

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

WILDEARTH GUARDIANS)
301 N. Guadalupe St., Suite 201)
Santa Fe, New Mexico 87501)
)
Plaintiff,)
)
v.)
)
U.S. BUREAU OF LAND MANAGEMENT)
1849 C Street NW)
Washington, D.C. 20240)
)
Defendant.)

Case No. 1:19-cv-3813

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff WildEarth Guardians (“Guardians”) hereby brings this action seeking declaratory and injunctive relief to redress violations of the Freedom of Information Act (“FOIA” or “the Act”), 5 U.S.C. § 552 *et. seq.*, by Defendant U.S. Bureau of Land Management (“BLM”) for wrongly withholding records responsive to request made by Guardians pursuant to FOIA.

2. On March 20, 2018, Guardians filed a FOIA request for all records related to BLM’s announcement that it was re-opening the Desert Renewable Energy Conservation Program to consider designating more desert federal public lands in southern California for energy development. Guardians sought the requested records to ensure federal government compliance with environmental statutes in managing energy development on federal public lands. Guardians intended to disseminate the requested records broadly to its members and the

public, using the internet and other forums, to facilitate outreach, education, and advocacy related to large-scale energy development projects on federal public lands. BLM's repeated failures to comply with FOIA frustrate Guardians' mission.

3. Contrary to FOIA, BLM failed to make a determination on Guardians' FOIA request within the prescribed statutory period, failed to provide Guardians with an estimated date on which BLM would make a determination on the request, and unlawfully withheld non-exempt records responsive to Guardians' FOIA request.

4. To remedy BLM's violations of the law, Guardians seeks an order from this Court declaring that BLM has violated FOIA, directing BLM to make a prompt determination on Guardians' FOIA request, and compelling BLM to provide all responsive records to Guardians by a date certain.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA citizen suit provision). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his duty).

6. This Court has authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has authority to grant injunctive relief pursuant to 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

7. This Court has authority to award costs and attorney fees under 5 U.S.C. § 552(a)(4)(E).

8. Venue in this Court is appropriate under 5 U.S.C. § 552(a)(4)(B), which provides venue for all FOIA cases in the District of Columbia. Venue is also appropriate under 28 U.S.C.

§ 1391 because defendant is an agency of the United States with its primary office in Washington, D.C., and a substantial part of the events or omissions giving rise to this claim occurred in this judicial district.

PARTIES

9. Plaintiff WILDEARTH GUARDIANS is a non-profit conservation organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has offices in New Mexico, Colorado, Oregon, Washington, Montana, and Arizona. With more than 275,000 members and supporters, Guardians works to keep public lands where they belong: in public hands. Guardians requested the records sought in this action to support these efforts.

10. Guardians employs public education, community organizing, strategic partnerships, public records requests, information sharing, advocacy with administrative agencies, policy analysis, and litigation to ensure better implementation and enforcement of the nation's laws regarding management of public lands. Guardians acquires information about federal programs and activities affecting public lands through FOIA. Guardians then compiles and analyzes that information and, subsequently, disseminates that information to its members, supporters, the general public, and public officials through various sources including publications, reports, Guardians' website and newsletter, emails, general news media coverage, and public presentations. Guardians' successful efforts at educating the public on issues concerning federal government programs and activities that affect public lands significantly contribute to the public's understanding of governmental operations and activities. Guardians also uses the information that it acquires through FOIA to participate in federal decision-making

processes, to file administrative appeals and civil actions, and generally to ensure that federal agencies comply with federal environmental laws.

11. Guardians and its staff, members, and supporters derive benefits from agencies' compliance with FOIA and from their receipt of public records.

12. The records in this action are requested in support of Guardians' ongoing efforts to ensure that federal agencies comply with federal environmental laws and to keep public lands in public hands. Because BLM has not previously disclosed the information that Guardians requested, its disclosure would significantly enhance public understanding concerning federal management and decision making about federal public lands in southern California. In particular, the requested records will provide information about the impetus behind BLM's announcement to re-open the southern California Desert Renewable Energy Conservation Program to consider designating more lands for energy development so soon after BLM issued its final decision for the first phase of the plan.

13. Guardians, its staff, and one or more of its members are directly injured by BLM's failure to comply with the statutory requirements of FOIA. The relief requested in this lawsuit can redress these injuries. Guardians brings this action on behalf of itself, its staff, and its members.

14. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT is a federal agency of the executive branch of the United States government, and is in possession, custody, or control of the records sought by Guardians, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

15. FOIA is a disclosure statute that was enacted to facilitate public access to government documents. FOIA requires a federal agency to “determine within 20 days . . . after the receipt of any [FOIA] request whether to comply with such request and . . . immediately notify the person making such request of . . . such determination and the reasons therefore[.]” 5 U.S.C. § 552(a)(6)(A)(i)(I).

