

Plaintiff, Wilderness Watch, alleges as follows:

INTRODUCTION

1. This is an action for declaratory and injunctive relief pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et. seq., and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 et. seq. This action challenges the unlawful failure of the Defendant Forest Service to respond to Plaintiff’s FOIA appeal within the time and in the manner required by the FOIA.
2. The Forest Service has unnecessarily, unreasonably, and unlawfully failed to provide a final determination on Wilderness Watch’s FOIA appeal regarding responsive documents withheld by the agency, provide an anticipated appeal determination date as repeatedly requested by Wilderness Watch and as required by the FOIA, and is unlawfully withholding responsive documents that are not subject to any exemption as provided by the FOIA.
3. On August 4, 2014, Wilderness Watch submitted a FOIA request to the Forest Service seeking information on recreation use monitoring (consisting of raw monitoring data, summary documents, and maps) and outfitter guide permit administration in the Emigrant Wilderness within the Stanislaus National Forest.

4. On October 10, 2014, the Forest Service partially denied Wilderness Watch's FOIA request by withholding all raw monitoring data, summary documents, and maps pursuant to the FOIA's deliberative process exemption.
5. On November 21, 2014, Wilderness Watch submitted, and the Forest Service acknowledged, a timely appeal of the FOIA denial.
6. Absent certain unusual circumstances, the FOIA requires the Forest Service to provide an appeal determination within 20 workdays from receipt of the FOIA appeal. However, to-date, and despite several requests, Wilderness Watch has not received an appeal determination or an estimated date on which an appeal determination will be forthcoming.
7. The Forest Service violated the FOIA by 1) failing to issue a final determination on Wilderness Watch's appeal within the statutory deadline, 2) refusing to provide Wilderness Watch with an anticipated determination date, and 3) failing to release information that is not exempt from disclosure under the FOIA.
8. The Forest Service is unlawfully withholding public disclosure of information sought by Wilderness Watch, information to which it is entitled and for which no valid disclosure exemption applies. The Forest Service violated the statutory mandates and deadlines imposed by the FOIA through

its failure to provide a final appeal determination resolving Wilderness Watch's FOIA appeal within the time and manner required by law.

Accordingly, Wilderness Watch seeks declaratory relief establishing that the Forest Service has violated the FOIA and the APA. Wilderness Watch also seeks injunctive relief directing Defendant to promptly provide Wilderness Watch with the requested material.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under the FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201, et. seq.
10. Venue is proper pursuant to 5 U.S.C. § 552(a)(4)(B) because Wilderness Watch's principal office is in Missoula, Montana and Wilderness Watch has members and staff who work and/or reside within this judicial district.
11. Declaratory relief is appropriate under 28 U.S.C. § 2201.
12. Injunctive relief is proper under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

13. Plaintiff Wilderness Watch is a tax-exempt, nonprofit organization with its principal office in Missoula, Montana. Wilderness Watch is dedicated to the

protection and proper stewardship of designated wilderness and wild and scenic rivers. Its members use these areas for work and outdoor recreation of all kinds, including fishing, hiking, horseback riding, wildlife viewing, and cross-country skiing. Wilderness Watch's members' interests are directly affected by Defendant's failure to respond to requests for, and disclose, information regarding Forest Service management of designated wilderness. Wilderness Watch brings this action on its own behalf and on behalf of its adversely affected members.

14. Defendant United States Forest Service ("Forest Service") is an administrative agency within the United States Department of Agriculture entrusted with the management of our National Forests and designated wilderness areas within National Forest boundaries. The Forest Service is the agency in possession and control of the records sought by Wilderness Watch, and as such, is subject to FOIA. The Forest Service has a statutory duty to respond to Wilderness Watch's information requests and appeals, and disclose the requested records. 5 U.S.C. § 552 (a)(6)(A).

