

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Colorado

FRIENDS OF ANIMALS

Plaintiff(s)

v.

GEORGE ERVIN "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture, and UNITED STATES FOREST SERVICE, an agency of the United States

Defendant(s)

Civil Action No. 19-cv-01510-REB

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) United States Forest Service
1400 Independence Ave, SW
Washington, DC 20250-1111

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Courtney R. McVean
Friends of Animals, Wildlife Law Program
7500 E. Arapahoe Rd., Suite 385
Centennial, CO 80112

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 05/28/2019



s/ R. Villa, Deputy Clerk
Signature of Clerk or Deputy Clerk

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Civil Action No. 19-cv-01510-REB

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

FRIENDS OF ANIMALS

(b) County of Residence of First Listed Plaintiff Denver, CO
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Courtney R. McVean, Friends of Animals
7500 E. Arapahoe Rd, Suite 385
Centennial, CO 80112 (720) 949-7791

DEFENDANTS

GEORGE ERVIN "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture, and UNITED STATES FOREST SERVICE, an agency of the United States

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Acts <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 5 U.S.C. § 552 Failure to provide responsive documents within the time required under FOIA
 Brief description of cause: _____ AP Docket

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____ CHECK YES only if demanded in complaint.
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE _____ SIGNATURE OF ATTORNEY OF RECORD
 /s/ Courtney R. McVean

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

FRIENDS OF ANIMALS,

Plaintiff,

v.

GEORGE ERVIN "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture, and
UNITED STATES FOREST SERVICE, an agency of the United States,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff, Friends of Animals, brings this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* Specifically, Friends of Animals challenges the failure of Defendants George Ervin "Sonny" Perdue III and the United States Forest Service (USFS) to provide responsive documents within the time required under FOIA.

2. On April 9, 2018, Friends of Animals submitted a FOIA request to USFS for documents and records held by the USFS for the time period starting April 9, 2017 through the date of the FOIA request related to the December 22, 2017 Intergovernmental Agreement between the Arizona Department of Agriculture (AZDA) and the USFS, IGA No. AZDA-ODD-001; FS #18-CS-11031200-009 (hereinafter, "Salt River Wild Horse Management Agreement") (FOIA Case Number 2018-FS-R3-03416-F).

3. Friends of Animals requested all records, whether received, created, and/or distributed by USFS, that relate to or mention: (1) management of horses in the Tonto

National Forest; (2) the Salt River Wild Horse Management Agreement; and (3) any communications with AZDA and/or third parties relating to the management of the horses in the Tonto National Forest.

4. Federal Defendants released interim responses on both July 13, 2018 and November 6, 2018.

5. As of the date of this Complaint, Federal Defendants have not issued a final determination in response to Friends of Animals' April 9, 2018 FOIA request.

6. Federal Defendants are unlawfully withholding public disclosure of information that Friends of Animals is entitled to receive under FOIA. Defendants failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide a final determination resolving Friends of Animals' request within the time required by law. Accordingly, Friends of Animals seeks declaratory relief establishing that Defendants have violated FOIA. Friends of Animals also seeks injunctive relief directing Defendants to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

8. This Court has the authority to grant declaratory relief under 28 U.S.C. §§ 2201 *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552 (a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiff and Defendants. This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

9. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in the district where the complainant resides or has a

principle place of business. Plaintiff, Friends of Animals' Wildlife Law Program resides in Colorado and has a principal place of business in Centennial, Colorado. Venue is also proper under 28 U.S.C. § 1391(b) because Defendant is subject to the Court's personal jurisdiction in this judicial district.

PARTIES

10. Plaintiff, FRIENDS OF ANIMALS, is a not-for-profit international advocacy organization incorporated in the State of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living, and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues, and the organization's progress in addressing these issues, through its magazine, *Action Line*, its website, social media, and other reports. Friends of Animals has published articles and information advocating for the protection of wildlife species, including horses, so that they can live unfettered in their natural habitats. Friends of Animals regularly submits requests under FOIA to further its goals and missions. Defendants' refusal to comply with FOIA injures Friends of Animals, its members, and its staff by preventing them from using the requested information to advocate for their mission.

11. Defendant, GEORGE ERVIN "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture, has ultimate responsibility for USFS and ensuring that the agency complies with federal law.

12. Defendant, UNITED STATES FOREST SERVICE, is a federal agency within the United States Department of Agriculture. USFS is responsible for fulfilling Plaintiff's request and complying with all federal laws.

LEGAL FRAMEWORK

A. Freedom of Information Act.

13. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. *Dep't of State v. Ray*, 502 U.S. 164 (1991). Upon written request, FOIA requires agencies of the United States government to promptly disclose their records, unless the government can lawfully withhold the records from disclosure under one of nine specific exemptions in FOIA. 5 U.S.C. § 552(a)(3)(A). The burden is on the government—not the public—to justify why particular information may be withheld. *Ray*, 503 U.S. at 164.

14. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of . . . such determination and the reasons therefor” and, in the case of an adverse determination, the right of such person to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

15. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* § 552(a)(6)(C).

16. In “unusual circumstances” an agency may extend the time limits up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* § 552(a)(6)(B). With respect to a request for which a written notice purports to apply the “unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

17. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552(a)(6)(C)(i).

