

Grand Canyon Trust v. NRC, No. 2:00CV-0288 ST (D. Utah, filed April 3, 2000)

United States District Court

CENTRAL DIVISION DISTRICT OF UTAH

GRAND CANYON TRUST,
Plaintiff,

SUMMONS IN A CIVIL CASE

V.

CASE NUMBER:

U.S. NUCLEAR REGULATORY COMMISSION,
Defendant.

2:00CV-0288ST

TO: (Name and address of defendant)

Annette L. Vietti-Cook
Secretary of the Commission
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

W. Cullen Battle, #A0246
Fabian & Clendenin
215 S. State Street, Suite 1200
Salt Lake City, UT 84111

Marie A. Kirk, Esq.
Susan D. Daggett, Esq.
Earthjustice Legal Defense Fund
1631 Glenarm Place, Suite 300
Denver, CO 80202

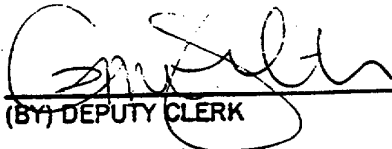
an answer to the complaint which is herewith served upon you, within ^{60 (sixty)} days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of the time after service.

MARK W. D. ZAMES

CLERK

4/3/00

DATE


(BY) DEPUTY CLERK

Marie Kirk *
Susan Daggett *
Earthjustice Legal Defense Fund
1631 Glenarm Place, Ste. 300
Denver, CO 80202
Telephone: (303) 623-9466

W. Cullen Battle, # A0246
Fabian & Clendenin
215 S. State Street, Suite 1200
Salt Lake City, UT 84111
Telephone: (801) 531-8900

Attorneys for Plaintiff

*Application for admission
pro hac vice pending

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GRAND CANYON TRUST,

Plaintiff,

v.

U.S. NUCLEAR REGULATORY COMMISSION,

Defendant.

*
*
*
*
*
*
*
*
*
*

Case No. 2:00CV-02885T

CERTIFICATE OF SERVICE

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

I hereby certify that I caused copies of the COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF and the original SUMMONSES, copies of which are attached hereto, to

be mailed, by certified mail, return receipt requested, this 3rd day of April, 2000, to the following:

Annette L. Vietti-Cook
Secretary of the Commission
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Honorable Janet Reno
Attorney General of the United States
10th and Constitution Avenue, N.W.
Room 4400
Washington, D.C. 20530

And to be hand delivered the same day to:

Paul Warner, U.S. Attorney
U.S. Attorney's Office
185 South State Street, 4th Floor
Salt Lake City, UT 84111

Dated this 3rd day of April, 2000.




W. Cullen Battle, # A0246
Fabian & Clendenin
215 S. State Street, Suite 1200
Salt Lake City, UT 84111
Telephone: (801) 531-8900

Marie A. Kirk, # 28,705
Susan D. Daggett, # 29,901
Earthjustice Legal Defense Fund
1631 Glenarm Place, Suite 300
Denver, CO 80202
Telephone: (303) 623-9466

Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this 3rd day of April, 2000.


Notary Public

Marie Kirk *
Susan Daggett *
Earthjustice Legal Defense Fund
1631 Glenarm Place, Ste. 300
Denver, CO 80202
Telephone: (303) 623-9466

W. Cullen Battle, # A0246
Fabian & Clendenin
215 S. State Street, Suite 1200
Salt Lake City, UT 84111
Telephone: (801) 531-8900

Attorneys for Plaintiff

*Application for admission
pro hac vice pending

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GRAND CANYON TRUST,

Plaintiff,

v.

U.S. NUCLEAR REGULATORY COMMISSION,

Defendant.

*
*
*
*
*
*
*
*

Case No. 2:00 CV-0288 ST

COMPLAINT FOR DECLARATORY RELIEF

I. INTRODUCTION

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel the Nuclear Regulatory Commission ("NRC") to grant a fee waiver for the

production of government documents requested by the Grand Canyon Trust. This case involves a request for documents related to the financial capability of the NRC's licensee, the Atlas Corporation ("Atlas"), to clean up a massive radioactive waste site on the banks of the Colorado River. The Grand Canyon Trust and several other organizations sought information pursuant to FOIA to determine whether the NRC could fulfill its statutory obligations to ensure that adequate funding would be available to clean up the groundwater beneath the site and stop the toxic plume of contaminants flowing into the river.

2. Although the NRC identified a number of documents responsive to the FOIA request, the agency refused to grant the mandatory fee waiver to which the Grand Canyon Trust and the other requesters are entitled. According to the NRC's FOIA Officer, the requesters were barred from obtaining a fee waiver because the requesters are presently engaged in an adjudicatory proceeding before the NRC. The Grand Canyon Trust appealed this determination administratively.

