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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

WILDERNESS WATCH,

Plaintiff,

v.

UNITED STATES BUREAU OF
LAND MANAGEMENT, an agency
of the U.S. Department of Interior,

Defendant.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF.**

I. INTRODUCTION

1. Wilderness Watch files this action to remedy the Bureau of Land Management's clear-cut violation of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.* This action concerns a FOIA request that Wilderness

Watch sent the Bureau of Land Management (BLM) in April 2019, coming up on *four years ago*.

2. Wilderness Watch’s request sought a compilation of agency records and communications regarding motorized use authorizations for livestock grazing activities in Wilderness areas. Motor vehicles are generally prohibited as part of the federal statutory scheme protecting these lands from environmental degradation. Wilderness Watch is a conservation organization that performs outreach, education, policy, and advocacy work toward sound stewardship of lands in the National Wilderness Preservation System. The organization therefore has a keen interest in tracking government actions and authorizations that contradict the statutory motor vehicle proscription.

3. FOIA exists to provide the public and organizations like Wilderness Watch broad access to government records. FOIA also provides rigid timelines for compliance with requests. Federal agencies must generally respond to a request within 20 days, although they may—with clear written notice—sometimes extend the time limit by no more than 10 days at a time if unusual circumstances arise. *See* 5 U.S.C. § 552(6).

4. Here, BLM initially failed to respond to Wilderness Watch’s April 8, 2019 request within 20 days. The agency replied via email on June 13, 2019. In that email, BLM indicated that it would place this request in its “exceptional/voluminous

track,” a first-in, first-out queue that the agency describes as processing FOIA requests that might take “more than sixty workdays for processing.”

5. Wilderness Watch waited patiently well beyond 60 days and reached out to seek a timeline clarification or responsive records in November 2019 and again that December. BLM refused to provide clarity, only emphasizing that its queue was long.

6. Now, over three years later, Wilderness Watch has sent BLM numerous follow-up emails seeking updates on the request. The agency has not responded since December 2019. BLM’s protracted failure to provide the requested records is hindering Wilderness Watch’s ability to carry out its grazing policy work. Wilderness Watch therefore seeks judicial enforcement as provided by FOIA under 5 U.S.C. § 552(a)(6)(c), or alternatively, relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706.

II. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties under FOIA’s provisions at 5 U.S.C. § 552(a)(4)(B). 5 U.S.C. § 552(a)(4)(B) also renders this district a proper venue, as Wilderness Watch maintains its principal place of business in Missoula, Montana. Because this controversy arises under federal law, this Court also has jurisdiction under 28 U.S.C. § 1331, and venue in this district is proper under 28 U.S.C. § 1391(e)(1).

8. Declaratory relief is appropriate under the Declaratory Judgment Act, 28 U.S.C. § 2201.

9. Injunctive relief is authorized by 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

III. PARTIES

10. Plaintiff Wilderness Watch is a national, non-profit conservation organization whose sole mission is the preservation and proper stewardship of lands and rivers in the National Wilderness Preservation System and the National Wild and Scenic Rivers System. To that end, since 1989, Wilderness Watch has engaged in public policy advocacy, congressional and agency oversight, public education, and litigation to promote sound stewardship of federal Wilderness areas and Wild and Scenic River corridors. Wilderness Watch is headquartered in Missoula, Montana, and has offices in Idaho, Minnesota and Vermont. Wilderness Watch and its thousands of members are harmed by BLM's violations of FOIA because such violations prevent the organization, its members, and the public from gaining a full understanding of the activity and decision-making undertaken at BLM, which has immediate, direct and substantial effects on the Wilderness system.

11. Defendant U.S. Bureau of Land Management (BLM) is a federal administrative agency situated within the Department of the Interior. BLM maintains

possession and control over the records sought by Wilderness Watch's FOIA request, and BLM is subject to FOIA under 5 U.S.C. § 552(f).

IV. LEGAL CONTEXT

12. FOIA requires federal government agencies to make public records available to any requester who reasonably describes the records sought and follows any published agency rules regarding request procedures. 5 U.S.C. § 552(a)(3)(A).

13. FOIA requires an agency that receives such a request to issue a determination on the FOIA request within 20 business days from the date of receipt. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16(a). The required determination must include (1) the agency's determination of whether to comply with the request; (2) the reasons for the agency's determination; and (3) notice of the right of the requester to appeal an adverse determination to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i). The agency "shall make the records promptly available[.]" 5 U.S.C. § 552(a)(3)(A).

