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Plaintiff's Attorneys

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION**

KLAMATH SISKIYOU WILDLANDS CENTER,
an Oregon non-profit corporation, P.O. Box 102
Ashland, OR 97502,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF INTERIOR,
an agency of the United States of America, 1849 C Street,
N.W., Washington DC 20240,

Defendant.

Civil Action No.: 1:18-cv-00683

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Klamath Siskiyou Wildlands Center (“KS Wild”), alleges as follows:

INTRODUCTION

1. In this action, brought pursuant to the Freedom of Information Act (“FOIA” or “the

Act”), 5 U.S.C. § 552 *et. seq.*, or, in the alternative, the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et. seq.*, KS Wild challenges the unlawful acts of the Bureau of Land Management, (“BLM”) acting on behalf of the Defendant United States Department of Interior (“DOI” or “the Agency”) as well as unlawful acts of the DOI itself in relation to KS Wild’s September 19, 2017 FOIA request, and KS Wild’s December 7, 2017 appeal of the partial withholding determination BLM made in response to KS Wild’s September 19, 2017 request.

2. KS Wild’s September 19, 2017 FOIA request to BLM sought “All emails and correspondence concerning the Pickett West Project in the Grants Pass Resource Area of the Medford BLM generated since December 2016; and all administrative protests received by the BLM concerning the Pickett Hog portion of the Picket West Project.”

3. KS Wild submitted its FOIA request, in part, so that it could continue to disseminate accurate and substantive information held by the BLM to their more than 10,000 members and the public through their website, email platform, local newspapers, and social media accounts.

4. BLM violated FOIA by making an untimely final determination of KS Wild’s September 19, 2017, FOIA request on November 15, 2017. Because BLM withheld records responsive to Plaintiff’s FOIA request by asserting FOIA’s Exemption 5 for attorney client privilege, 5 U.S.C. § 552(b)(5), KS Wild timely appealed BLM’s final determination on December 7, 2017. As of the date this complaint was filed Defendant has not made a decision on Plaintiff’s appeal.

5. BLM’s actions in relation to KS Wild’s FOIA request and appeal thereof violate FOIA in several ways. First, the BLM failed to make decisions on KS Wild’s FOIA request and appeal within the 20-business-day deadline imposed by FOIA. Second, BLM failed to provide reasons that each withheld record falls under Exemption 5 for attorney client privilege. Third, DOI failed to acknowledge receipt of KS Wild’s FOIA appeal. Fourth, DOI failed to provide KS Wild with

estimated completion dates for KS Wild's FOIA request and appeal

6. KS Wild is engaged in ongoing public outreach, education, professional and technical advocacy efforts regarding state and federal compliance with environmental statutes and BLM's repeated failures to comply with FOIA frustrate KS Wild's mission to disclose this information to their membership and the public. Accordingly, KS Wild seeks a declaration from this Court that BLM has violated FOIA, or in the alternative, the APA. KS Wild also seeks an injunction from this Court that directs DOI to promptly provide KS Wild with the requested records.

JURISDICTION, VENUE AND BASIS FOR RELIEF

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

8. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases arising out of judicial districts where a requester is located and where agency records are situated. Plaintiff both resides and has its principal place of business in Ashland, Oregon and the Medford BLM holds the records at question in this judicial district. Assignment is proper in this judicial division for the same reasons. L.R. 3-2(a).

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

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

PARTIES

11. KS Wild is a regional non-profit environmental organization founded and incorporated under the laws of Oregon in 1997, with its principal place of business in Ashland, Oregon. KS Wild's mission is to protect and restore wild nature in the Klamath-Siskiyou region of southwest

Oregon and northwest California. KS Wild promotes science-based land and water conservation through policy and community action. KS Wild works towards building a Klamath-Siskiyou region where local communities enjoy healthy wildlands, where clean rivers are teeming with native salmon, and where connected plant and wildlife populations are prepared for climate change.

12. KS Wild achieves this mission through public education, community organizing, strategic partnerships, public records requests, information sharing, advocacy with administrative agencies, policy analysis, lobbying, and litigation by being the watchdog and steward of northern California and southern Oregon's public lands, public trust waters, and the diversity of plant and animal life contained therein.

