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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

COLUMBIA RIVERKEEPER AND WILLAMETTE RIVERKEEPER, Oregon nonprofit corporations, Plaintiffs, v. **FEDERAL ENERGY REGULATORY COMMISSION,** an agency of the United States, Defendant.	No. 08-936-HU **PLAINTIFFS' REPLY TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **Oral argument requested**

INTRODUCTION

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Columbia and Willamette Riverkeeper ("Riverkeeper") sent two distinct requests to FERC for information. Regarding FOIA request #1, Riverkeeper moved for summary judgment in this case because: a) FERC failed to conduct an adequate search, and b) FERC has not produced responsive documents under FOIA. Riverkeeper is entitled to summary judgment in both respects because:

a) FERC's response to plaintiffs' Motion for Summary Judgment ("response") admits that it failed to conduct an adequate search, and

b) FERC's response fails to address the fact that discovery responses are not final agency actions for the purposes of FOIA, and FERC has still not produced responsive documents pursuant to FOIA.

Regarding FOIA request # 2, Riverkeeper moved for summary judgment because FERC improperly redacted under FOIA Exemption 6 the April 18, 2008 address list. Riverkeeper is entitled to summary judgment for this claim because the public interest in ensuring that FERC complied with the law in notifying affected landowners greatly outweighs any privacy interest. This is especially true because FERC counsel admits that FERC "may have missed including some individual landowners on the list" but this "does not mean it was not trying to do its job." Def.'s Resp. at 5. Without the address list, there is no way for the public to ascertain which landowners were "missed" and deprived of their legal rights of notification.

ARGUMENT

A. FERC conducted an inadequate search

Riverkeeper is entitled to summary judgment on its inadequate search claim because FERC admits that its search was inadequate. Def.'s Resp. at 5.

B. FERC failed to produce responsive documents

As explained in great detail in Riverkeeper's Memorandum in Support of Motion for Summary Judgment, FERC has not produced, pursuant to FOIA, any of the requested October to December 2007 landowner mailing lists. Riverkeeper did obtain, through discovery in this litigation, several landowner lists that appear to be responsive documents. Discovery documents cannot substitute for FOIA because plaintiffs have no appeal rights to challenge the discovery

responses under FOIA and the production of discovery documents is not an agency action under FOIA. The only final actions FERC has made are the initial response to plaintiffs' FOIA request on March 12, 2008 and the denial of plaintiffs' administrative appeal on June 11, 2008. Pls' Memo. Supp. Mot. Summ. J. at 5.

Riverkeeper's First Claim for Relief states that "FERC's *failure to produce documents that it possesses* or FERC's failure to adequately search" violates the law. First Am. Compl. at 27 (emphasis added). FERC's response brief only responds to the inadequate search component (by admitting), but fails entirely to address plaintiffs' claim that FERC did not produce the documents. Def.'s Resp. at 5. FERC's silence on the "failure to produce" claim weighs in favor of granting plaintiffs' summary judgment motion.

FERC's "Factual Background" section states that FERC "has produced its mailing lists of October 3, 17, and 28, 2007 . . ." Def.'s Resp. at 4., but this production was a discovery response. FERC produced these lists only after plaintiffs' conferred with FERC counsel on Plaintiffs' Second Motion to Compel a Discovery Response in February of 2009[1], nearly a year after plaintiffs' February 12, 2008 FOIA request. FERC makes no arguments that discovery responses somehow substitute for final agency actions under FOIA. Therefore, FERC does not, and cannot, argue that it has met its FOIA obligations. While the discovery responses provide evidence that there are responsive documents that FERC withheld, Riverkeeper still does not know which documents are responsive to the FOIA request and what other documents FERC may have but has not produced.

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[1] Plaintiffs did not file the Second Motion to Compel a Discovery Response because FERC produced the requested documents at that time.

C. FERC's decision to redact information violates FOIA

1. The public interest in disclosure is strong

Riverkeeper's Third Claim for Relief should be granted because FERC improperly redacted the names and addresses of individual landowners on the April 18, 2008 list in response to FOIA request # 2.[2] The issue is whether the public interest in knowing what FERC is up to and ensuring that FERC complies with the law outweighs any privacy interest that may exist. Pls' Memo. Supp. Mot. for Summ. J. at 14-23.

