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Western Watersheds Project*

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

WESTERN WATERSHEDS PROJECT,

Plaintiff,

v.

BUREAU OF LAND MANAGEMENT,

Defendant.

No. 1:18-cv-505

COMPLAINT

INTRODUCTION

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, to compel Defendant the Bureau of Land Management (BLM) to produce records that Plaintiff Western Watersheds Project requested in two FOIA requests in 2017 and 2018. The first request, sent on September 27, 2017, concerned audio recording and presentation slides for a BLM National Office presentation regarding changes to BLM implementation of several laws that occurred on September 21, 2017. The second request, sent on March 14, 2018, concerned

Endangered Species Act (ESA) consultation records related to BLM's Converse County oil and gas development project in Wyoming.

2. Western Watersheds Project (WWP), an Idaho not-for-profit corporation, requested the documents and records that are the subject of this lawsuit to further its objective of educating the public about BLM's public land management decisions and policies.

3. In this civil action WWP seeks a court order (1) declaring that BLM's failure to timely respond to WWP's requests violates FOIA; and (2) ordering BLM to immediately produce the requested records.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331, because this action arises under the laws of the United States, including FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201.

5. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1) because Plaintiff WWP's principal place of business is in this district.

6. Because BLM has failed to comply with the applicable time requirements of FOIA, WWP is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial relief enjoining BLM from continuing to withhold agency records and ordering the production of records improperly withheld under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202.

PARTIES

7. Plaintiff WWP is an Idaho non-profit membership organization dedicated to protecting and restoring watersheds and wildlife in the American West through education, public policy initiatives, and legal advocacy. WWP has over 5,000 members and supporters, including

many members who live in Idaho. WWP is headquartered in Hailey, Idaho, and has staff in Boise, Idaho, as well as in other western states.

8. WWP's mission is to protect and restore western watersheds and wildlife through education, public policy initiatives and legal advocacy. WWP is active in seeking to protect and improve the public lands, wildlife, and other natural resources and ecological values of western watersheds, particularly by addressing impacts caused by domestic livestock grazing. WWP has long-standing concerns about impacts of BLM's land management, including decisions to allow oil and gas development, upon sage-grouse and other species.

9. To further its mission, WWP often requests information regarding federal programs and activities through the FOIA. WWP then compiles and analyzes the information it obtains through the requests and disseminates it to the public by: (1) presenting the material to its members and supporters, as well as members of other state and national conservation organizations, through its newsletter and email alerts; (2) presenting the materials at national and regional conferences; (3) participating in other public forums, such as local government hearings; (4) issuing press releases and presenting the information to national, regional and local media; (5) posting the information (in a compiled and more readily understandable form) on WWP's internet web site, which has over 2,000 views each month; and (6) periodically posting information in a compiled and more readily understandable form to a heavily trafficked weblog, The Wildlife News (<http://www.thewildlifeneeds.com>) which receives on average over 7,000 visits each week. The records requested in the FOIA requests at issue here will help WWP inform and educate its members and the public about BLM's public land management policies and decisions, and how they may affect sensitive wildlife species.

10. WWP and its staff and members are directly injured by BLM's failure to comply with the statutory requirements of FOIA, and a favorable outcome of this litigation will redress that injury. WWP brings this suit on behalf of itself, its staff and its members.

11. Defendant the BUREAU OF LAND MANAGEMENT is an independent agency of the U.S. Department of Interior (Interior), and has possession of and control over the records WWP seeks. As a federal agency, BLM is obligated to comply with the mandatory requirements of FOIA and is sued in this action in connection with its failure to comply with its statutory duties under the FOIA.

THE FREEDOM OF INFORMATION ACT

12. FOIA was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, at 3 (1st Sess. 1965). As the Supreme Court has affirmed, "Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.'" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Accordingly, "the basic purpose" of FOIA is "to open agency action to the light of public scrutiny." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

13. Ordinarily, FOIA requires that federal agencies shall determine within twenty (20) working days after receiving a request whether to comply with it. 5 U.S.C. § 552(a)(6)(A); 43 C.F.R. § 2.16(a).

14. In determining whether to comply with a request, the agency must first gather and review the requested documents. *Citizens for Responsibility and Ethics in Wash. v. Federal Election Com'n*, 711 F.3d 180, 188 (D.C. Cir. 2013) (*CREW*).

15. Then, the agency making the determination “must determine whether to comply with a request—that is, whether a requester will receive all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decide to later decide. Therefore, within the relevant time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *CREW*, 711 F.3d at 186.

16. The FOIA provides that “[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” 5 U.S.C. § 552(a)(6)(C)(i).

17. An untimely determination or response is a violation of FOIA, regardless of the final outcome of the request. *Gilmore v. U.S. Dept. of Energy*, 33 F. Supp. 2d 1184, 1188 (N.D. Cal. 1998), *Or. Natural Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006).