13. KS Wild is a leader in protecting public lands and threatened or endangered species, and actively participates in many state and federal agency actions that affect these issues. KS Wild provides advice and information to many organizations across the region. Indeed, KS Wild is an informational conduit to the public, the media, government agencies, elected officials, and other environmental organizations such as water quality groups, salmon conservation and recovery groups, and organizations focused on protection of endangered species as well as regulatory agencies that make agency actions through the NEPA process. KS Wild regularly disseminates such information via its newsletter, door canvass, emails, website, local newspapers and media contacts to the public.

14. Defendant DOI is an agency of the executive branch of the United States government, and is in possession, custody, or control of the records sought by KS Wild, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

15. FOIA imposes strict and rigorous deadlines on federal agencies. The Act requires a federal agency that receives a FOIA request to determine whether the requested records are exempt from disclosure under 5 U.S.C. § 552(b) and to communicate that determination and the reasons therefor to the requester within 20-business-days. 5 U.S.C. § 552(a)(6)(A)(i). If the agency determines the records are not exempt from public disclosure, the agency is required to make the requested records “promptly available” to the requester. 5 U.S.C. § 552(a)(3)(A),

16. The agency must either grant or deny a request for records within within 20-business-days after receiving the request. 5 U.S.C. § 552(a)(6)(A)(i); *see also* 29 CFR 2201.6(a).

17. If the requester appeals an agency’s determination, the agency must make a determination with respect to that appeal within 20-business-days. 5 U.S.C. § 552(a)(6)(A)(ii). The 20-business-day period commences on the date on which the request is first received by the appropriate component of the agency, “but in any event not later than ten days after the request is first received by any component of the agency” that is designated in the agency’s regulations to receive requests under FOIA. *Id.*

18. Congress set forth the circumstances in which federal agencies may take longer than 20-business-days to make a determination. First, the agency may toll the 20-business-day deadline for up to ten additional business 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).

19. Second, the agency may also toll the 20-business-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). If the agency faces “unusual circumstances,” the agency may extend the 20-business-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). No extension will exceed 10 business 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).

20. Under FOIA, “unusual circumstances” are defined as “the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request[,]” or “the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request,” or “the need for consultations ... with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.” 5 U.S.C. § 552(a)(6)(B)(iii).

21. If the agency fails to meet the disclosure deadlines established by FOIA, including the deadline to determine within 20-business-days whether to issue a decision on the request, the agency may not charge the requester for the costs incurred in searching for or duplicating the requested documents unless unusual or exceptional circumstances apply. 5 U.S.C. § 552(a)(4)(A)(viii).

22. 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-business-day deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i).

23. 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).

24. A U.S. district court has jurisdiction “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).

25. 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).

26. Any person making a request to any agency for records ... shall be deemed to have exhausted their administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions. 5 U.S.C. § 552(a)(6)(C)(i).

27. Agency action arising under FOIA has also been subject to judicial review under the APA.

28. Under the judicial review provisions of the APA, district courts are authorized to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). District courts

must also set aside any agency action found to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or made without observation of required procedures. 5 U.S.C. § 706(2)

STATEMENT OF FACTS

KS Wild's September 19, 2017 FOIA Request

29. On September 19, 2017 KS Wild sent a FOIA request via email to BLM at blm_or_so_foia@blm.gov, and a hard copy addressed to FOIA Coordinator, Medford BLM, 3040 Biddle Rd. Medford, OR 97504, that requested, “1.) All emails and correspondence concerning the Pickett West Project in the Grants Pass Resource Area of the Medford BLM generated since December 2016; and 2.) all administrative protests received by the BLM concerning the Pickett Hog portion of the Picket West Project.”
30. More specifically, KS Wild sought records from BLM so it could help keep the public informed about the BLM's actions and decisions regarding implementation of the Picket West Timber sale. KS Wild requires these records from the BLM in order to inform their membership, media, the public, and elected officials about changing BLM policies and implementation practices under their new Resource Management Plan.
31. On September 20, 2017, BLM sent KS Wild an email acknowledging that BLM had received KS Wild's request made on September 19, 2017 and assigned the request a FOIA tracking number eFTS BLM-2017-01093 and a FOIA case number of OR-2017-0099. The BLM did not provide an estimated completion date but did state, “For your information, the BLM ordinarily has 20 workdays after the date of receipt to respond to a FOIA request. See [43 CFR § 2.16](#).”
32. On November 15, 2017, 18 days past the statutory deadline of 20-business-days to make

a decision under FOIA, BLM notified KS Wild by letter of their decision to issue a partial denial of KS Wild's September 19, 2017 FOIA request OR-2017-0099.

