

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

CENTER FOR BIOLOGICAL DIVERSITY,  
378 N. Main Avenue  
Tucson, AZ 85701,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE  
INTERIOR,  
1849 C Street, N.W.  
Washington, D.C. 20240,

Defendant.

Case No.: \_\_\_\_\_

**COMPLAINT**  
**FOR DECLARATORY AND**  
**INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiff Center for Biological Diversity (“the Center”) challenges the United States Department of the Interior’s (“Interior”) ongoing violations of the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), resulting from the agency’s failure to timely respond to a narrowly tailored request for public records regarding the Tusayan Stilo development, a massive commercial and residential development in close proximity to the Grand Canyon that will exponentially increase the population of Tusayan from about 600 people to between 5,500 and 8,000 people. As proposed, the Tusayan Stilo development stands to substantially increase tourism to Grand Canyon National Park and threaten the some of the most threatened ecosystems on Earth, including a water source for springs that nourish humans, wildlife, and habitat in and around the Grand Canyon, with the potential to drawdown flows in the Colorado River—one of America’s most iconic rivers—and harm the endangered humpback chub and razorback sucker that depend on those flows for survival.

2. On October 7, 2019, the Center submitted its FOIA request to Interior's Office of the Secretary. The Center requested the records to enhance the public's understanding of the environmental impact of the Tusayan Stilo development, as compared to the level of public understanding that exists prior to disclosure. Although 75 working days have passed since the Center submitted its FOIA request, to date Interior has not provided any records. Accordingly, the Center challenges Interior's FOIA violations resulting from its failure to respond to the Center's request and seeks declaratory and injunctive relief to require Interior to search for and produce all responsive records without further delay.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA and the Declaratory Judgment Act, *id* §§ 2201-2202.

4. Venue vests in this Court under 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district and because the responsive records may be found in this district.

5. Declaratory relief is appropriate under 28 U.S.C. § 2201.

6. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 69,500 members. Interior's failure to comply with FOIA impairs the Center's ability to provide full, accurate, and current information to the public on a matter of public interest. Absent this information, the Center is hampered in its ability to advance its mission to protect native species and their habitat. The Center and its members are harmed by Interior's ongoing violations of

FOIA, which are preventing the Center from gaining a full understanding of Interior's activities, priorities, and decision-making regarding the massive proposed commercial and residential development near the Grand Canyon National Park.

8. Defendant U.S. DEPARTMENT OF THE INTERIOR is a United States federal executive department of the U.S. government. Interior's responsibility is to conserve and manage the Nation's natural resources and cultural heritage for the benefit and enjoyment of the American people. Interior is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f) and is responsible for fulfilling the Center's FOIA request.

### **STATUTORY BACKGROUND**

9. FOIA's basic purpose is government transparency. It establishes the public's right to access federal agency records, with certain narrow exceptions. 5 U.S.C. § 552(b)(1)-(9).

10. Within 20 working days of receiving a FOIA request, an agency must determine if it will release requested records and notify the requester of its determination and the reasons therefore, the right to seek assistance from the FOIA Public Liaison, and the right to appeal an adverse agency determination. *Id.* § 552(a)(6)(A)(i).

11. Only in "unusual circumstances" may an agency extend the time to make a final determination by no more than 10 working days, but it must provide written notice to the requester setting forth the unusual circumstances for the extension and "the date on which a determination is expected to be dispatched." *Id.* § 552(a)(6)(B)(i). If it provides written notice that it cannot process the request within the specified time limit, the agency shall provide "an opportunity to limit the scope of the request so that it may be processed within" the statutory time limit or "an opportunity to arrange with the agency an alternative timeframe for processing

the request or a modified request” and shall make available its FOIA Public Liaison to “assist in the resolution of any disputes between the requester and the agency.” *Id.* § 552(a)(6)(B)(ii).

12. FOIA requires each agency to undertake a search for requested records in a manner reasonably calculated to locate all records responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D). Using the date of a FOIA request as the cut-off date for its search is not always reasonable, while using the date that the agency commences its search has consistently been found to be reasonable.