3. In deciding the administrative appeal, the Secretary of the NRC rejected the FOIA Officer's reasoning but affirmed the denial of the fee waiver nonetheless, on the grounds that the FOIA request "d[id] not concern the operations or activities of the federal government" and "[would not] contribute significantly to the public's understanding of federal government operations or activities." As set forth below, the NRC's decision to deny the fee waiver violates FOIA. Because the Grand Canyon Trust has met its burden to show that the FOIA request is in the "public interest," the NRC's decision to deny the fee wavier must be reversed.

II. PARTIES

4. Plaintiff Grand Canyon Trust (“plaintiff”) (also referred to as one of the “requesters”) is a nonprofit organization based in Flagstaff, Arizona, with approximately 4,000 members. Its mission is to protect and restore the canyon country of the Colorado Plateau, including its spectacular landscapes, flowing rivers, clean air, diversity of plants and animals, and areas of beauty and solitude. Members of the Grand Canyon Trust raft, canoe, and fish the stretch of river adjacent to the Atlas site and also hike on the riverbanks, view wildlife, and seek solitude in the area immediately adjacent to the tailings pile.

5. Defendant NRC is an agency of the United States, and has the authority to grant the fee waiver that plaintiff seeks.

III. JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). Plaintiffs have exhausted their administrative remedies with respect to this action in accordance with 10 CFR § 9.29. This Court also has jurisdiction pursuant to 28 U.S.C. §§ 2201-2202 (declaratory judgment action), 28 U.S.C. § 1331 (federal question jurisdiction), and 5 U.S.C. § 706 (APA review).

7. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B) because the Grand Canyon Trust maintains an office in Utah and because a significant number of its members reside in Utah. Moreover, the subject of the FOIA request, the Atlas tailings pile, is located in Utah.

IV. STATUTORY FRAMEWORK

8. Under the Freedom of Information Act (“FOIA”), a fee waiver is generally available to any requester upon a showing that the request is in the public interest. See 5 U.S.C.

§ 552(a)(4)(iii). Such disclosure is in the public interest if “it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” See 5 U.S.C § 552(a)(4)(iii). Once a requester meets its burden of showing that the request is in the public interest, a fee waiver is mandatory. See 5 U.S.C § 552(a)(4)(iii) (“Documents *shall* be furnished without any charge...if disclosure of the information is in the public interest”) (emphasis added); see Friends of the Coast Fork v. U.S. Dep’t of the Interior, 110 F.3d 53, 54 (9th Cir. 1997) (“FOIA requires the federal government to furnish documents to public interest groups free of charge...if the disclosure of the information is in the public interest”).

9. NRC regulations set forth eight questions for requesters and a six-factor balancing test for the agency to evaluate whether a request is in the public interest. See 10 C.F.R § 9.41 (b)-(d). Based on the eight questions, a requester must show, for example, that the requester will disseminate the material widely, that the requester possesses the ability to utilize the information and will use it to contribute to public understanding, and that the request is not primarily in the requester’s commercial interest. See id. Once the requester has answered the eight questions, the NRC must consider the following six factors to determine whether a fee waiver is in the public interest:

- (1) How the subject of the requested agency records concerns the operations or activities of the Government;
- (2) How the disclosure of the information is likely to contribute to an understanding of Government operations or activities;
- (3) If disclosure of the requested information is likely to contribute to the public understanding;
- (4) If disclosure is likely to contribute significantly to public understanding of Government operations or activities;
- (5) If, and the extent to which, the requester has a commercial interest that would be furthered by the disclosure of the requested agency records; and,
- (6) If the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison

with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

See 10 C.F.R § 9.41(d).

V. FACTS

10. On September 22, 1999, the Grand Canyon Trust sent a FOIA request to the NRC for information in the NRC's possession related to the financial status and bankruptcy of the Atlas Corporation. The requesters sought this information because of their concern about pollution from the Atlas site, the government's cleanup plans, and, specifically, whether the NRC could assure that adequate resources are available to finance the cleanup. The Atlas Corporation at the time of the request was the licensee of the Atlas tailings pile, over which the NRC has regulatory jurisdiction.

11. The initial FOIA letter requested:

All documents, correspondence and other material, including written, electronic and verbal communications, phone logs, etc. located in your records from September 1998 through September 1999 related to the Atlas Corporation's bankruptcy status and proceedings as well as any information on the financial status of the Atlas Corporation.

In that letter, plaintiffs specifically requested a waiver of fees associated with the request, noting:

[n]either Earthjustice nor its clients would derive any income or commercial benefit from use of any of the documents. These documents will be used to increase the public understanding of government activities related to finalizing and funding a reclamation plan for the Atlas Mill Tailings pile while the Atlas Corporation is undergoing bankruptcy proceedings.