33. The November 15, 2017, letter withheld 107 pages in full from the KS Wild FOIA request OR-2017-0099 on the basis of attorney client privilege asserted under FOIA's Exemption 5.

34. BLM's description of the 88-pages of withholding as "partial" is untrue and inaccurate.

35. Attached hereto as Exhibits A, B and C respectively, are true copies of: (A) BLM's November 15, 2017 initial response to KS Wild's FOIA request OR-2017-0099; (B) a 29-page pdf document titled "20160907_KS Wild Protest DR1_Redacted.pdf"; (C) a 1-page pdf document titled "Attachment_Chapters 1_2_4 with highlighting+perron comments.pdf".

36. KS Wild specifically appealed two out of six documents withheld in DOI's November 15, 2017, letter and true copies are attached hereto as **Exhibit B)** The 29-page document with corner to corner blanket redactions titled "20160907_KS Wild Protest DR1_Redacted.pdf" the BLM held under Exemption 5 as attorney client privilege, and; **Exhibit C)** The 78-page document held in full titled "Attachment_Chapters 1_2_4 with highlighting + perron comments.pdf" the BLM held under Exemption 5 as attorney client privilege.

KS Wild's December 7, 2017 FOIA Appeal

37. On December 7, 2017, KS Wild timely appealed the partial denial of the FOIA request OR-2017-0099. This FOIA appeal was sent via a hard copy letter, delivered by certified mail #7009 2250 0001 8888 8176, to FOIA/ Privacy Act Appeals Officer at 1849 C Street, NW, MS-6556, MIB, Washington, DC 20240.

38. The appeal to FOIA request OR-2017-0099 was accepted by an individual at the FOIA office on December 11, 2017.

39. The DOI failed to acknowledge receipt of Plaintiff's timely appeal.

40. An agency must make a determination with respect to a FOIA appeal within 20-business-days of receipt. 5 U.S.C. § 552(a)(6)(A)(ii). At the very latest, the 20-day deadline date for a determination of the appeal would have been January 10, 2018, accounting for the Christmas and New Years Day holidays within the time period.

41. On February 9, 2018, 81-business-days after filing its FOIA request, 58 days after the last communication from BLM was received (November 15, 2017), and 41 days after DOI received KS Wild's submitted appeal (December 11, 2017), the undersigned counsel Minter, on behalf of KS Wild, placed a phone call and left a voice message for DOI's FOIA Office at: (202) 208-5339 regarding the status of Plaintiff's appeal.

42. On February 23, 2018, the undersigned counsel Minter, on behalf of KS Wild, placed another phone call to the FOIA Appeals office at the above number and was told that the appeal had been received, that it had been given a appeal number Appeal # 2018-048, and that no other information on the appeal other than the BLM number and Appeal number was known. The woman on the phone asked KS Wild to send an email to foia.appeals@sol.doi.gov asking for the status of the appeal. Following the phone call, the undersigned counsel, on behalf of KS Wild, sent an email to DOI's FOIA Appeals office at: foia.appeals@sol.doi.gov noting that having obtained the BLM and Appeal numbers, a reminder that the agency has significantly exceeded the 20-day period to decide the appeal and asking for an estimated completion date for the appeal.

43. Thus, on February 28, 2018, after no response by the DOI, KS Wild notified DOI by a letter sent by certified mail #7000 0520 0014 9713 0933, to FOIA/ Privacy Act Appeals Officer

at 1849 C Street, NW, MS-6556, MIB, Washington, DC 20240, that the DOI response to KS Wild's FOIA appeal was past due and again asked for an estimated completion date.

44. Plaintiff's February 28, 2018 letter was accepted by an individual at the DOI FOIA office on March 6, 2018.

45. On March 8, 2018 KS Wild memorialized all correspondence with DOI and asked for an estimated completion date of the determination of the appeal in a letter sent via certified mail #7017 3380 0000 6880 0720 to the FOIA/ Privacy Act Appeals Officer at 1849 C Street, NW, MS-6556, MIB, Washington, DC 20240.