13. FOIA requires federal agencies to promptly disclose requested records. *Id.* § 552(a)(3)(A), (a)(6)(C)(i).

14. In certain limited instances, an agency may withhold records under one or more of nine specific exemptions. *Id.* § 552(b). These exemptions must be narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.

15. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

16. FOIA provides this Court jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.*

17. 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, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* § 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.” *Id.* § 706(2)(A).

**STILO DEVELOPMENT GROUP PROPOSED DEVELOPMENT**

18. Stilo Development Group is an Italian real estate developer known for building and operating high-end shopping malls. In the 1990s, Stilo bought a dozen inholding properties scattered throughout the Kaibab National Forest. Stilo funded the creation of the Town of Tusayan and its council, which allowed the developer to rezone Tusayan for mixed-use commercial, residential, and retail development.

19. Two of Stilo's National Forest inholdings, Kotzin Ranch and TenX Ranch are located less than two miles from Grand Canyon National Park. Kotzin Ranch is located just northwest of Tusayan, is less than a mile from Grand Canyon National Park and less than two miles from the Park's South Rim entrance. TenX Ranch is southeast of Tusayan and less than three miles from the Park boundary.

20. Stilo would like to build a more than 2.6 million square feet of commercial space on the property, including "extensive retail, dining, and entertainment venues,"<sup>1</sup> a conference center, spa, dude ranch, cultural "edutainment" center, thousands of hotel rooms, and more.<sup>2</sup> Stilo also plans to build about 2,200 new housing units, including detached houses, townhouses, apartments, and condominiums.<sup>3</sup>

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<sup>1</sup> E. Whitman, *Video Showcases Italian Developer Stilo's Ambitions for the Grand Canyon*, Phoenix New Times (June 1, 2019) (video), available at <https://tinyurl.com/y3ro3mj3>.

<sup>2</sup> Grand Canyon National Park, *Issues and Concerns Regarding Proposed Groundwater Developments near the South Rim* (June 6, 2012) ("GCNP Report") at 8-9.

<sup>3</sup> GCNP Report at 8; J. Cart, *National Park Service calls development plans a threat to Grand Canyon*, Los Angeles Times (July 6, 2014), available at <https://www.latimes.com/nation/la-na-grand-canyon-2014-story.html>; C. Beard, *Stilo Presents Preliminary Plans for Tusayan's Properties*, Grand Canyon News (Mar. 15, 2011), available at <https://tinyurl.com/y4q25x79>.

21. This massive development would increase Tusayan's population from about 600 to between 5,500 to 8,000.<sup>4</sup> The tourist population visiting the Grand Canyon National Park and the surrounding areas would also significantly increase.

22. Stilo's massive development plans for Kotzin and TenX cannot be fulfilled because they need to obtain special use authorization for easements. The easements are needed to build paved roads and run utilities across Forest Service land to the two inholdings.

### **STILO'S PROPOSED DEVELOPMENT IRREPARABLE HARM**

23. Stilo's proposed development threatens the water that is a major source for springs that nourish wildlife and habitat within Grand Canyon National Park.

24. The primary aquifer in the region is the Redwell-Muav (R-M) aquifer, which supplies flows to the majority of springs and seeps on the Grand Canyon's South Rim.<sup>5</sup>

25. The South Rim's many seeps and springs represent the most diverse ecosystems in the region and are some of the most threatened ecosystems on Earth. These oases are essentially the only water sources for most of the Inner Canyon's flora, fauna, and humans. Groundwater pumping threatens to destroy these ecosystems.

26. Any interference with the R-M aquifer and groundwater around the Grand Canyon and Tusayan area will result in flow reductions to small seeps and springs along the South Rim. These seeps and springs are habitat for rare and endemic species. A substantial reduction in spring flows would also decrease flows in the Colorado River,<sup>6</sup> potentially harming the endangered humpback chub and razorback sucker that depend on those flows.

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<sup>4</sup> GCNP Report, at 8-9; C. Cole, *Tusayan Resort Coming Up Dry*, Arizona Daily Sun (Nov. 11, 2012), available at <https://tinyurl.com/y55crxv5>.

<sup>5</sup> GCNP Report, at 9.