16. Congress set forth the circumstances in which federal agencies may take longer than 20 business days to make a determination. 5 U.S.C. § 552(a)(6)(A)(i). In two very limited circumstances an agency may toll the 20-day deadline for making that determination. 5 U.S.C. § 552(a)(6)(A)(ii). First, the agency may toll the 20 working-day deadline for up to ten additional working days while the agency is waiting for the information that it has reasonably requested from the requester. 5 U.S.C. § 552(a)(6)(A)(ii)(I). Second, the agency may also toll the 20 working-day deadline for up to ten additional business days if it needs to clarify with the requester any issues regarding fee assessment. 5 U.S.C. § 552(a)(6)(A)(ii)(II).

17. If the agency faces “unusual circumstances,” the agency may extend the 20 working-day deadline if the agency sets “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). An extension may not exceed 10 working days unless the agency provides written notice to the requester explaining the “unusual circumstances” requiring an extension, establishes the date on which the agency expects to make the determination, and gives 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.” 5 U.S.C. § 552(a)(6)(B)(ii).

18. Unless an agency subject to FOIA properly establishes a different timeline for disclosing responsive records, FOIA's mandate to make public records "promptly available" to a requester requires federal agencies to provide responsive records to a requester within or shortly after the 20 working-day deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i).

19. FOIA mandates that every federal agency "(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and (B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—(i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request." 5 U.S.C. § 552(a)(7).

20. FOIA allows for the commencement of an action in district court, and provides that the district court has jurisdiction to enjoin an agency from withholding records and to order an agency to produce records that have been improperly withheld. 5 U.S.C. § 552(a)(4)(B). The court may also assess reasonable litigation costs against the United States where the plaintiff has substantially prevailed. *Id.* § 552(a)(4)(E).

21. If the government can show that "exceptional circumstances" exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. 5 U.S.C. § 552(a)(6)(C)(i). Notably, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of FOIA requests, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. 5 U.S.C. § 552(a)(6)(C)(ii).

FACTUAL BACKGROUND

22. Guardians submitted a FOIA request to BLM's California State Office on March 20, 2018 that requested (1) records regarding potentially amending the California Desert Conservation Area, Bakersfield, and Bishop Resource Management Plans and preparing associated environmental impact statements or environmental assessments; (2) records regarding possible modifications to the boundaries or management of areas of critical environmental concern within the Desert Renewable Energy Conservation Program; (3) records regarding creating opportunities for increased renewable energy development, recreational and off-highway vehicle access, mining access, and grazing within the Desert Renewable Energy Conservation Program boundaries; and (4) records regarding siting broadband infrastructure projects on public lands within the Desert Renewable Energy Conservation Program planning area.

23. Guardians' request stated:

The records we are seeking include, but are not limited to, communications with private parties, state or municipal governments and their agencies, other federal agencies, as well as communications with the Department of Interior and within the BLM. Examples of this type of record include, but are not limited to, requests from industry groups or the Interior Department to revisit the DRECP's renewable energy and conservation designations as well as the subsequent communications in response to those requests.

In addition, Guardians requested "all records dated before fulfillment of this FOIA request but after September 14, 2016" and to "[p]lease tender responsive records in digital format whenever possible."

24. On March 21, 2018, Guardians received confirmation from the BLM California State Office FOIA Coordinator that it had received Guardians' FOIA request and that BLM would prepare a formal acknowledgment letter.

25. On April 12, 2018, BLM sent Guardians a letter acknowledging that BLM had received Guardians' FOIA request on March 20, 2018 and assigned the request a tracking number of BLM-2018-00628. In the letter, BLM: granted Guardians' request for a fee waiver based on its determination that release of the requested records will significantly enhance public understanding of the operations and activities of BLM; stated it was taking the 10-workday extension under 43 C.F.R. § 2.19 because it would need to search for and collect requested records from field facilities or other establishments; placed the request on the "Complex" processing track (for requests that can be processed in twenty-one to sixty workdays); stated that the request was currently at number 30 in the Complex processing track; stated that BLM would advise Guardians of the anticipated timeframe to produce responsive records in its initial determination letter; and stated that it expected to dispatch a determination by April 30, 2018.

26. In the April 12, 2018 letter, BLM also stated that some of Guardians' requests, if read alone, were too broadly worded for the agency to be sure of the records that Guardians sought. BLM provided the agency's understanding of each request, noting that Category 4 was very broad and could include any record regarding the processing of any broadband right-of-way application within the DRECP planning area. BLM stated this would be an extensive set of records that would take an extremely long time to gather and review. BLM requested additional detail, and suggested that Guardians narrow the scope of requested records to obtain faster processing.

27. On April 16, 2018, Guardians left the BLM California State Office FOIA Coordinator a voicemail in response to BLM's suggestion to narrow the scope of the request. Guardians offered to clarify the scope of Category 4 of the FOIA request.