18. Additionally, if the agency fails to comply with the statutory time limit, it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

FACTUAL BACKGROUND

19. Friends of Animals submitted its FOIA request to USFS on April 9, 2018.

20. Friends of Animals requested “copies of all documents and records held by the United States Forest Service (USFS) for the time period starting April 9, 2017 through the date of this FOIA request relating to the December 22, 2017 Intergovernmental Agreement between the Arizona Department of Agriculture (AZDA) and the USFS, IGA No. AZDA-00D-001; FS #18-CS-11031200-009.”

21. Specifically, Friends of Animals requested all records in the possession of USFS “that relate to or mention: (1) management of horses in the Tonto National Forest; (2) the Salt River Wild Horse Management Agreement; and (3) any communications with AZDA and/or third parties relating to the management of the horses in Tonto National Forest.”

22. Friends of Animals received an email from USFS acknowledging receipt of the request on April 16, 2018 and a letter confirming that request on or around April 19, 2018. USFS assigned the request Case Number 2018-FS-R3-03416-F.

23. On May 1, 2018, Friends of Animals received a letter stating that the request had been rerouted to the Southwestern Region FOIA/PA Service Center for review.

24. FOIA’s twenty workday deadline for responding to Friends of Animals’ request passed on May 17, 2018.

25. USFS did not respond by May 17, 2018.

26. On May 21, 2018 and May 30, 2018, Friends of Animals sent emails to the FOIA contact listed on the April 19, 2018 confirmation letter asking for the status of the FOIA request. Friends of Animals received no response.

27. On June 7, 2018, Friends of Animals sent an email to USFS's Government Information Specialist asking about the status of the FOIA request. On the same day, USFS's Regional Litigation Coordinator responded stating that USFS would "strive to review and release documents by the end of the month."

28. On July 3, 2018, after receiving no documents, Friends of Animals once again emailed USFS to ask about the status of the request. USFS responded stating that it would have a partial response by the end of the week.

29. USFS provided the first interim responses on July 13, 2018.

30. On September 7, 2018, Friends of Animals sent an email to a new FOIA contact in USFS's Southwestern Region to ask about the status of the request. On September 13, 2018, Friends of Animals received an email stating that the request was "21st in the overall queue for all requests in the region" but "third in line" for review.

31. On October 3, 2018, Friends of Animals received an email stating that USFS hoped to complete the request by the end of the month.

32. USFS provided the second interim response on November 6, 2018.

33. On January 29, 2019, following the government shutdown, Friends of Animals sent an email to USFS's Southwestern Region to ask about the status of the final release of documents. USFS declined to provide a date for when the request would be completed, and instead noted that the "remaining documents are emails which may need redaction of sensitive material which is time consuming."

34. On April 29, 2019, well over a year after Friends of Animals submitted its request, Friends of Animals sent yet another email asking about the status of the request. USFS responded stating that USFS would complete the request "as soon as practicable" but

noted that there were over 40 requests in the queue and about half predated Friends of Animals' request.

35. On May 22, 2019, Friends of Animals sent a final email asking about the status of the request and specifically requested a date of completion.

36. USFS declined to provide a date of completion.

37. USFS responded that requests are reviewed on a "first in, first out basis" and it would resume review of our request after older requests were completed.

38. As of the date of this Complaint, USFS has still not made a final determination in response to Friends of Animals' FOIA request.

39. USFS has offered no reasonable explanation for its delay, and it has failed to provide a specific date for when it will finally be able to comply with its obligations under FOIA.

40. USFS is unlawfully withholding public disclosure of information sought by Friends of Animals, information to which Friends of Animals is entitled to receive, and for which USFS has not provided a valid disclosure exemption.

CLAIM FOR RELIEF
(Violation of the Freedom of Information Act)

41. Friends of Animals herein incorporates all information and allegations contained in the preceding paragraphs.

42. Friends of Animals properly requested records within the control of Defendants.

43. Defendants have failed to fully release the records Friends of Animals requested and failed to make any claims of statutory exemption regarding the requested records.

44. Accordingly, Friends of Animals is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

PRAYER FOR RELIEF

Friends of Animals respectfully requests that the Court enter judgment providing the following relief:

- A. Declare that Defendants violated the Freedom of Information Act by failing to lawfully satisfy, in full, Plaintiff's request under the Freedom of Information Act;
- B. Order Defendants to process and release immediately all records responsive to Plaintiff's request at no cost to Plaintiff;
- C. Retain jurisdiction of this action to ensure the processing of Plaintiff's request, and to ensure that no agency records are wrongfully withheld;
- D. Award Plaintiff costs, including reasonable attorney fees and litigation costs in this action, pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E); and
- E. Grant Plaintiff any other relief that the Court deems just and proper.

Dated: May 28, 2019

Respectfully submitted,

/s/ Courtney R. McVean

Courtney Renee McVean (CO Bar # 48358)

Staff Attorney

Friends of Animals

7500 E. Arapahoe Rd., Suite 385

Centennial, CO 80112

720-949-7791

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Attorney for Plaintiff

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U.S. DISTRICT COURT DISTRICT OF COLORADO