of the
9 available visitor survey data that existed. Schramel Decl., ¶ 9 and Ex. E. The FOIA Coordinator also
10 told Ms. Lazzarino that hard copy backup data for the surveys was contained in three boxes at the
11 Plumas National Forest and, to save FOIA duplication costs, the Forest Service would allow SAC access
12 to that data and a copy machine should SAC choose to review and copy any of it. *Id.*, ¶ 9. Neither Ms.
13 Lazzarino nor anyone else from SAC followed up on the hard copy visitor survey data, and nobody from
14 SAC went to the Plumas National Forest to review it. *Id.*

15 R.S. 2477 Roads: Regarding the request for a map of the R.S. 2477 roads on the Plumas
16 National Forest, on December 7, 2010, FOIA Coordinator Schramel handed Ms. Lazzarino a hard copy
17 of a 1916 forest map and suggested SAC use the map in conjunction with a Plumas County map from
18 the late 1800s available from the Plumas County Museum to assess what roads might have been in place
19 at the time the Plumas National Forest was established in 1905. Schramel Decl., ¶ 10 and Ex. F. Ms.
20 Lazzarino indicated that she already had copies of both maps. *Id.*, ¶ 10. The FOIA Coordinator also
21 described to Ms. Lazzarino other file information and data that could be made available to SAC to
22 supplement the two maps. *Id.*, ¶ 11 and Ex. G. However, neither Ms. Lazzarino nor anyone else from
23 SAC asked to review any of this other information and data at any time after December 7, 2010. *Id.*

24 **C. SAC Thanks The Forest Service For Its Handling Of SAC's FOIA Requests**

25 On December 17, 2010, the FOIA Coordinator received an email from Ms. Lazzarino thanking
26 her for expediting FOIA requests stating, "We really appreciate the extra attention and consideration
27 you've shown us." Schramel Decl., ¶ 12 and Ex. H.

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1 A few weeks later, on January 7, 2011, Ms. Lazzarino sent another email thanking the FOIA
2 Coordinator and others at the Forest Service for sending documents to her. She stated, “You guys have
3 all been great about providing information to SAC, and in a very timely manner. We appreciate it.”
4 Schramel Decl., ¶ 13 and Ex. I.

5 **D. September 2, 2011 FOIA Request**

6 On September 2, 2011, SAC made a FOIA request to the Forest Service for all contacts,
7 warnings, and citations issued in the Sly Creek Reservoir area between August 17, 2011 and August 31,
8 2011 that relate to OHV use. Complaint, ¶ 198; Schramel Decl., ¶ 14 and Ex. J. The only document
9 responsive to that request is a September 8, 2011 email from Deputy Sean West to Patrol Captain Duane
10 Jackson with a subject line that states “Sly Creek FOIA,” and the FOIA Coordinator believes that she
11 provided this information to Ms. Lazzarino in 2011. *Id.*, ¶ 15 and Ex. K.

12 **E. The Federal Defendants Have Produced All Responsive Information**

13 The Schramel Declaration confirms that the Forest Service already provided and made available
14 all information responsive to SAC’s FOIA requests back in 2010 and 2011. However, to resolve any
15 doubt, Federal Defendants are providing the same information again (except for voluminous appendices
16 to Environmental Impact Statements) with this motion. *See* Exhibits to Schramel Declaration.
17 Additionally, Federal Defendants intend to provide in electronic format to plaintiffs’ counsel another
18 full set of the responsive information, including appendices, in an effort to resolve this motion without
19 the need for further briefing and a hearing.

20 **III.**

21 **APPLICABLE LEGAL STANDARDS**

22 **A. Mootness Under Rule 12(b)(1)**

23 Federal courts are courts of limited jurisdiction and may hear a case only if authorized to do so
24 by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).
25 “A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively
26 appears.” *A-Z Int’l. v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citations omitted). Thus, “[w]hen
27 subject matter jurisdiction is challenged under Federal Rule of [Civil] Procedure 12(b)(1), the plaintiff
28 has the burden of proving jurisdiction in order to survive the motion.” *Tosco Corp. v. Communities for*

1 *a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001); *see also Thornhill Pub. Co. v. Gen. Tel. & Electronics*
2 *Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

3 Federal courts lack jurisdiction to consider moot claims. *Church of Scientology v. United States*,
4 506 U.S. 9, 12 (1992). “A claim is moot if it has lost its character as a present, live controversy.” *Am.*
5 *Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997). Because mootness pertains
6 to a federal court’s subject matter jurisdiction, it is properly raised in a Rule 12(b)(1) motion to dismiss.
7 *White*, 227 F.3d at 1242.

8 A defendant may make a factual attack on jurisdiction supported by extrinsic evidence. “In
9 resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint
10 without converting the motion to dismiss into a motion for summary judgment.” *Safe Air v. Meyer*,
11 373 F.3d 1035, 1039 (9th Cir. 2004). Further, the district court should not presume the truthfulness of
12 plaintiffs’ allegations in the context of a motion to dismiss under Rule 12(b)(1). *See White*, 227 F.3d at
13 1242; *see also Thornhill*, 594 F.2d at 733.

14 **B. Summary Judgment Under Rule 56(a)**

15 Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any
16 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The
17 moving party is entitled to judgment by demonstrating that “there is an absence of evidence to support
18 the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Nissan Fire*
19 *& Marines Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102, 1106 (9th Cir. 2000).