28. On April 17, 2018, BLM sent an email response confirming receipt of Guardians' clarification, and asking if the same scope similarly applied to the other three categories of the request. That same day, Guardians responded via email confirming that BLM had accurately described the other three categories of requested documents in its April 12, 2018 letter.

29. Guardians did not receive a determination on its FOIA request by April 30, 2018 as BLM had indicated in its April 12, 2018 letter.

30. At the very latest, based on the March 20, 2018 date that BLM acknowledges receiving Guardians' FOIA request BLM-2018-00628, and the 10-workday extension, the deadline for issuing a final determination under FOIA was May 2, 2018.

31. On May 2, 2018, Guardians notified BLM via email that the response to its FOIA request was past due and requested a status update on the FOIA request. BLM did not respond.

32. Having still not received any communication from BLM related to the FOIA request, on June 1, 2018, Guardians sent a letter to the BLM California State Office FOIA Coordinator that notified BLM of the agency's failure to comply with FOIA determination requirements, requested an estimated completion date, and explained that Guardians may take legal action if a determination is not promptly forthcoming.

33. On June 12, 2018, BLM responded to Guardians' inquiry with a letter that stated the agency had been unable to make a determination on Guardians' FOIA request. It noted its search for records was roughly 80% completed, it had located approximately 250 potentially responsive records that may include a significant number of duplicates and internal agency communications that require review under FOIA Exemption 5 for predecisional and deliberative content. BLM apologized for the delay in completing the request. BLM stated its hope that Guardians would wait for the agency to complete its search, review, and duplication process. BLM

noted that Guardians may seek dispute resolution services, or may file an appeal regarding the delay any time between June 12, 2018 and the date BLM makes its determination on the FOIA request. BLM stated the FOIA request was currently at number 28 in the Complex processing track, that the agency was working to complete the request, and that it would make partial releases if practicable as material is processed. In the June 12, 2018 letter, BLM did not make a determination on Guardians' FOIA request, it did not provide an estimated completion date, and it did not provide any responsive records.

34. On June 13, 2018, Guardians sent an email to BLM thanking the agency for the updated status in the June 12 letter, but again requested an estimated completion date for the agency's response to Guardians' FOIA request. BLM did not respond to the June 13, 2018 email.

35. On August 6, 2018, Guardians sent BLM an email requesting an estimated completion date as part of the status update for FOIA request BLM-2018-00628.

36. On September 11, 2018, Guardians sent BLM an email requesting an estimated completion date as part of the status update for the request.

37. On October 18, 2018, Guardians sent BLM an email requesting an estimated completion date as part of the status update for the FOIA request. Guardians also notified BLM that it would file a legal complaint if it did not receive a response from BLM to Guardians' October 18, 2018 email by November 1, 2018.

38. On October 31, 2018, BLM sent Guardians an email stating the agency had a backlog of FOIA requests. BLM stated the bulk of records gathered in response to FOIA request BLM-2018-00628 were internal communications requiring line-by-line review. It stated the agency had additional FOIA personnel resources to help address the backlog. The BLM Califor-

nia State Office FOIA Coordinator stated she was “cautiously optimistic” that the agency could start partial responses to Guardians’ FOIA request in January 2019.

39. On October 31, 2018, Guardians replied that it would await the partial response in January, 2019.

40. BLM did not provide a partial response to Guardians’ FOIA request in January 2019.

41. Following the October 31, 2018 email from BLM, Guardians received no further communication from BLM. Thus, Guardians has not been able to obtain any information about the status of its FOIA request since October 31, 2018.

42. Throughout 2019, Guardians contacted BLM on at least three occasions to inquire about the status of its FOIA request and to ask for an estimated date of completion for BLM’s determination on the request. Guardians sent BLM emails on March 28, May 7, and September 19, 2019. In so doing, Guardians invoked 5 U.S.C. § 552(a)(7)(B)(ii).

43. BLM has not responded to any of Guardians’ requests for information about the status of its FOIA request in 2019.

44. As of the date this action was filed, BLM has not made a final determination on Guardians’ FOIA request BLM-2018-00628. BLM has not provided Guardians with a written notice setting forth any unusual circumstances preventing BLM from responding to Guardians’ FOIA request, beyond the “Complex” track designation and associated 10 working-day extension that BLM asserted in its letter to Guardians on April 12, 2018, that would justify extension of any of FOIA’s deadlines, as required by 5 U.S.C. 552(a)(6)(B)(i).

45. Because BLM has failed to respond to Guardians’ FOIA request within the period required by FOIA, Guardians has constructively exhausted all administrative remedies required

by FOIA and may seek immediate judicial review. 5 U.S.C. §§ 552(a)(6)(A)(ii), (a)(6)(C)(i).