46. Plaintiff's March 8, 2018 letter was accepted by an individual at the DOI FOIA office on March 12, 2018.

47. On March 23, 2018 KS Wild again sent a Notice of Violation/Request for Estimated Completion date letter sent via certified mail #7009 2250 0001 8888 8220 to the FOIA/ Privacy Act Appeals Officer at 1849 C Street, NW, MS-6556, MIB, Washington, DC 20240.

48. Plaintiff's March 23, 2018 letter was accepted by an individual at the DOI FOIA office on March 18, 2018.

49. DOI has provided no acknowledgement of KS Wild's Appeal # 2018-048, or any of the written or phone correspondence sent to them since the December 7, 2017, appeal # 2018-048. In an attempt to discern the status of its appeal, KS Wild has repeatedly requested from DOI the individualized tracking number for its appeal of FOIA request and an estimated completion date of the appeal determination at least seven times.

50. Thus, KS Wild has not been able to obtain any information about the status of its FOIA appeal through the DOI office by telephone, email, letter, or using the DOI FOIA Appeals tracker. KS Wild has not been able to track the status of their December 7, 2017, appeal through

the FOIAonline program at this web address: <https://www.justice.gov/oip/submit-and-track-request-or-appeal> with the Appeal # 2018-048.

51. As of the date this action was filed, DOI has not informed KS Wild of the date on which the Agency received the Appeal # 2018-048.

52. As of the date this action was filed, DOI has not informed KS Wild if KS Wild's appeal was sent to an inappropriate component of the agency, nor has BLM/DOI requested information regarding the scope or content of KS Wild's request, or sought to clarify with KS Wild's issues regarding fee assessment.

53. As for the date this action was filed, DOI has not provide an estimated completion date for the Appeal # 2018-048.

54. As of the date this action was filed, the undersigned counsel Minter on behalf of KS Wild, contacted DOI on at least seven occasions to inquire about the status of its FOIA appeal # 2018-048 and to request an estimated date of completion for the DOI's determination on the appeal. In so doing, KS Wild invoked 5 U.S.C. § 552(a)(7)(B)(ii).

55. DOI has not responded to any of KS Wild's requests for information about the status of its appeal.

56. As of the date this action was filed, DOI has failed to make a final determination resolving KS Wild's FOIA Appeal # 2018-048 within the statutory deadline.

57. As of the date this action was filed, DOI has failed to provide KS Wild with a written notice setting forth any unusual circumstances, that would justify extension of any of FOIA's deadlines, as required by 5 U.S.C. 552(a)(6)(B)(i).

58. Because DOI has failed to decided KS Wild's FOIA appeal within the period required by FOIA, KS Wild 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).

CAUSES OF ACTION

COUNT I

VIOLATION OF THE FREEDOM OF INFORMATION ACT: UNLAWFUL CONSTRUCTIVE DENIAL OF FOIA APPEAL AND WITHHOLDING OF INFORMATION

59. KS Wild has a statutory right to the records it seeks, which are “agency records” within the meaning of FOIA, and Defendant has provided no legal basis to assert any of FOIA’s nine disclosure exemptions apply to the records requested. *See* 5 U.S.C. § 552(b)(1)-(9).

60. Even if a specific exemption applies, any “reasonable segregable portion” not covered by the exemption must be provided. 5 U.S.C. § 552(b) (last paragraph).

61. Defendant violated KS Wild’s rights under FOIA by failing to comply with the Act’s decision deadlines regarding the response to their initial September 19, 2017 request and to make a determination on KS Wild’s FOIA appeal and by thus constructively withholding information responsive to KS Wild’s FOIA request and appeal.

62. Based on the nature of KS Wild’s professional activities, it will continue to employ FOIA’s provisions in information requests to Defendant in the foreseeable future.

63. KS Wild’s professional activities in disseminating information to the public will be adversely affected if Defendant is allowed to continue violating FOIA’s disclosure provisions as it has in this case.

64. Unless enjoined and made subject to a declaration of KS Wild’s legal rights by this Court, Defendant will continue to violate the rights of KS Wild to receive public records under FOIA.

65. KS Wild is entitled to reasonable costs of litigation, including attorneys’ fees and costs

pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT II
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
DECISION DEADLINE VIOLATIONS

66. KS Wild hereby incorporates by reference the allegations in the preceding paragraphs.

67. KS Wild has a statutory right to have Defendant process its FOIA request and appeal in a manner which complies with FOIA. KS Wild's rights in this regard were violated when the Defendant failed to make a determination on KS Wild's FOIA request and appeal by the deadlines imposed by FOIA. 5 U.S.C. §§ 552(a)(6)(A)(i); 552(a)(6)(A)(ii).