<sup>6</sup> B. Tobin, *Review: The distribution, flow, and quality of Grand Canyon Springs, Arizona (USA)*, Hydrogeology Journal (Nov. 2017), available at <https://tinyurl.com/y43ohvu8>.

27. With Stilo's development a few miles from Grand Canyon Village, there will likely be an increase to the population of tourists visiting the park, which will stress the park's facilities, infrastructure, emergency services, and visitor experience.

28. Grand Canyon National Park would not be able to support and manage a large increase in visitors with its limited resources and aging infrastructure. The park is already experiencing problems due to drastic budget cuts and growing visitor numbers. In 2016, more than six million people visited the park. An increase in residents and visitation will have a negative impact on a park that is already struggling to support the visitors it receives currently.

29. The proposed easement routes and inholdings provide important habitat to a variety of wildlife species in the Kaibab National Forest. TenX provides habitat for fawning antelope and is directly adjacent to Forest Service lands that include elk calving grounds, deer and antelope fawning grounds, and an important wildlife water source.<sup>7</sup> The easement routes are also within a wildlife corridor for elk, mule deer, mountain lion, northern goshawk, and pronghorn. Construction of roads and utility corridors will result in habitat loss and fragmentation and disrupt these species' movements.

30. Stilo's massive proposed commercial and residential development on Kotzin and TenX will have a huge negative impact on the Grand Canyon, Kaibab National Forest, and water sources, which are relied on by the Havasupai tribe, wildlife and plants.

### **FACTUAL BACKGROUND**

31. On October 7, 2019, the Center sent a FOIA request to Interior requesting "all records of the meetings, calendars, and emails about the Tusayan Stilo development near the Grand Canyon including but not limited to, the search terms 'Tusayan' and 'Stilo:' Secretary

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<sup>7</sup> U.S. Forest Service, Final EIS for Tusayan Growth, 200-03 (Aug. 6, 1999).

David Bernhardt; Casey Hammond; Katherine MacGregor; Andrea Travnicek; Rob Wallace; Ryan Hambleton; Marshall Critchfield; Tom De Paolo; and/or All individuals from the law firm Brownstein Hyatt Farber and Schreck (all emails ending in “bhfs.com”).”

32. On October 28, 2019, Interior acknowledged the Center’s request, assigned it control number “OS-2020-00024,” and placed it on the “complex processing track.”

33. On November 13, 2019, after 26 workdays passed with no determination or further correspondence, the Center sent Interior via email a letter notifying the agency that it had violated FOIA’s statutory determination deadline and offering to assist the agency.

34. On November 21, 2019, Interior sent the Center via email a receipt of the Notice of Violation letter.

35. On November 26, 2019 the Center sent Interior via email a request for a status update. That same day, Interior responded to the Center via email stating that it was “still waiting for potentially responsive records and cannot provide a timeline at this point.”

36. On December 12, 2019, the Center sent Interior a second letter notifying the agency that it had violated FOIA’s statutory determination deadline, requesting a final determination, and offering to assist. At the date of this filing, Interior has not acknowledged receipt of this notice.

37. As of the date of this filing, which is 55 working days after the 20 working day appeal determination deadline of November 5, 2019, the Center has received no response from Interior regarding the Center’s November 26, 2019 and December 12, 2019, notice of deadline violation letters, and has received no records or a determination from Interior.

38. Upon information and belief, Interior has failed to conduct a search for records responsive to the Center’s October 7, 2019 FOIA request.



39. Interior's failure to conduct an adequate search and failure to provide all responsive records to the Center undermine FOIA's primary purpose of government transparency.

40. The Center has been required to expend resources to prosecute this action.

**FIRST CLAIM FOR RELIEF**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**(Interior failed to conduct an adequate search for responsive records)**

41. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

42. The Center has a statutory right to have Interior process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). Interior is violating the Center's rights in this regard by unlawfully failing to undertake a search reasonably calculated to locate all records that are responsive to the Center's FOIA request.

43. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to Interior in the foreseeable future.

44. The Center's organizational activities will be adversely affected if Interior continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA request.

45. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, Interior will continue to violate the Center's right to receive public records under FOIA.