46. As of the date this action was filed, BLM has not provided an estimated completion date for completing its response to Guardians' FOIA request BLM-2018-00628.

47. As of the date this action was filed, BLM has not communicated to Guardians the scope of the documents that BLM intends to produce and withhold in response to FOIA request BLM-2018-00628, or its reasons for withholding any documents.

48. As of the date of the filing of this action, BLM has not provided any records responsive to FOIA request BLM-2018-00628.

49. The filing of this lawsuit is necessary to compel BLM to disclose all records that are responsive to Guardians' FOIA request BLM-2018-00628.

50. Guardians' claims presented herein are not insubstantial within the meaning of 5 U.S.C. § 552(a)(4)(E)(ii)(II).

51. No exceptional circumstances exist within the meaning of FOIA, 5 U.S.C. § 552(a)(6)(C), that would allow this Court to grant BLM more time to review and disclose requested records. The delays at issue in this case result from a predictable agency workload of FOIA requests. Based on the information available to Guardians, BLM has not made reasonable progress in reducing its backlog of pending requests.

52. The circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholdings at issue in this case.

53. Based on the nature of Guardians' professional activities, Guardians will continue to use FOIA's provisions in information requests to BLM in the foreseeable future. Guardians' professional activities will be adversely affected if BLM is allowed to continue violating FOIA's disclosure provisions. Unless enjoined and made subject to a declaration of Guardians' legal

rights by this Court, BLM will continue to violate the rights of Guardians to receive public records under FOIA.

FIRST CLAIM FOR RELIEF

Violation of FOIA – Failure to Make a Determination on Guardians’ FOIA Request Number BLM-2018-00628 Within the Statutory Timeframe

54. Guardians hereby incorporates by reference the allegations in the preceding paragraphs.

55. Guardians has a statutory right to have BLM process its FOIA request in a manner which complies with FOIA. BLM violated and is violating Guardians’ rights in this regard when BLM failed to make a determination to disclose or withhold documents and information responsive to Guardians’ FOIA request by the deadline imposed under FOIA. 5 U.S.C. § 552(a)(6)(A)(i).

56. FOIA also requires federal agencies to provide the requester with information about the status of the agency’s response to a request, including an estimated date on which the agency will complete action on the request. 5 U.S.C. § 552(a)(7)(B)(ii). BLM violated and is violating FOIA by failing to provide Guardians with an estimated date by which the agency will complete action on Guardians’ FOIA request.

57. BLM’s failure to make a determination on Guardians’ FOIA request within the timeframe required by FOIA and failure to provide Guardians with an estimated completion date for its FOIA request are FOIA violations for which Guardians is entitled to reasonable costs of litigation, including attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E).

SECOND CLAIM FOR RELIEF

Violation of FOIA - Constructive Denial of FOIA Request and Unlawfully Withholding Non-exempt Responsive Records

58. Guardians hereby incorporates by reference the allegations in the preceding paragraphs.

59. Guardians has a statutory right to the records it seeks, which are “agency records” within the meaning of FOIA. BLM has not used a FOIA determination to assert a legal basis for BLM to withhold any record responsive to Guardians’ FOIA request pursuant to any of FOIA’s nine disclosure exemptions. *See* 5 U.S.C. § 552(b)(1)-(9).

60. BLM violated and is violating Guardians’ rights under FOIA by unlawfully withholding non-exempt documents and information responsive to Guardians’ FOIA request. BLM actions in response to Guardians’ FOIA request constitute constructive and unlawful denials of Guardians’ FOIA request.

61. BLM’s constructive denial of Guardians’ FOIA request and unlawful withholding of responsive documents entitle Guardians to reasonable costs of litigation, including attorneys’ fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

REQUEST FOR RELIEF

WHEREFORE, Guardians respectfully requests that this Court:

- A. Declare that BLM has violated FOIA for the reasons set forth above;
- B. Order BLM to comply immediately with FOIA by providing Guardians with the required determination and completion date, and all non-exempt public records responsive to Guardians’ March 20, 2018 FOIA request;
- C. Award Guardians its costs and reasonable attorneys’ fees in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

D. Grant Guardians such further and additional relief as this Court may deem just and proper.

Respectfully submitted this 23rd day of December, 2019.

/s/ Samantha Ruscavage-Barz

Samantha Ruscavage-Barz, Bar No. CO0053

WildEarth Guardians

301 N. Guadalupe Street, Ste. 201

Santa Fe, New Mexico 87501

Tel: 505-401-4180

Email: sruscavagebarz@wildearthguardians.org

Marla Fox, OR Bar No. 141648

WildEarth Guardians

P.O. Box 13086

Portland, OR 97213

Tel: 651-434-7737

Email: mfox@wildearthguardians.org

(Pro Hac Vice application forthcoming)

Attorneys for Plaintiff WildEarth Guardians