14. Only under "unusual circumstances" may an agency extend the 20-business day deadline. 5 U.S.C. § 552(a)(6)(B)(i). Such an extension requires written notice to the requester setting forth the qualifying "unusual circumstances." The notice must also specify a new date upon which the requester can expect a determination, and that new date cannot amount to more than a 10-working day extension. 5 U.S.C. § 552(a)(6)(B)(ii). "Unusual circumstances" may include the

need to seek out “a voluminous amount of separate and distinct records” or those from “field facilities and other establishments that are separate from the office processing the request.” 5 U.S.C. § 552(a)(6)(B)(iii).

15. Invoking the “unusual circumstances” provision for extension does not absolve the agency of its statutory obligation to provide a date for the determination to be issued or to promptly release the records. The only time an extended date may surpass an additional 10 business days is if the agency provides the requester an opportunity to limit the scope of the request to help hasten the processing or an opportunity to arrange with the agency an alternative time frame. 5 U.S.C. § 552(a)(6)(B)(ii).

16. FOIA does allow federal agencies to promulgate regulations that provide for “multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.” 5 U.S.C. § 552(a)(6)(D)(i). BLM has adopted such regulations. 43 C.F.R. § 2.14-2.20.

17. A multitrack processing regulation “shall not be considered to affect the requirement . . . to exercise due diligence” in retrieving the requested records. 5 U.S.C. § 552(a)(6)(D)(iii).

18. FOIA requires agencies to establish telephone or internet services to provide information about the status of FOIA requests, including “an estimated date on which the agency will complete action on the request.” 5 U.S.C.

§ 552(a)(7)(B)(ii); *see also* 43 C.F.R. § 2.15(g).

25. If an agency fails to comply with the applicable time limits of the FOIA, the FOIA requester is deemed to have exhausted their administrative remedies and may file suit against the agency. 5 U.S.C. § 552(a)(6)(C)(i).

19. The agency bears the burden to prove the legality of its actions under the FOIA. 5 U.S.C. § 552(a)(4)(B).

20. FOIA grants jurisdiction to the Court “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).

21. Alternatively, an agency’s response to a FOIA request is subject to judicial review under the APA, which confers a right of judicial review on any person who is adversely affected by agency action and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. 5 U.S.C. §§ 702, 706(1). District Courts must set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

V. FACTS

22. A large programmatic component of Wilderness Watch’s public policy and advocacy work focuses on livestock grazing on federal lands, particularly in

designated Wilderness areas where such grazing causes acute environmental problems.

23. Wilderness Watch also functions as a watchdog organization monitoring federal land management agencies' compliance with the Wilderness Act, including provisions like its express prohibition of motorized and mechanized activity in Wilderness areas.

24. On March 15, 2018, then-Interior Secretary Ryan Zinke appeared at a hearing before the House Committee on Natural Resources. During the hearing, Idaho Congressman Raul Labrador described a letter that he and Idaho Senator Mike Crapo had sent Secretary Zinke that same month. The letter purportedly addressed policies regarding livestock grazing in Wilderness.

25. Interested in this subject as part of its grazing policy work, Wilderness Watch reviewed copies of the correspondence between the BLM under Secretary Zinke and the Idaho congressional delegation. In one of those letters, the Deputy Director of Policy and Programs at BLM asserted that “[e]xamples abound of the BLM, via the Minimum Requirements Analysis, permitting motorized uses in Wilderness to manage grazing facilities and activities.”

26. The ability to review documentation of such purported examples is vital to Wilderness Watch's public policy work and vital to the public's understanding of management decisions and activities at BLM.

27. On April 8, 2019, Wilderness Watch sent a FOIA request to the BLM's lead FOIA Officer in its Washington office. Wilderness Watch requested

all records of those examples [of grazing-related motorized use authorizations] from the last ten years, including:

- 1) Letters or emails from grazing permittees to the BLM requesting authorization to use motorized equipment in wilderness
- 2) Letters or emails authorizing motorized use for grazing-related activities in wilderness
- 3) Voicemail or text messages requesting or authorizing motorized use for grazing-related activities in wilderness
- 4) Minimum Requirements Decision Guides or other Minimum Requirements Analysis documents used to support decisions to allow motorized use for grazing-related activities in wilderness

28. BLM first responded to Wilderness Watch's request over 45 working days later, on June 13, 2019. BLM's response acknowledged receipt of the request and assigned it control number 2019-00825.

29. BLM's June 13, 2019 response did not provide a determination about the response to the request, noted nothing about the right to appeal an adverse determination, and did not specify a date on which Wilderness Watch could expect the required determination.