18. In specified unusual circumstances, the time limits prescribed in the statute may be extended by written notice to the requester “setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i). *See also* 43 C.F.R. § 2.19(a).

19. “No such notice shall specify a date that would result in an extension for more than ten working days,” except as provided elsewhere in the statute. *Id.* § 552(a)(6)(B)(i).

20. If the agency determines unusual circumstances exist and that the request cannot be processed within the 10 additional days, it shall notify the requester and “shall provide the

person an opportunity to limit the scope of that 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.* § 552(a)(6)(B)(ii).

21. Interior’s FOIA regulations provide for four “processing tracks” based on the number of workdays needed to process the request: simple (1-5 days), normal (6-20 days), complex (21-60 days), and exceptional/voluminous (over 60 days). 43 C.F.R. § 2.15(c). However, the use of multi-track processing “does not alter the statutory deadline for a bureau to determine whether to comply” with a FOIA request. *Id.* § 2.15(f). A bureau is “any major component of the Department administering its own FOIA program,” a definition that includes BLM. *Id.* § 2.70.

22. Interior’s FOIA regulations provide that if the processing time will extend beyond a total of 30 workdays, the bureau will give the requester a chance to modify the request or agree to an alternative time period for processing, and make available Interior’s FOIA Public Liaison to assist in resolving any disputes between the requester and the bureau. *Id.* § 2.19(b). If the bureau extends the time limit and does not offer the requester an adequate response during that time period, the requester “may consider the request denied.” *Id.* § 2.19(c).

23. Administrative remedies are deemed exhausted when an agency fails to comply with applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i); *CREW*, 711 F.3d at 277.

STATEMENT OF FACTS

A. FOIA Control Number 2018-00056—Webinar Notes

24. On September 27, 2017, WWP properly submitted a FOIA request via email to Mr. Ryan Witt, a FOIA liaison in BLM’s Washington Office. WWP requested a BLM presentation on recommendations to Secretary of the Interior Ryan Zinke concerning “proposed

changes to BLM coordination with local and state governments, as well as proposed changes to BLM implementation of several laws, including the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Federal Land Policy and Management Act (FLPMA), Freedom of Information Act (FOIA), and Equal Access to Justice Act (EAJA).”

25. WWP received no acknowledgement of its request. Consequently, Ms. Kelly Fuller, a WWP employee, called BLM’s Washington Office to inquire into BLM’s non-responsiveness. A BLM employee instructed Ms. Fuller to forward the email to a different email address, blm_wo_foia@blm.gov. WWP forwarded the request to that email address on October 11, 2017.

26. On October 12, 2017, WWP received an Acknowledgment Letter from FOIA liaison Ms. Keiosha Alexander acknowledging receipt of the request and assigning it “control number” 2018-00056. The letter notified WWP that it had been classified as an “other-use” requester for fee purposes, and that the request “falls into the normal track.”

27. On October 12, 2017, WWP responded to the Acknowledgment Letter, thanking Ms. Alexander for the acknowledgment.

28. If 2018-00056 was considered received on September 27, 2017, a response or determination was due on or around October 26, 2017.

29. On November 7, 2017, Ms. Fuller called and emailed Ms. Alexander to inquire about the status for the request, pointing out that BLM had exceeded the 20 working day deadline. WWP received no response to this query.

30. On February 27, 2018, Ms. Fuller again emailed Ms. Alexander and BLM staff at blm_wo_foia@blm.gov to inquire about the status of the request, and when WWP would receive responsive documents. WWP received no response to this query.

31. On October 12, 2018, more than a year after the request was originally submitted, Ms. Fuller again emailed BLM's Washington FOIA office at blm_wo_foia@blm.gov to inquire about the status of the request, and when WWP would receive responsive documents. WWP received no response to this query.

32. Upon information and belief, as of the date of filing of this Complaint, BLM has not conducted a search for records responsive to WWP's FOIA request.

33. BLM has never: (a) informed WWP of the scope of the documents it plans to produce and withhold, or the basis for projected withholdings with respect to this request, (b) informed WWP of its appeal rights, (c) stated whether WWP's request for a fee waiver has been granted, or (d) requested a modified deadline for producing the records or required determination. Despite numerous inquiries from WWP, BLM has not communicated with WWP about this request at all since the October 12, 2017 Acknowledgment letter.

34. BLM has never made the legally-required determination on WWP's request and has not produced any responsive records to WWP's request. Consequently, BLM has violated FOIA.

B. FOIA Control Number 2018-00591

35. On March 14, 2018, WWP emailed a FOIA request to Ms. Jennifer Litman, BLM Wyoming's FOIA coordinator, concerning Endangered Species Act (ESA) consultations related to BLM Wyoming's Converse County oil and gas project.