68. Defendant is unlawfully withholding public disclosure of records sought by KS Wild, records which are "agency records" within the meaning of FOIA, to which KS Wild is entitled, and for which no valid disclosure exemption applies.

69. Based on the nature of KS Wild's professional activities, it will continue to employ FOIA's provisions in information requests to Defendant in the foreseeable future.

70. KS Wild's professional activities will be adversely affected if Defendant allowed to continue violating FOIA's decision deadlines as it has in this case.

71. Unless enjoined and made subject to a declaration of KS Wild's legal rights by this Court, Defendant will continue to violate the rights of KS Wild to have its information requests processed as required by FOIA.

72. KS Wild is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT III
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
FAILURE TO INFORM OF DATE OF RECEIPT AND TRACKING NUMBER
OF FOIA REQUEST AND APPEAL

73. KS Wild hereby incorporates by reference the allegations in the preceding paragraphs.

74. KS Wild routinely seeks information from government agencies in order to further the organizations' purposes.

75. Through dissemination of public records, KS Wild members and the public derive benefits from agencies' compliance with FOIA and from its receipt of public records.

76. The records in this action are requested in support of its KS Wild's ongoing efforts to work with the Medford BLM to develop and implement projects that meet the Purpose and Need statements prepared by project planners while improving protection of species through proper implementation of the land use management plans and environmental laws. Because the information requested involves BLM disposition of issues of concern to the public regarding public lands and has not been publicly disclosed, its disclosure would significantly enhance public understanding concerning BLM's planning, operation, management, and actions.

77. The above-described interests of KS Wild, its members, and the public, have been, are being, and, unless the relief requested herein is granted, will continue to be adversely affected by DOI's disregard of its statutory duties under FOIA and by the unlawful harm that results. DOI's failure to fully implement FOIA injures the interests of KS Wild, its members, and the public, and the relief requested in this lawsuit can redress these injuries.

78. KS Wild has invested considerable organizational resources in the National Environmental Policy Act ("NEPA") planning process for the Pickett West Project; including but not limited to providing timely comments to the BLM regarding the project, conducting extensive field work in the project area, creating informative blog content for their membership, leading public hikes in the project area, and escorting members of the media to the project area. The forthcoming Clean Slate project area consists of the same project area and issues as the Pickett West timber sale. The defendants' failure to provide KS Wild with records to which it is

entitled under the FOIA substantially interferes with KS Wild's ability to further its organizational purposes and inform the public regarding agency action on public land.

79. FOIA requires federal agencies to acknowledge receipt of requesters' appeals of FOIA determinations, provide requesters with the date upon which the agency received FOIA appeal and provide an individualized tracking number for each appeal received that will take longer than ten days to process. 5 U.S.C. §§ 552(a)(7)(A), (B)(i).

80. Defendant has violated and continues to violate FOIA by failing to timely decide the original FOIA request OR-2017-0099 was, acknowledge receipt of KS Wild's December 7, 2017 FOIA appeal, failing to provide an estimated completion date, or tracking number to KS Wild's appeal # 2018-048.

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

COUNT IV
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
FAILURE TO PROVIDE AN ESTIMATED DATE ON WHICH THE AGENCY WILL
COMPLETE ACTION ON PLAINTIFF'S FOIA REQUEST AND APPEAL

82. FOIA requires federal agencies to provide the requester with information about the status of the agency's response to an appeal, including an estimated date on which the agency will complete action on the appeal. 5 U.S.C. § 552(a)(7)(B)(ii).

83. KS Wild asked Defendant, or its component DOI, at least seven times for an estimated date on which Defendant would complete action on KS Wild's administrative appeal. In so doing, KS Wild constructively invoked 5 U.S.C. § 552(a)(7)(B)(ii).

84. As of the date this action was filed, Defendant has failed to provide an estimated date on which Defendant would complete action on KS Wild's FOIA original request and pending appeal.

85. Defendant has violated FOIA by failing to provide KS Wild with an estimated date of completion for KS Wild's original FOIA request.