30. Nor has BLM demonstrated any effort to promptly release the records.

31. Instead, BLM's June 13, 2019 response simply cited the agency's multi-track processing regulations and noted that given the temporal sweep of

Wilderness Watch's response and the need to collect records from disparate offices, request 2019-00825 would be placed in the agency's "exceptional/voluminous" track for requests expected to surpass 60 days of processing time.

32. "Even though we normally process requests on a first-in, first-out basis, because of the nature of your request and the circumstances surrounding this request, we will prioritize and process your request as the records become available," the email added.

33. BLM's message included an email address and a phone number to contact with future questions on the request.

34. Wilderness Watch waited well past 60 working days before reaching out for a status update. On November 5, 2019, Wilderness Watch sent an email to the FOIA Officer at the address listed seeking a status update on request 2019-00825.

35. Wilderness Watch received no response.

36. On December 3, 2019, Wilderness Watch sent another message, again requesting a status update and an estimated completion date for request 2019-00825.

37. This time, someone at the Washington Office FOIA Coordinators address responded, but they provided neither a status update nor an estimated date on which to expect a determination or records release. The message only repeated a description of the multi-track processing categories and this request's placement in the "exceptional/voluminous" track. "[W]e have almost 700 backlogged requests, so

we are working down the list to process your request in the order it was received,” the message concluded.

38. Wilderness Watch’s staff member working on the matter promptly replied: “Can you please let me know where we are in the queue?”

39. In BLM’s subsequent response on December 3, 2019—the last word Wilderness Watch has received from the agency on this FOIA request—the FOIA Coordinator declined to specify the request’s place in the queue and continued to omit any indication of a determination or expected determination date.

40. However, the FOIA Coordinator assured, “I do know that your request has been sent out already for search to the subject matter specialists and once documentation has been received and reviewed, the assigned specialist will begin releasing documents in interim releases if necessary . . . I hope this assists and please feel free to check back.”

41. On January 24, 2020, someone from the BLM’s Utah FOIA office reached out to Wilderness Watch via email to seek a clarification:

Regarding your request for authorized motorized equipment use in wilderness. I have subject matter experts questioning the definition of wilderness. Are you referring to land specifically designated as Wilderness, or including wilderness characteristics, Natural Areas, and Wilderness Study Areas? Thank you.

42. Wilderness Watch's staff attorney responded that same day, clarifying that the request referred specifically to designated wilderness.

43. Wilderness Watch continued to wait. About five months later, on May 13, 2020, Wilderness Watch staff reached out to the Washington FOIA office again for a status update: "Can you tell me when we can expect a final decision and release of records?"

44. Wilderness Watch received no response and continued to wait.

45. Wilderness Watch staff tried contacting BLM through the phone number provided by the FOIA Coordinators but were unable to reach anyone on the line. The contact number lacked a voicemail service through which to leave a message.

46. On June 10, 2020, Wilderness Watch sent a follow-up email to BLM's Utah FOIA office to seek a status update and an estimated completion date.

47. That same day, the Utah FOIA office replied and noted that "the responsive documents from Utah were sent to the Washington Office (WO) for consolidation on February 6, 2020." The Utah FOIA office instructed Wilderness Watch to contact the Washington office at their email address for further information.

48. Later that day, Wilderness Watch reached out, again, to BLM's FOIA Coordinators in the Washington office for a status update. Wilderness Watch's June

10, 2020 email message described the Utah office's communication about consolidation, noted that the phone contact number had proved fruitless, and again asked for clarification about when to expect a completed FOIA response.

49. BLM's silence continued.

50. Wilderness Watch has continued to wait patiently and has continued periodic attempts to reach BLM's FOIA staff to seek a status update and responsive records.

51. Wilderness Watch sent another status update request on September 16, 2021 and received no response.

52. Wilderness Watch sent another status update request on September 7, 2022, this time expressly noting FOIA's statutory provisions regarding judicial review, and again received no response.

53. Throughout this time, Wilderness Watch has continued efforts towards its grazing campaign work, including data collection, public and governmental outreach, presentations, and other research and policy work. As Wilderness Watch builds its ongoing work in this area, the organization's need for the information sought in FOIA request 2019-00825 grows. Wilderness Watch has spent years trying to resolve this request by reaching out to BLM, but the agency's prolonged failure to respond or to provide the relevant documents has been increasingly impacting Wilderness Watch's ability to carry out its work.

54. Wilderness Watch sent a final status update request on December 30, 2022, this time making expressly clear that Wilderness Watch would seek judicial enforcement if BLM failed to acknowledge the correspondence or provide an estimated date of completion within the next two weeks.