20 Once the moving party meets the requirements of Rule 56, the burden shifts to the opposing party
21 to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby,*
22 *Inc.*, 477 U.S. 242, 256 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
23 586 (1986). The opposing party may not “rest upon mere allegation[s] or denials of his pleading[s].”
24 *Anderson*, 477 U.S. at 256. The opposing party must go beyond the pleadings to designate specific facts
25 showing the existence of genuine issues of material fact for trial. *Celotex*, 477 U.S. at 324-25.

26 Thus, to overcome summary judgment, the opposing party must demonstrate a factual dispute
27 that is both material, *i.e.* it affects the outcome of the claim under the governing law, *see Anderson*,
28 477 U.S. at 248; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.

1 1987), and genuine, *i.e.*, the evidence is such that a reasonable jury could return a verdict for the
2 nonmoving party. *See Anderson*, 477 U.S. at 247-49. [T]he moving party is entitled to a judgment as a
3 matter of law” when the opposing party fails to make a sufficient showing on an essential element of its
4 case because “a complete failure of proof concerning an essential element of the nonmoving party’s case
5 necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 323.

6 Summary judgment may address all or any part of a claim. Fed. R. Civ. P. 56(g). When the
7 entire case cannot be decided summarily, the Rule authorizes the Court to “enter an order stating any
8 material fact – including an item of damages or other relief – that is not genuinely in dispute and treating
9 the fact as established in the case.” *Id.*

10 IV.

11 ARGUMENT

12 A. The Court Lacks Subject Matter Jurisdiction Because The FOIA Claim Is Moot.

13 The FOIA “is fundamentally designed to inform the public about agency action and not to
14 benefit private litigants.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144, 95 S. Ct. 1504 (1975).
15 When a plaintiff makes a claim under the FOIA, “federal jurisdiction is dependent upon a showing that
16 an agency has (1) ‘improperly’; (2) ‘withheld’; (3) ‘agency records.’” *Kissinger v. Reporters Comm. for*
17 *Freedom of the Press*, 445 U.S. 136, 150, 100 S. Ct. 960 (1980). “Judicial authority to devise remedies
18 and enjoin agencies can only be invoked . . . if the agency has contravened all three components of this
19 obligation.” *Id.*; *see also U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142, 109 S. Ct. 2841
20 (1989) (each criteria must be met before court can compel an agency to comply with the FOIA request).

21 An action for production of documents pursuant to the FOIA becomes moot once the requested
22 documents have been produced, regardless of when they are produced. *Papa v. United States*, 281 F.3d
23 1004, 1013 (9th Cir. 2002) (“[T]he production of all nonexempt material, ‘however belatedly,’ moots
24 FOIA claims”) (citations omitted); *Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986)
25 (same); *Yonemoto v. Dep’t of Veterans Affairs*, 305 Fed. Appx. 333, 334 (9th Cir. 2008); *see also*
26 *Velasquez v. DEA Headquarters Unit*, 2013 WL 686727 at *2 (S.D. Cal. Feb. 25, 2013) (“[O]nce the
27 requested records have been produced, there is no longer a live case or controversy and the FOIA action
28 becomes moot”) (citing *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978 (1998)).

1 The FOIA claim is moot because, as shown by the Schramel Declaration and accompanying
2 exhibits, the Forest Service responded to and produced responsive documents and information to all
3 three of the FOIA requests back in 2010 and 2011. *See* Schramel Decl., ¶¶ 5, 7-11, 15 and Exs. B-G, K.
4 And, although the Forest Service made additional documents and information available to SAC for
5 review and copying, neither SAC’s Executive Director nor anyone else from SAC ever went to the
6 Forest Service to review and copy that information. *Id.*, ¶¶ 7, 11. Indeed, rather than complaining that
7 SAC had not responded to the FOIA requests, in December 2010 and January 2011, SAC’s Executive
8 Director sent emails to Forest Service employees, including the FOIA Coordinator, to thank them for
9 giving SACs FOIA requests “extra attention and consideration” and for “providing information to SAC,
10 and in a very timely manner.” *Id.*, ¶¶ 12-13 and Exs. H, I. Therefore, the FOIA claim is moot because
11 the Forest Service responded to the FOIA requests back in 2010 and 2011.

12 To avoid any doubt that the FOIA claim is moot, the Forest Service is providing responsive
13 documents and information to SAC again in connection with this litigation by way of the Schramel
14 Declaration and exhibits filed herewith, as well as directly to plaintiffs’ counsel. Plaintiffs will have
15 received responses to their FOIA requests, not just once, but twice. The Court should therefore find that
16 the FOIA claim is moot and it should dismiss the claim for lack of subject matter jurisdiction.

17 **B. Alternately, The Court Should Grant Summary Judgment On The FOIA Claim.**

18 Since the Forest Service has responded and produced documents and information to plaintiffs
19 on all of the FOIA requests identified in the complaint, the FOIA claim fails on the merits because
20 plaintiffs cannot prove that the Forest Service improperly withheld any agency records responsive to
21 their FOIA requests. *Kissinger*, 445 U.S. at 150. Rather, the evidence shows that the Forest Service
22 responded to all of the requests in 2010 and 2011, and the Forest Service is again producing responsive
23 documents and information in this litigation. *See generally* Schramel Decl. Because plaintiffs cannot
24 establish an essential element of their FOIA claim, the Court should grant summary judgment for
25 Federal Defendants on the FOIA claim.

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V.

CONCLUSION

For all of these reasons, the Court should dismiss plaintiffs' FOIA claim for lack of subject matter jurisdiction without leave to amend. Alternatively, the Court should grant summary judgment in favor of Federal Defendants on the FOIA claim.

DATED: May 29, 2015

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