36. On March 22, 2018, WWP received a communication from BLM acknowledging receipt of the request on March 14, 2018. The communication informed WWP that it had been classified as an "other-use requester" and that its request for a fee waiver had been approved. BLM also notified WWP that the request had been placed on the "complex" processing track,

and that BLM was taking the 30-workday extension under 43 C.F.R. § 2.19(b) because “we will need to search for and collect requested records from field facilities or other establishments that are separate from the office processing the request....”

37. Ms. Fuller responded on March 27, 2018, thanking BLM for the response.

38. On April 2, 2018, Ms. Fuller and another WWP employee, Mr. Jonathan Ratner, received a status report concerning several WWP FOIA requests submitted to BLM Wyoming, including 2018-00591. The status of 2018-00591 at that time was “collecting records.”

39. Ms. Fuller responded to BLM on April 2, 2018, thanking BLM for the update.

40. The twenty working days for a response or determination under FOIA, and additional 30 working days claimed by BLM, expired on May 23, 2018.

41. On May 24, 2018, BLM sent WWP a communication informing WWP that there were 18 FOIA requests ahead of 2018-00591 in queue for processing on the complex track. Attached to that communication was a letter informing WWP that the determination on its FOIA request was delayed.

42. Ms. Fuller responded to BLM on May 25, 2018, thanking BLM for the communication.

43. On October 12, 2018, Ms. Fuller emailed BLM to inquire about the status of 2018-00591 and when WWP would receive a final determination and responsive documents.

44. On October 16, 2018, Ms. Litman responded to Ms. Fuller’s inquiry, stating that the request “remains in line for search and review of responsive records” and that it expected to provide a determination (not a response) to WWP by mid-February 2019—almost a full year after WWP sent the request.

45. Upon information and belief, as of the date of filing of this Complaint, BLM has not conducted a search for records responsive to WWP's FOIA request.

46. BLM has never made the legally-required determination on WWP's request and has not produced any responsive records to WWP's request. Upon information and belief, BLM has not conducted the initial search for responsive records for this request. Thus BLM has violated FOIA.

FIRST CLAIM FOR RELIEF

Violation of FOIA—Failure to conduct an adequate search for records responsive to 2018-00056.

47. WWP realleges and incorporates by reference all preceding paragraphs.

48. WWP has a statutory right to have BLM process its FOIA request in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3).

49. BLM violated WWP's rights because it failed to perform an adequate search, reasonably calculated to discover the requested records, in violation of FOIA, 5 U.S.C. § 552(a)(3)(A)-(D).

50. BLM has failed to "gather and review the requested documents" to determine whether to respond to WWP's request. *CREW*, 711 F.3d at 188.

51. BLM's failure to conduct an adequate search for records responsive to WWP's FOIA request violates FOIA.

52. BLM's FOIA violations have deprived WWP of its right to receive public records, thereby injuring WWP's interests.

53. WWP is therefore entitled to declaratory and injunctive relief stating BLM has violated FOIA and requiring BLM to promptly perform an adequate search, reasonably calculated to discover the requested records.

SECOND CLAIM FOR RELIEF

Violation of FOIA—Failure to make an adequate determination as to 2018-00056.

54. WWP realleges and incorporates by reference all preceding paragraphs.

55. WWP properly requested records within BLM's control through the March 14, 2018 request.

56. WWP has a statutory right under FOIA to receive a determination from BLM, as well as to receive the underlying records that it seeks.

57. BLM has failed to make an adequate and timely determination with respect to 2018-00056 because the statutory 20 days for response have passed and BLM has failed: (a) to gather responsive records and inform WWP whether it plans to comply with the request; (b) if so, to provide an estimated completion date for its response; and (c) if not, the reasons for which they are denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.15(f).

58. BLM has failed to notify WWP of any "unusual circumstances" in a notice that also set forth a date on which the determination was expected to be dispatched within ten working days of the statutory 20-day deadline, as required by FOIA. 5 U.S.C. § 552(a)(6)(B)(i).

59. BLM violated the statutory deadline because it failed to give WWP an estimated completion date by which WWP may expect to receive responsive records. 5 U.S.C. § 552(a)(7)(B)(ii).

60. BLM's FOIA violations have deprived WWP of its right to receive public records, thereby injuring WWP's rights and interests.

61. WWP is therefore entitled to declaratory and injunctive relief requiring BLM to promptly render an adequate determination on WWP's request 2018-00056, including an index justifying the withholding of any responsive records under a claim of exemption.

THIRD CLAIM FOR RELIEF

Violation of FOIA—Improper withholding of records responsive to 2018-00056.

62. BLM has violated and continues to violate the FOIA by failing to provide WWP with a timely and full response to 2018-00056.

63. WWP has a statutory right to the records sought and there is no legal basis for BLM to assert that any of FOIA's nine disclosure exemptions apply to prevent their disclosure. 5 U.S.C. § 552(b)(1)–(9). BLM has failed to make responsive records promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i).