55. Wilderness Watch received no response.

56. As of the date of this complaint, BLM has failed to comply with its obligation to issue a determination on the FOIA request by the statutory deadline (including an identification of the records released and/or withheld, the reasons for the determination, and the notice of a right to appeal), has failed to explain or justify its continued breach of FOIA's deadlines and directives, has failed to provide an estimated completion date, and has failed to release any responsive records—let alone “promptly.”

VI. LEGAL CLAIMS

Claim One: Violation of the Freedom of Information Act –

Determination Deadline Violation

57. Plaintiff hereby realleges and reincorporates all above paragraphs.

58. FOIA confers upon Wilderness Watch a statutory right to receive a final determination on its records request to BLM. FOIA mandates a 20-working-day deadline for such determinations, or alternatively and with written notice, no more

than 10-working-day extensions beyond that deadline according to qualifying “unusual circumstances.” 5 U.S.C. § 552(a)(6)(A)(i), (B).

59. BLM has violated FOIA by failing to meet these requirements.

60. Wilderness Watch’s organizational activities have been and will continue to be adversely affected if BLM is allowed to continue violating FOIA’s decision deadlines as it has in this case.

61. Unless enjoined and made subject to a declaration of Wilderness Watch’s rights by this Court, BLM will continue to violate FOIA’s deadlines and continue to violate Wilderness Watch’s rights under the law.

62. Wilderness Watch is entitled to reasonable costs of litigation and attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

Claim Two: Violation of the Freedom of Information Act –

Failure to Provide an Estimated Completion Date

63. All above paragraphs are incorporated by reference.

64. FOIA requires BLM to provide Wilderness Watch with an estimated date on which it will complete its actions processing Wilderness Watch’s FOIA request. 5 U.S.C. § 552(a)(7)(B)(ii).

65. BLM has violated Wilderness Watch’s rights under FOIA by repeatedly and unlawfully failing to provide such an estimated date of completion in response to numerous direct requests.

66. Wilderness Watch's ongoing and foreseeable organizational activities will depend upon future employment of FOIA's open access provisions in requests to BLM. Wilderness Watch's organizational activities will continue to be adversely affected if BLM's unlawful non-responsiveness is permitted to continue.

67. Unless enjoined and made subject to a declaration of Wilderness Watch's rights by this Court, BLM will continue to violate FOIA's requirements regarding communication about completion timelines and will continue to violate Wilderness Watch's rights under the law.

68. Wilderness Watch is entitled to reasonable costs of litigation and attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

Claim Three: Violation of the Freedom of Information Act –

Constructive and Unlawful Withholding

69. All above paragraphs are incorporated by reference.

70. FOIA requires BLM, after it receives a request for records such as request 2019-00825 here, to make responsive records promptly available unless they may be withheld under one of FOIA's narrow exemptions. 5 U.S.C. § 552(a)(3)(A), (B).

71. Wilderness Watch properly requested from BLM, pursuant to FOIA, a set of records within the agency's control.

72. Wilderness Watch has a statutory right to receive the records it seeks, and there is no legal basis for BLM to assert any of FOIA's disclosure exemptions. *See* 5 U.S.C. § 552(b)(1)-(9).

73. BLM has not produced any records responsive to Wilderness Watch's request.

74. As of the date of this complaint, BLM has not claimed that any exemptions apply to Wilderness Watch's FOIA request.

75. BLM's failure to make responsive records promptly available and failure to provide a timely appeal determination date constitute constructive withholding of the documents and records Wilderness Watch requested, in violation of the clear statutory obligations mandated by FOIA.

76. Wilderness Watch's ongoing and foreseeable organizational activities will depend upon future employment of FOIA's open access provisions in requests to BLM. Wilderness Watch's organizational activities have been and will continue to be adversely affected if BLM's violations of FOIA's disclosure provisions are allowed to perpetuate.

77. Unless enjoined and made subject to a declaration of Wilderness Watch's rights by this Court, BLM will continue to violate FOIA's prompt disclosure mandate and continue to violate Wilderness Watch's rights under the law.

78. Wilderness Watch is entitled to reasonable costs of litigation and attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

Claim Four: Violation of the Freedom of Information Act –

Inadequate Search

79. All above paragraphs are incorporated by reference.

80. Wilderness Watch has a statutory right to have BLM process Wilderness Watch's FOIA request in a manner compliant with FOIA and compliant with BLM's FOIA regulations. The statute and the regulations impose upon BLM an obligation to conduct a search reasonably calculated to locate records responsive to Wilderness Watch's request.