FACTUAL AND PROCEDURAL BACKGROUND

15. On August 4, 2014, Wilderness Watch sent a FOIA request to the Forest Supervisor of the Stanislaus National Forest.
16. Wilderness Watch's FOIA request states in part:

Pursuant to the Freedom of Information Act (FOIA), Wilderness Watch requests information related to recreation use monitoring in the Emigrant Wilderness and outfitter guide permit administration. Specifically, we request all of the following for the years 2009-2014:

- 1) Raw Monitoring Data, Summary Documents & Maps
 - Campsite Condition
 - Firewood Availability
 - Stock Holding Area Condition
 - Crowding

- 2) Kennedy Meadows and Aspen Meadow Pack Stations
 - Permits & Operating Plans
 - Reported Annual Use
 - Annual Field Inspection Forms and Field Inspection Summary Reports
 - Incident Reports
 - All correspondence between the Forest Service and the permit holders, (including, but not limited to, letters, emails & faxes), meeting notes, staff notes and notes from phone conversations

17. On October 10, 2014, the regional office (Region 5) for Defendant Forest Service notified Wilderness Watch that it was partially denying Wilderness Watch's FOIA request. The Forest Service stated it was withholding, in full, all documents pertaining to raw monitoring data, summary documents, and maps pursuant to the deliberative process prong of FOIA exemption 5.

18. Specifically, the Forest Service explained that it was withholding this information because the "raw monitoring data, summary documents and maps, have not received any peer review and/or review or approval by line officials who will use the data to make decisions concerning the further

development of one or more potential management proposals for the area.”

Id.

19. On November 21, 2014, via email to the Forest Service Freedom of Information Act Appeals office at wo_foia@fs.fed.us, Wilderness Watch timely appealed the Forest Service’s partial FOIA denial.
20. Wilderness Watch argued in its appeal that the deliberative process exemption under FOIA exemption 5 is not appropriate in this case and the Forest Service has not met its burden to prove that it may withhold raw monitoring data, summary documents, and maps pursuant to this exemption. Wilderness Watch also argued, in the alternative, that the Forest Service failed to provide “reasonably segregable portions” of the documents.
21. In an email dated November 28, 2014, the Forest Service’s Freedom of Information Act Appeals office confirmed receipt of Wilderness Watch’s FOIA appeal on November 21, 2014. The receipt confirmation stated “our final appeal response may require review by the USDA Office of General Counsel (OGC) for legal sufficiency. Once OGC has completed their review, our final determination will be provided to you.” The confirmation also noted that “the WO FOIA Service Center has a large backlog of pending FOIA requests and appeals. We are working as quickly as possible to process each request and appeal in the order in which it was received.”

The receipt confirmation directed Wilderness Watch to contact Ms. Sandra Dover at sdover@fs.fed.us with any questions regarding the status of the appeal.

22. On January 5, 2015, after the 20 day statutory deadline for an appeal determination had lapsed, and after receiving no further correspondence regarding its appeal, Wilderness Watch sent, via email, a notice of deadline violation and request for an anticipated decision date to Appeals Officer Sandra Dover. The notice stated, in part:

The FOIA requires an agency to make an appeal determination within 20 (twenty) days after receipt of appeal. 5 U.S.C. 552 (a)(6)(A)(ii). This deadline has lapsed. The FOIA allows, in specifically defined unusual circumstances, the agency to extend this 20 day deadline if the agency provides written notice detailing 1) the unusual circumstances causing the delay, and 2) the date on which a determination is expected to be made. 5 U.S.C. 552 (a)(6)(B)(i). Any extension cannot be longer than 10 working days. *Id.* Your office has not provided Wilderness Watch with a date by which we can expect an appeal determination, nor any unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B)(iii), for a delay.

The FOIA provides Wilderness Watch the legal option to file suit to compel compliance with FOIA's express deadlines. 5 U.S.C. 552(a)(6)(C). However, rather than filing suit at this time, Wilderness Watch is providing your office with this notice in an attempt to resolve the delay. But time is of the essence. [...].

Wilderness Watch requests an estimated appeal decision date. Your acknowledgement of receipt indicates that your office has implemented a first in, first out system for processing a backlog of FOIA appeals. To help us better assess the length of delay anticipated, and the need to seek judicial review if an appeal

determination is not expected for some time, please let us know how many appeals are in line ahead of ours.