64. BLM's failure to produce the documents is therefore a constructive denial and unlawful withholding.

65. BLM is improperly withholding records from WWP in violation of FOIA.

66. BLM's improper withholding of public records to which WWP is entitled injures WWP's rights and interests.

67. Unless enjoined and made subject to a declaration of WWP's legal rights by this Court, BLM will continue to violate the rights of WWP to receive public records under the FOIA.

FOURTH CLAIM FOR RELIEF

Violation of FOIA—Failure to conduct an adequate search for records responsive to 2018-00591.

68. WWP realleges and incorporates by reference all preceding paragraphs.

69. WWP has a statutory right to have BLM process its FOIA request in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3).

70. BLM violated WWP's rights because it has failed to perform an adequate search, reasonably calculated to discover the requested records, in violation of FOIA, 5 U.S.C. § 552(a)(3)(A)-(D).

71. BLM has failed to “gather and review the requested documents” to determine whether to respond to WWP’s request. *CREW*, 711 F.3d at 188.

72. BLM’s failure to conduct an adequate search for records responsive to WWP’s FOIA request violates FOIA.

73. BLM’s FOIA violations have deprived WWP of its right to receive public records, thereby injuring WWP’s interests.

74. WWP is therefore entitled to declaratory and injunctive relief stating that BLM has violated FOIA and requiring BLM to promptly perform an adequate search, reasonably calculated to discover the requested records.

FIFTH CLAIM FOR RELIEF

Violation of FOIA—Failure to make an adequate determination as to 2018-00591.

75. WWP realleges and incorporates by reference all preceding paragraphs.

76. WWP properly requested records within BLM’s control through the March 14, 2018 request.

77. WWP has a statutory right under FOIA to receive a determination from BLM, as well as to receive the underlying records that it seeks.

78. BLM has failed to make an adequate and timely determination with respect to 2018-00591 because the statutory 20 days for response, as well as an additional 30 working days, have passed. Nevertheless, BLM has failed to gather responsive records and inform WWP whether they plan to comply with the request; if so, an estimated completion date for its response; and if not, the reasons for which they are denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.15(f).

79. BLM violated the statutory deadline because it failed to give WWP an estimated completion date by which WWP may expect to receive responsive records. 5 U.S.C. § 552(a)(7)(B)(ii).

80. BLM's FOIA violations have deprived WWP of its right to receive public records, thereby injuring WWP's rights and interests.

81. WWP is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly render an adequate determination on WWP's request 2018-00591, including an index justifying the withholding of any responsive records under a claim of exemption.

SIXTH CLAIM FOR RELIEF

Violation of FOIA—Improper withholding of records responsive to 2018-00591.

82. WWP realleges and incorporates by reference all preceding paragraphs.

83. BLM has violated and continues to violate the FOIA by failing to provide WWP with a timely and full response to 2018-00591.

84. WWP has a statutory right to the records sought and there is no legal basis for BLM to assert that any of FOIA's nine disclosure exemptions apply to prevent their disclosure. 5 U.S.C. § 552(b)(1)–(9). BLM has failed to make responsive records promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i).

85. BLM's failure to produce the records is therefore a constructive denial and unlawful withholding.

86. BLM is improperly withholding records from WWP in violation of FOIA.

87. BLM's improper withholding of public records to which WWP is entitled injures WWP's rights and interests.

88. Unless enjoined and made subject to a declaration of WWP's legal rights by this Court, BLM will continue to violate the rights of WWP to receive public records under the FOIA.

PRAYER FOR RELIEF

WHEREFORE, WWP respectfully prays that this Court:

A. Declare that BLM's failure to provide WWP with timely and full responses to either or both of WWP's FOIA requests described above, including its failure to make timely determinations and produce all records requested, is in violation of the FOIA, 5 U.S.C. § 552(a)(6).

B. Declare that BLM's failure to conduct an adequate search reasonably calculated to discover records responsive to either or both of WWP's requests violated the FOIA, 5 U.S.C. § 552(a)(3)(A)-(D).

C. Order BLM to immediately and fully provide WWP with all agency records responsive to either or both of WWP's FOIA requests described above, 5 U.S.C. § 552(a)(4)(B), including any and all such records that would be responsive as of the date of such court order.

D. Enjoin BLM from continuing to withhold non-exempt records responsive to WWP's FOIA requests.

E. Award WWP its reasonable costs, litigation expenses, and attorney's fees incurred in prosecuting this civil action under the FOIA, 5 U.S.C. § 552(a)(4)(E), and/or all other applicable authorities.

F. Grant such other and further relief as the Court deems just and proper.

Dated: November 14, 2018

Respectfully submitted,

s/ Talasi B. Brooks
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