FERC sent "Notice of Intent" letters to affected landowners announcing upcoming public hearings and describing the citizens' rights under the National Environmental Policy Act and FERC regulations. Memo. Supp. Mot. Summ. J. Ex. 6. The Notice of Intent letters also explained the eminent domain process, stating, "if the project is approved by FERC . . . the pipeline company could initiate condemnation proceedings." *Id*. at 2. The Notice, therefore, provides important information about landowners' rights in eminent domain. The stakes are clearly high for farmers, foresters, and other landowners facing condemnation of their properties for a pipeline.

Riverkeeper provided declarations demonstrating that FERC failed to comply with its obligations to provide notice of upcoming hearings and legal rights to landowners. Pls' Memo. Supp. Mot. Summ. J. Exs. 2, 14, and 15. Based on these known omissions, there is a strong public interest in ensuring that FERC complied with the law. FERC's brief stated, "the fact that FERC may have missed including some individual landowners on the list, over a 200-mile pipeline, does not mean it was not trying to do its job." Def.'s Resp. at 7. Thus, defendant argues that as long as FERC is trying (but in this case failing) to comply with the law, there is no value

[2] The issue of whether the redaction is proper is limited to FOIA request # 2 because the April 18, 2008 list is the only list that FERC properly produced under FOIA.

in public oversight. To the contrary, the public interest in FERC's mailing lists is high because FERC admits that some landowners did not receive notice. The law requires the FERC provide notice to all landowners affected by the pipeline – not "try" to provide notice.

Defendant also argues that providing the names and addresses does not contribute to the understanding of how FERC compiles a mailing list. As set out at length in the Plaintiffs' Memorandum in Support of Motion for Summary Judgment, the release of names and addresses allows the public to understand whether FERC met its obligation to notify all landowners. Plaintiffs are not interested in how FERC compiles a mailing list, but there is great value in public review of whether FERC complied with the law, especially in light of FERC's known failures to provide notice and questionable actions throughout this case.

FERC also suggests that disclosure of the mailing list would not help the public assess whether FERC is complying with the law. This is incorrect. The <u>only</u> way to assess whether FERC contacted affected landowners, as required by law, is to review the landowner mailing list. In addition, the mailing list is helpful because citizens could compare the mailing list with the publicly available pipeline maps to ensure that landowners who are on the pipeline route received the Notice of Intent. This confirmation would not require contacting the landowners.

FERC's response brief also states, "revealing the names and addresses of the individuals would not contribute to the public's understanding of how well FERC was doing its job unless someone double-checked the owner of each piece of property next to the path of the proposed pipeline and compared it to FERC's list." Def.'s Resp. at 7. Indeed, citizens can double-check with landowners to ensure they received the Notice of Intent, so FERC acknowledges that the mailing list would contribute to public understanding of FERC's actions. FERC's suggestion that citizens would have to check with the owner of "each piece of property" along the pipeline

route is an exaggeration. Even if citizens only conducted this comparison in one community, such as Gales Creek, McMinnville, or Woodburn, or even one neighborhood, this would shed light on whether FERC complied with its statutory duties. In addition, citizens who are currently aware that they did not receive proper notice can check the mailing list to demonstrate FERC's failure to comply with the law.

Therefore, FERC's only two arguments against the public value of disclosure – that FERC was "trying to do its job" and that the mailing list would not help citizens review FERC's actions – are both misplaced. In addition, FERC's response brief fails to address Riverkeeper's additional arguments and salient caselaw in favor of disclosure. As such, FERC fails to carry the burden of proving that the mailing list falls within the claimed exemption. *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994).

2. The privacy interest is low

As described in detail in Riverkeeper's Motion for Summary Judgment, the privacy interest implicated by releasing the list is minimal because: a) FERC routinely releases the landowner list for similar pipelines; b) the list does not reveal any private information; c) FERC regularly shared the landowner list with the Palomar corporation, which mailed multiple unsolicited letters; and d) disclosure of the list will not cause harm or embarrassment. Pls' Memo. Supp. Mot. Summ. J. at 21-25.

a. FERC routinely released landowner lists for similar pipelines

FERC's claim of a strong privacy interest in the Palomar Pipeline landowner lists is undercut by the fact that FERC published on its website unredacted landowner lists for the three similar pipeline applications currently pending in Oregon – Ruby, NorthernStar, and Oregon LNG. Pls' Memo. Supp. Mot. Summ. J. at 20. FERC's response acknowledged that "FERC's

website shows the names and addresses of individuals related to other pipeline projects . . . ." Def.'s Resp. at 7. In fact, the landowner list for the Palomar Pipeline appears to be the only one that FERC did not freely publish on its website. FERC's response brief did not point out a single pipeline project where it redacted or withheld any of the landowner information, except Palomar. FERC's claim of a strong privacy interest is inconsistent with its past actions.