86. Defendant has repeatedly violated and continues to violate FOIA by failing to provide KS Wild with an estimated date of completion for KS Wild's pending appeal determination.

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

**COUNT V
VIOLATION OF FOIA AND THE APA:
PRACTICE OR POLICY OF UNLAWFUL CONDUCT OF FAILURE TO PROVIDE
ESTIMATED COMPLETION DATES**

88. KS Wild hereby incorporates by reference the allegations in the preceding paragraphs.

89. Defendant has adopted and is engaged in a pattern, practice or policy of violating FOIA's procedural requirements when processing FOIA requests and appeals by repeatedly refusing to issue an estimated date on which it will complete action on information requests or associated appeals as required by 5 U.S.C. § 552(a)(7)(B)(ii).

90. Defendant's practice or policy regarding its online FOIA tracker is that it does not monitor the progress of FOIA appeals of information requests.

91. Defendant's Office of the Solicitor has a practice or policy of not providing requesters with estimated dates of completion for information requests and associated appeals.

92. In this case Defendant has engaged in a pattern, practice or policy of violating FOIA in responding to KS Wild's September 19, 2017, request OR-2017-0099 and December 7, 2017, appeal # 2018-048 by its failure to provide estimated dates by which Plaintiff's FOIA request # OR-2018-0099 and appeal # 2018-048 would be completed.

93. Defendant's pattern, practice or policy of failing to provide estimated completion dates for processing information requests or associated appeals violates the intent and purpose of

FOIA.

94. Defendant's patterns, practices or policies for processing FOIA requests and appeals have resulted in violations of KS Wild's rights to the lawful implementation of FOIA as alleged above.

95. Additionally, Defendant's patterns, practices or policies for processing FOIA requests and appeals are likely to result in future violations of FOIA that will harm KS Wild and its members because KS Wild is likely to continue seeking public records from Defendant.

96. Defendant's patterns, practices or policies of unlawful conduct in violation of the FOIA's clear requirement to issue an estimated date on which it will complete action on information requests or associated appeals is likely to recur absent intervention by this Court.

97. Defendant's pattern, practice or policy exists, whether formal or informal in nature.

98. FOIA imposes no limits on courts' equitable powers in enforcing its terms, and this Court should exercise its equitable powers to compel Defendant to comply with the clear requirements of FOIA and prevent it from continuing to apply its unlawful FOIA pattern, practice or policy.

99. KS Wild is entitled to a declaration that Defendant's actions violated FOIA and to an injunction barring Defendant from violating FOIA in the future when responding to KS Wild's FOIA requests or associated appeals. Whether made under FOIA or the APA, declaratory or injunctive relief will clarify and settle the legal relations at issue and afford relief from the uncertainty and controversy giving rise to these proceedings.

100. Defendant's unlawful patterns, practices or policies of violating FOIA when responding to KS Wild's FOIA requests or associated appeals entitles KS Wild's to an award of reasonable attorney fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

COUNT VI

(In the alternative to Counts I through V)

**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
FAILING TO COMPLY WITH FOIA IN RESPONDING TO
KS WILD'S SEPTEMBER 19, 2016 FOIA REQUEST AND DECEMBER 7, 2017 FOIA
APPEAL**

101. KS Wild hereby incorporates by reference the allegations in the preceding paragraphs.

102. Defendant has failed to act in an official capacity under color of legal authority by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) issue a timely final determination of KS Wild's FOIA request OR-2017-0099 (2) issue a timely final determination of KS Wild's FOIA appeal # 2018-048 (3) provide KS Wild with the specific date it received its appeal; (4) provide KS Wild with the estimated completion dates of its September 19, 2017 request and December 7, 2017 appeal, (5) provide KS Wild with a tracking number for its appeal.

103. KS Wild has been adversely affected and aggrieved by the Defendant's failure to comply with the mandates of FOIA. Defendant's failure and refusal to: (1) issue a timely final determination of KS Wild's FOIA request OR-2017-0099 (2) issue a timely final determination of KS Wild's FOIA appeal # 2018-048 (3) provide KS Wild with the specific date it received its appeal; (4) provide KS Wild with the estimated completion dates of its September 19, 2017 request and December 7, 2017 appeal, (5) provide KS Wild with a tracking number for its appeal, has injured KS Wild's interests in public oversight of governmental operations and constitute a violation of Defendant's statutory duties under the APA.