23. On January 6, 2015, Ms. Dover responded via email¹:

I have recently received the records from Region 5 – there are a lot of records for me to review pertaining to your original request. I have to review all records.

Please note that in accordance with Title 7 CFR, Subtitle A, 1.14 appeals, our final appeal response will require review by the USDA Office of General Counsel (OGC) for legal sufficiency. This process does take some time. Once OGC has completed their review, our final determination will be provided to you.

In addition, please note, the WO FOIA Service Center has a large backlog of pending FOIA requests and appeals. We are working as quickly as possible to process each request and appeal in the order in which they are received. We greatly appreciate your patience. To check on the status of your appeal, please contact me, Ms. Sandra Dover via email at sdover@fs.fed.us.

Please reference your assigned case number, 2015-FS-WO-00045-A.

(highlighting, colored font, other formatting removed).

24. On January 9, 2014, Wilderness Watch responded via email to Ms. Dover, again requesting an anticipated determination date and also requesting information on the number of appeals in line ahead of Wilderness Watch's appeal:

Thank you for the response. We understand that there is a backlog and that an appeal denial may need to be reviewed by the OGC.

Please note that 7 C.F.R., Subtitle A, 1.14(c), in accordance with 5

¹ Email exchanges are excerpted from the body of the email with salutations, headers, and signature lines / blocks excluded.

U.S.C. 552 (a)(6)(A)(ii), requires an appeal determination within twenty workdays, and any review of an appeal denial by the OGC must occur within this deadline. *See* 7 C.F.R., Subtitle A, 1.14(e).

If there are unusual circumstances causing a delay in processing the appeal, 7 C.F.R., Subtitle A, 1.16, in accordance with 5 U.S.C. 552(a)(6)(B)(i), requires the agency to "indicate the anticipated date for a substantive response." This date should not exceed an additional 10 workdays unless the specific circumstances of 7 C.F.R., Subtitle A, 1.16(a)(1-2) are met. This section notes that "[t]he term 'exceptional circumstances' does not include a delay that results from a predictable agency backlog, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."

Response Requested: Since we have no bearing on how long the delay might be (an additional 20 days? several months?), we are requesting the following information: 1) the number of appeals / requests that are in line in front of ours, and 2) an anticipated decision date.

Please let me know if I can be of any assistance in either limiting the delay or in obtaining the information in the above paragraph.

25. On January 14, 2015, Ms. Dover responded via email:

I am working on your appeal.
Thanks

26. On February 10, 2015, after receiving no further correspondence and still without having an anticipated decision date, Wilderness Watch emailed Ms.

Dover stating:

I am writing to follow up on the status of the above appeal. Can you please provide an anticipated decision date?

27. On February 10, 2015, Ms. Dover responded via email:

There is a large amount of records -- I have to review all documents

regarding the original response.
I am working on the appeal right now.
Thanks

28. On February 11, 2015, Wilderness Watch responded to Ms. Dover via email again requesting an estimated determination date:

Thank you for your work on our appeal. Now that you've been going through the responsive documents for the last few weeks, do you have an idea of how long you will need to complete your review? We are just requesting an anticipated / estimated decision date.

29. Ms. Dover responded via email on February 11, 2015, with the following:

I am working with Region 5, in my task, to complete the review of the documents.
I will keep you posted of the status of this appeal – there are close to 3,000 pages involved in this appeal.
Thanks

30. Because the Forest Service refused to provide any indication of when Wilderness Watch could expect a final appeal determination, on February 11, 2015, Wilderness Watch again responded via email to Ms. Dover with the following:

You are required by statute to provide Wilderness Watch with an estimated decision date. *See* 7 C.F.R., Subtitle A, 1.16; 5 U.S.C. 552(a)(6)(B).

Because you will not provide us with any indication on how long we may be waiting for a decision (again, a few more weeks? a few more months? six months?), we will be forced to file a lawsuit to enforce the provisions of the FOIA. We do not want to do this and thus are simply requesting that you provide us with a reasonable estimated decision date.