12. On September 29, 1999 the NRC sent a letter acknowledging its receipt of requesters' FOIA request and informed the requesters that more information was needed to make a determination to waive fees under 10 C.F.R. §9.41. On October 18, 1999, the NRC notified the requesters that the agency had found responsive documents, issued a statement of fees totaling

\$383.26, and notified the requesters that more information was needed to make a determination to waive fees.

13. On October 27, 1999, the requesters sent the NRC a letter explaining in detail why the requesters satisfy each of the eight questions relevant for a waiver of fees as specified in 10 C.F.R § 9.41. Among other factors, the requesters explained that the information sought was expected to increase the public's understanding of the financing of the cleanup of the Atlas site, that the information would be disseminated to the public widely through newsletters, action alerts, meetings, and other means, and that the information was not in the commercial or private interest of the requesters.

14. On December 20, 1999, the NRC sent a letter acknowledging that the requesters had responded to fee waiver criteria (1)-(8) as requested. Nevertheless, in that same letter the NRC informed the requesters that the request for a fee waiver "cannot be favorably considered because the NRC is prohibited by law (5 U.S.C. 504) from funding 'parties intervening in regulatory or adjudicatory proceedings' before the NRC."

15. Prior to this FOIA request, in a separate matter, Earthjustice Legal Defense Fund filed a Request for Hearing and Petition for Leave to Intervene on behalf of the requesters and several other parties with the NRC on January 27, 1998. This petition alleged a number of shortcomings in the NRC's proposed amendment to Atlas's materials license to cap the tailings pile in place next to the Colorado River. The Petitioners' request for hearing and petition for leave to intervene was granted on February 17, 2000.

16. The language relied upon by the NRC FOIA Officer to deny the fee waiver is codified as part of the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, which provides

that “(n)one of the funds in this Act...or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts.” This statute governs the award of attorneys’ fees in federal court and administrative proceedings; it does not reference FOIA or fee waivers under FOIA.

17. The plaintiff timely filed an administrative appeal of NRC’s December 20, 1999 decision to deny the fee waiver on January 13, 2000. In the administrative appeal, the plaintiff notified NRC that its refusal to provide the requested fee waiver violated FOIA, that the agency had not met its burden to show that the fee waiver was not in the ‘public interest,’ and that section 504 is not relevant in deciding a fee waiver request pursuant to FOIA.

18. In a March 2, 2000 letter, the Secretary of the NRC determined that section 504 does not apply in this case because the requesters’ petition to intervene was not granted until February 17, 2000; nevertheless, the NRC denied the administrative appeal. This time, the NRC concluded that the Grand Canyon Trust had not satisfied the public interest test because “[the] subject matter does not concern the operations or activities of the federal government” and “the documents are [not] likely to contribute significantly to the public’s understanding of federal Government operations or activities.” According to NRC, the plan to finalize and fund a cleanup at the Atlas site is merely a “licensee’s activity that was subject to NRC approval” and does not concern the operations or activities of the federal government.

19. Atlas’s reclamation plan was described by the NRC as a “federal proposed action” in an Environmental Impact Statement evaluating the environmental consequences of the project pursuant to the National Environmental Policy Act (“NEPA”). In addition, the proposed project

to reclaim the Atlas tailings pile by capping it in place was the subject of formal Endangered Species Act ("ESA") consultation as an "agency action" between the NRC and the U.S. Fish and Wildlife Service. The NRC offered an opportunity for a hearing to interested members of the public regarding Atlas's application to amend its Materials License to allow it to reclaim the tailings pile in place. See 59 Fed. Reg. 16665.

20. Because the NRC has finally denied plaintiff's administrative appeal in this matter, the Grand Canyon Trust has exhausted its administrative remedies as defined in 5 U.S.C. § 552(a)(6)(C)(i).

VI. CAUSE OF ACTION

21. Plaintiff has a statutory right under FOIA, 5 U.S.C. § 552, to a waiver of fees for the requested documents, and there is no legal basis for NRC's refusal to grant it.


VII. REQUEST FOR RELIEF

THEREFORE, plaintiff requests that this Court:

1. Reverse and remand the NRC decision with instructions to release the documents to plaintiffs and grant plaintiff a full fee waiver in accordance with 5 U.S.C. § 552(a)(4)(A)(iii);
2. Award plaintiff its costs and reasonable attorneys' fees in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
3. Grant such other and further relief as the Court may deem just and proper.

Dated this 3rd day of April, 2000.

Respectfully submitted,



Marie A. Kirk, # 28,705
Susan D. Daggett, # 29,901
Earthjustice Legal Defense Fund
1631 Glenarm Place, Suite 300
Denver, CO 80202
Telephone: (303) 623-9466



W. Cullen Battle, # A0246
Fabian & Clendenin
215 S. State Street, Suite 1200
Salt Lake City, UT 84111
Telephone: (801) 531-8900

Attorneys for Plaintiff

Plaintiff's Name and Address:

Grant Canyon Trust
HC64 Box 1801
Moab, UT 84532