**SECOND CLAIM FOR RELIEF**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**(Interior failed to promptly disclose records responsive to the Center's FOIA request)**

46. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

47. Interior is violating FOIA and implementing regulations by refusing to promptly disclose the records responsive to the Center's FOIA request.

48. The Center has a statutory right to the records it seeks.

49. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to Interior in the foreseeable future.

50. The Center's organizational activities will be adversely affected if Interior continues to violate FOIA's disclosure provisions as it has in this case.

51. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, Interior will continue to violate the Center's right to receive public records under FOIA.

**THIRD CLAIM FOR RELIEF**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**(Interior's failure to disclose all non-exempt records responsive to the Center's FOIA request)**

52. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

53. The Center has a statutory right to the records it seeks and there is no legal basis for Interior to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

54. To the extent Interior is claiming any of these exemptions, Interior is unlawfully withholding from disclosure records that are responsive to the Center's FOIA Request.

55. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to Interior in the foreseeable future.

56. The Center's organizational activities will be adversely affected if Interior continues to violate FOIA's disclosure provisions.

57. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, Interior will continue to violate the Center's right to receive public records under FOIA.

**FOURTH CLAIM FOR RELIEF**  
**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

**(Interior's failure to provide reasonably segregable portions of any lawfully exempt records)**

58. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

59. The Center has a statutory right to any reasonably segregable portion of a record that may contain information lawfully subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

60. Interior is violating the Center's rights in this regard to the extent it is unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to the Center's FOIA request.

61. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests Interior in the foreseeable future.

62. The Center's organizational activities will be adversely affected if Interior is allowed to continue violating FOIA's disclosure provisions as it has in this case.

63. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, Interior will continue to violate the Center's right to receive public records under FOIA.

**FIFTH CLAIM FOR RELIEF**  
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**  
**(In the Alternative to the First through Fourth Claim)**

**(Agency action unlawfully withheld or unreasonably delayed)**

64. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

65. Interior is unlawfully withholding agency action by failing to comply with FOIA's mandates as a result of its failure and refusal to search for and disclose records responsive to the Center's FOIA request. Interior's failures constitute agency action that is unlawfully withheld pursuant to the APA, 5 U.S.C. § 706(1).

66. Alternatively, Interior is unreasonably delaying agency action by failing to comply with FOIA's mandates as a result of its failure and refusal to search for and disclose records responsive to the Center's FOIA request. Interior's failures constitute agency action unreasonably delayed pursuant to the APA, 5 U.S.C. § 706(1).

67. As alleged above, Interior's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and violates its statutory duties under the APA.

68. The Center has suffered a legal wrong as a result of Interior's failure to comply with the mandates of FOIA. As alleged above, Interior is violating its statutory duties under the APA and injuring the Center's interests in public oversight of governmental operations.

69. The Center has no other adequate remedy at law to redress the violations noted above.

70. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

**SIXTH CLAIM FOR RELIEF**  
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**  
**(In the Alternative to the First Through Fifth Claims)**

**(Arbitrary and capricious agency action)**

71. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

72. Interior is violating FOIA's statutory mandates by failing to search for and disclose records responsive to the Center's FOIA request. By violating FOIA's statutory mandates, Interior's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law pursuant to the APA, 5 U.S.C. § 706(2)(A).

73. As alleged above, Interior's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

74. The Center has suffered a legal wrong as a result of Interior's failure to comply with the mandates of FOIA. As alleged above, Interior is violating its statutory duties under the APA and injuring the Center's interests in public oversight of governmental operations.

75. The Center has no other adequate remedy at law to redress the violations noted above.

76. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendant to conduct searches reasonably calculated to locate all records responsive to Plaintiff's FOIA request, utilizing a cut-off date for such searches that is the date the searches are conducted, and provided Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.
2. Declare that Defendant's failures to timely undertake a search for and disclose to Plaintiff all records responsive to Plaintiff's FOIA request, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the alternative, are agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2).
3. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.
4. Grant such other and further relief as the Court may deem just and proper.

DATED: January 27, 2020

Respectfully submitted,

/s/ Douglas W. Wolf

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