To avoid the need to seek judicial enforcement, we propose a new decision deadline of Friday, March 6, 2015. This new deadline is seventy (70) days, excluding weekends and federal holidays, from your November 21, 2014 receipt of our FOIA appeal and forty one (41) days, excluding weekends and federal holidays, from your January 6, 2015 email indicating that you had received the records for review from Region 5. If we have not received a decision on our appeal by March 6, 2015, we will file suit to enforce the deadline provisions, and the substantive provisions, of the FOIA.

Thank you for your prompt attention to this matter[.]

31. On February 18, 2015, Ms. Dover responded via email:

Good Morning,
I will do my best!

32. On March 10, 2015, after receiving no further correspondence, Wilderness

Watch sent the following email to Ms. Dover:

Hello Ms. Dover. I have not seen anything come through the mail or email yet on the above FOIA appeal. Can you please let me know if your determination has been sent? If possible, we would appreciate an electronic copy sent to my email address.

33. Ms. Dover did not respond to Wilderness Watch's March 10, 2015 email.

34. As of the date of the filing of this complaint, Wilderness Watch has not received a determination on its FOIA appeal nor has it received any estimated date on which a determination would be forthcoming.

35. Wilderness Watch is directly and adversely affected by Defendant's failure to issue an appeal determination and provide all responsive records and documents from Wilderness Watch's FOIA request.

36. Wilderness Watch is “deemed to have exhausted [its] administrative remedies” because Defendant “fail[ed] to comply with applicable time limit provisions” of the FOIA. 5 U.S.C. § 552(a)(6)(C)(i).

CLAIMS FOR RELIEF

CLAIM I **VIOLATION OF THE FREEDOM OF INFORMATION ACT:** **DECISION DEADLINE VIOLATION**

37. Plaintiff incorporates all previous paragraphs by reference.

38. Wilderness Watch has a statutory right to have Defendant process its FOIA request and appeal in a manner that complies with the FOIA.

39. Wilderness Watch’s rights were violated when the Forest Service failed to provide a final determination on Wilderness Watch’s FOIA appeal within the twenty (20) day statutory deadline. 5 U.S.C. § 552 (a)(6)(A)(ii).

40. If the ten (10) day deadline extension applies, 5 U.S.C. § 552 (a)(6)(B)(i), that deadline has also lapsed.

41. Wilderness Watch has been adversely affected and aggrieved by Defendant’s failure to comply with the FOIA’s mandates. Defendant’s failure has injured Wilderness Watch’s interests in public oversight of governmental operations and constitutes a violation of Defendant’s statutory duties under the FOIA.

42. Unless enjoined by this Court, the Forest Service will continue to violate Wilderness Watch's legal rights to access the records that it has requested.
43. Wilderness Watch is entitled to reasonable costs of litigation, including attorney fees pursuant to the FOIA. 5 U.S.C. § 552 (a)(4)(E).

CLAIM II
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
FAILURE TO PROVIDE ANTICIPATED DETERMINATION DATE

44. Plaintiff incorporates all previous paragraphs by reference.
45. In certain unusual circumstances, the FOIA allows the administrative agency to extend the deadline for an appeal determination. 5 U.S.C. § 552(a)(7)(B)(i). If the agency invokes this deadline extension, the agency must provide “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)(7)(B)(i).
46. Defendant violated the FOIA's requirement that an administrative agency provide an anticipated determination date if the agency is invoking a deadline extension beyond the twenty (20) day statutory deadline for an appeal determination. 5 U.S.C. § 552(a)(7)(B)(i); *See also* 7 C.F.R., Subtitle A, 1.16.
47. Wilderness Watch asked repeatedly for an anticipated determination date, and Defendant repeatedly refused to provide one.

48. Wilderness Watch has been adversely affected and aggrieved by Defendant's failure to comply with the FOIA's mandates. Defendant's failure has injured Wilderness Watch's interests in public oversight of governmental operations and constitutes a violation of Defendant's statutory duties under the FOIA.
49. Unless enjoined by this Court, the Forest Service will continue to violate Wilderness Watch's legal rights to access the records that it has requested.
50. Wilderness Watch is entitled to reasonable costs of litigation, including attorney fees pursuant to the FOIA. 5 U.S.C. 552 § (a)(4)(E).