81. BLM has failed to carry out such a reasonable search for records responsive to Wilderness Watch's request 2019-00825 and has violated Wilderness Watch's rights by so failing to fulfill its FOIA request.

82. Unless enjoined and made subject to a declaration of Wilderness Watch's rights by this Court, BLM will continue to violate FOIA and its implementing regulations. BLM's ongoing violation harms Wilderness Watch's organizational work, and it will continue to do so if not redressed by this Court.

83. Wilderness Watch is entitled to reasonable costs of litigation and attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

Claim Five: Violation of the Administrative Procedure Act –

Unlawfully Withholding or Unreasonably Delaying Actions Required

by FOIA

84. All above paragraphs are incorporated by reference.

85. BLM has unlawfully withheld agency action by failing to comply with FOIA's mandates, in at least three ways: (1) failing to make a timely and lawful determination on Wilderness Watch's FOIA request 2019-00825, (2) failing to promptly adequately search for and produce records responsive to Wilderness Watch's request, and (3) failing to provide Wilderness Watch with an estimated date by which BLM would complete its action satisfying this FOIA request.

Because BLM's failures of determination, document production, and communication constitute agency actions that are unlawfully withheld, BLM's conduct is actionable pursuant to the Administrative Procedure Act. 5 U.S.C. § 706(1).

86. Alternatively, BLM has unreasonably delayed agency action by failing to comply with FOIA's mandates—for well over three years—in the same three ways: (1) failing to make a timely and lawful determination on Wilderness Watch's FOIA request 2019-00825, (2) failing to promptly adequately search for and produce records responsive to Wilderness Watch's request, and (3) failing to provide Wilderness Watch with an estimated date by which BLM would complete its action satisfying this FOIA request. Because BLM's failures of determination,

document production, and communication constitute agency actions that are unreasonably delayed, BLM's conduct is actionable pursuant to the Administrative Procedure Act. 5 U.S.C. § 706(1).

87. As described above, BLM's persistent and ongoing failure to comply with FOIA injures Wilderness Watch's public oversight and public policy work.

88. Wilderness Watch is entitled to judicial review under the APA, 5 U.S.C. § 702.

89. Wilderness Watch is entitled to costs of disbursement and costs of litigation, including reasonable attorney fees under the Equal Access to Justice Act. 28 U.S.C. § 2412.

**Claim Six: Violation of the Administrative Procedure Act –
Actions that Are Arbitrary, Capricious, an Abuse of Discretion, or
Otherwise not in Accordance with Law**

90. All above paragraphs are incorporated by reference.

91. BLM has violated FOIA's clear statutory mandates in at least three ways: (1) failing to make a timely and lawful determination on Wilderness Watch's FOIA request 2019-00825, (2) failing to promptly adequately search for and produce records responsive to Wilderness Watch's request, and (3) failing to provide Wilderness Watch with an estimated date by which BLM would complete its action satisfying this FOIA request. BLM's actions in repeatedly and

persistently failing to comply with FOIA constitute are arbitrary, capricious, an abuse of discretion, or not in accordance with law and are therefore actionable pursuant to the Administrative Procedure Act. 5 U.S.C. § 706(2)(a).

92. As described above, BLM's persistent and ongoing failure to comply with FOIA injures Wilderness Watch's public oversight and public policy work.

93. Wilderness Watch is entitled to judicial review under the APA, 5 U.S.C. § 702.

94. Wilderness Watch is entitled to costs of disbursement and costs of litigation, including reasonable attorney fees under the Equal Access to Justice Act. 28 U.S.C. § 2412.

VII. REQUESTS FOR RELIEF

95. For all the above-stated reasons, Wilderness Watch respectfully requests that this Court grant relief as follows:

a. Enjoin BLM from withholding the requested records, and order BLM to promptly make records responsive to Wilderness Watch's FOIA request available by a date certain;

b. Retain jurisdiction to ensure that BLM provides Wilderness Watch promptly with responsive records and otherwise satisfies its duties under FOIA;

c. Declare that BLM's failures to make a timely determination about Wilderness Watch's FOIA request, to promptly perform an adequate search and release of records, and to provide an estimated completion date are unlawful under FOIA, 5 U.S.C. § 552, or alternatively are agency actions unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2);

d. Award Wilderness Watch its costs and reasonable attorney fees under 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412;

and

e. Grant Wilderness Watch such further relief as may be just, proper, and equitable.

Date: January 18, 2023

/s/ Andrew Hursh

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