FERC now claims that "in an effort to prevent future disclosure of the names and addresses of private individuals, Commission staff is taking [specified] steps" to avoid publishing these landowner lists online. Holmes Decl. ¶ 4. FERC's new staff policy does not change the fact that FERC consistently released this information prior to this litigation. While this new policy is convenient for this litigation, FERC cannot manufacture a strong privacy interest to overcome FOIA's presumption towards public disclosure.

FERC's response also states that it "inadvertently allowed contractors to post these lists on its website, without redacting the names and addresses of the individuals." Def.'s Resp. at 7. FERC now asserts a strong privacy interest in the landowner list, even after it "inadvertently" published the names and addresses of thousands of similarly situated individuals for all other major pipeline projects in Oregon. FERC fails to explain how it "inadvertently" published such obvious information if protected. For example, FERC published on its website a submission with the following title: "NorthernStar Natural Gas, LLC submits *the list of names and addresses of all landowners that may be affected* by the Bradwood Landing Pipeline." Pls' Memo. Supp. Mot. Summ. J. Ex. 17 at 1 (emphasis added). FERC must have understood what this submission contained, but did not consider the address list significantly private to withhold.

It is most telling that the pipeline companies themselves, not FERC, control whether the landowner lists are published. FERC's action of letting private companies decide whether to

publish the mailing list demonstrates that the privacy interest is weak. The declaration of FERC counsel Jacqueline Holmes stated, "The Commission *must rely on the entity submitting the information* to properly label information not appropriate for public review. Holmes Decl. ¶ 3. (emphasis added). FERC readily published NorthernStar's list, for example, because NorthernStar did not object. Palomar, however, strongly objected to the release of its landowner list so FERC withheld that information. Pls' Memo. Supp. Mot. Summ. J. Ex. 12. A letter from Palomar to FERC argued against the release of the list because, among other reasons, Columbia Riverkeeper has "openly advocated to landowners that they not provide the pipeline with permission to enter." *Id.* Palomar's cost in surveying is greatly reduced if landowners readily give permission instead of requiring eminent domain. Therefore, Palomar's interest in withholding the information is based on economic motivations. The motivations of the pipelines companies should be the arbiter of what is or is not a protected privacy interest.

b. FERC's conclusory statements fail to demonstrate a strong privacy interest

Riverkeeper's Memorandum in Support of Motion for Summary Judgment explains that the landowner list has a low privacy interest because: the list does not reveal any private information; FERC already shared the list with private corporations; and disclosure of the list will not cause harm or embarrassment. FERC's response brief did not respond to any of these arguments, except to state: "parties requesting the information could be commercial advertisers, solicitors, marketing groups, and others who may want to contact the individual landowners about the proposed pipeline. Releasing the names and addresses of the individual landowners to these groups has the potential of invading the privacy of the individuals and it should be protected." Def.'s Resp. at 7. FERC provides no support for this conclusory statement. As

such, FERC fails demonstrate that release of the list is a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

Further, despite FERC's admission that it published the names and addresses of thousands of landowners along other pipeline routes, FERC fails to provide a single example of harm to landowners. FERC's suggestion of "commercial advertisers, solicitors, [and] marketing groups" harassing landowners is purely speculative and not supported by the real-life empirical evidence.

CONCLUSION

For the foregoing reasons and the reasons discussed in detail in Plaintiffs' Memorandum in Support of Motion for Summary Judgment, plaintiffs request that this Court to grant summary judgment for both components of plaintiffs' First Claim for Relief (inadequate search and failure to produce documents) and plaintiffs' Third Claim for Relief (improper redaction of the April 18, 2008 mailing list). As such, plaintiffs request that the Court order FERC to produce promptly the responsive documents..

Dated: April 14, 2009

Respectfully submitted,

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