CLAIM III
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
CONSTRUCTIVE AND UNLAWFUL WITHHOLDING

51. Plaintiff incorporates all previous paragraphs by reference.
52. Wilderness Watch has a statutory right to the records it seeks, and there is no legal basis for Defendant to assert any of the FOIA's nine disclosure exemptions. *See* U.S.C. 552 § (b)(1)-(9).
53. Defendant's failure to provide a timely appeal determination date constitutes constructive withholding of documents and records requested by Wilderness Watch in violation of the FOIA's mandate that every administrative agency "make the records promptly available to any person"

who requests records from an administrative agency. 5 U.S.C. § 552 (a)(3)(A).

54. As explained in Wilderness Watch's timely FOIA appeal, the records requested by Wilderness Watch and withheld by the Forest Service are not exempt from disclosure and production under FOIA exemption 5.

55. Wilderness Watch has been adversely affected and aggrieved by Defendant's failure to comply with the FOIA's mandates. Defendant's failure has injured Wilderness Watch's interests in public oversight of governmental operations and constitutes a violation of Defendant's statutory duties under the FOIA.

56. Unless enjoined by this Court, the Forest Service will continue to violate Wilderness Watch's legal rights to access the records that it has requested.

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

CLAIM IV
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

58. Plaintiff incorporates all previous paragraphs by reference.

59. Defendant has unlawfully withheld agency action by failing to comply with the following FOIA requirements: 1) provide Wilderness Watch with responsive documents to its information request that are not within the scope of any of FOIA's disclosure exemptions; 2) issue a timely final

determination on Wilderness Watch's FOIA appeal, and 3) provide Wilderness Watch with an estimated determination date regarding Wilderness Watch's FOIA appeal.

60. Defendant's failure to 1) provide Wilderness Watch with responsive documents to its information request that are not within the scope of any of FOIA's disclosure exemptions; 2) issue a timely final determination on Wilderness Watch's FOIA appeal, and 3) provide Wilderness Watch with an estimated determination date regarding Wilderness Watch's FOIA appeal constitutes agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

61. Alternatively, Defendant's failure to 1) provide Wilderness Watch with responsive documents to its information request that are not within the scope of any of FOIA's disclosure exemptions; 2) issue a timely final determination on Wilderness Watch's FOIA appeal, and 3) provide Wilderness Watch with an estimated determination date regarding Wilderness Watch's FOIA appeal is in violation of FOIA's mandates and is therefore arbitrary, capricious, or otherwise not in accordance with the law and is therefore actionable pursuant to the APA 5 U.S.C. § 706(2).

62. Wilderness Watch has been adversely affected and aggrieved by Defendant's failure to comply with FOIA's mandates. Defendant's failure

has injured Wilderness Watch's interests in public oversight of governmental operations and constitutes a violation of Defendant's statutory duties under the APA.

63. Wilderness Watch is entitled to judicial review under the APA. 5 U.S.C. § 702, 706.

64. 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.S. § 2412.

REQUEST FOR RELIEF

THEREFORE, Wilderness Watch requests that this Court enter judgment providing the following relief:

- A. Declare that Defendant violated FOIA and/or the APA by failing to issue a determination on Wilderness Watch's FOIA appeal in accordance with the statutory deadline;
- B. Declare that Defendant violated FOIA and/or the APA by failing to provide Wilderness Watch with an estimated determination date for its FOIA appeal;
- C. Declare that Defendant violated FOIA and/or the APA by failing to promptly produce the documents requested in Wilderness Watch's FOIA request;

- D. Enjoin Defendant from withholding the requested records, and order Defendant to immediately provide the requested records to Wilderness Watch;
- E. Award Wilderness Watch its reasonable costs, litigation expenses and attorney's fees as provided by 5 U.S.C. 552 § (a)(4)(E), 28 U.S.C. § 2412, and/or any other applicable law; and
- F. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 18th day of March, 2015.

/s/ Rebecca K. Smith

Rebecca K. Smith

Public Interest Defense Center, P.C.

Dana M. Johnson

Wilderness Watch, Inc.

(pending pro hac vice admission)

Attorneys for Plaintiff