104. KS Wild has suffered a legal wrong as a result of the Defendant's failure to comply with the mandates of FOIA. Defendant DOI's failure and refusal to: (1) issue a timely final determination of KS Wild's FOIA request OR-2017-0099 (2) issue a timely final determination of KS Wild's FOIA appeal # 2018-048 (3) provide KS Wild with the specific date it received its appeal; (4) provide KS Wild with the estimated completion dates of its September 19, 2017

request and December 7, 2017 appeal, (5) provide KS Wild with a tracking number for its appeal, has injured KS Wild's interests in public oversight of governmental operations and constitute a violation of Defendant's statutory duties under the APA.

105. Defendant's failure and refusal to: (1) issue a timely final determination of KS Wild's FOIA request OR-2017-0099 (2) issue a timely final determination of KS Wild's FOIA appeal # 2018-048 (3) provide KS Wild with the specific date it received its appeal; (4) provide KS Wild with the estimated completion dates of its September 19, 2017 request and December 7, 2017 appeal, (5) provide KS Wild with a tracking number for its appeal, constitutes agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

106. Alternatively, Defendant's failure and refusal to: (1) issue a timely final determination of KS Wild's FOIA request OR-2017-0099 (2) issue a timely final determination of KS Wild's FOIA appeal # 2018-048 (3) provide KS Wild with the specific date it received its appeal; (4) provide KS Wild with the estimated completion dates of its September 19, 2017 request and December 7, 2017 appeal, (5) provide KS Wild with a tracking number for its appeal is a violation of FOIA and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2).

107. KS Wild is entitled to judicial review under the Administrative Procedure Act 5 U.S.C. §§ 702, 706.

108. KS Wild is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S. § 2412.

REQUESTS FOR RELIEF

WHEREFORE, KS Wild requests that this Court:

1. Adjudge and declare that Defendant has violated FOIA for the reasons set forth above;
2. Order Defendant to comply immediately with FOIA by providing KS Wild all non-exempt public records responsive to KS Wild's September 19, 2017, FOIA request OR-2017-0099 and December 7, 2017, appeal # 2018-048.
3. Declare that Defendant has engaged in an unlawful pattern or practice of violating FOIA's requirement to provide an estimated completion date when responding to KS Wild's FOIA request and FOIA appeal of that request;
4. Enjoin Defendant from continuing in an unlawful pattern or practice of violating FOIA when responding to KS Wild's FOIA requests for documents;
5. Award KS Wild its reasonable attorneys' fees and litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) and/or award KS Wild its reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation, under the Equal Access to Justice Act, 28 U.S.C. § 2412;
6. Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and
7. Grant such further and additional relief as this Court may deem just and proper.

Respectfully submitted for the Court's consideration, this 20th day of April, 2018.



Brodia N. Minter OR Bar #164414
Klamath Siskiyou Wildlands Center
P.O. Box 102
Ashland, Oregon 97520

Tel: 541-488-5789
Email: Brodia@kswild.org

/s/ David A. Bahr
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1035 1/2 Monroe Street
Eugene, Oregon 97402
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United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Oregon State Office
P.O. Box 2965, Portland, Oregon 97208
<http://www.blm.gov/or>



ELECTRONIC MAIL SYSTEM- RETURN RECEIPT REQUESTED

NOV 15 2017

Mr. George Sexton
Klamath Siskiyou Wildlands Center
PO Box 102
Ashland, Oregon 97520
gs@kswild.org

Dear Mr. Sexton:

This letter responds to your Freedom of Information Act (FOIA) request OR-2017-099/eFTS BLM-2017-01093. You seek the following records:

1. All emails and correspondence concerning the Pickett West Project in the Grants Pass Resource Area of the Medford BLM generated since December 2016.
2. All administrative protests received by the BLM concerning the Pickett Hog portion of the Pickett West Project.

You asked us to waive the fees for processing your request and, based on our review, we grant you a fee waiver. We evaluate each FOIA request on its merit, do not grant blanket fee waivers, and decide requests for fee waivers on a case-by-case basis. See 43 CFR §§ 2.45(a), (d), and 2.48(a).

We enclose responsive records to item 2 of your request in this first batch. We plan to complete a second response in the next several weeks. We withheld some information contained in these records under Exemptions 5 and 6 of the FOIA.

Under Exemption 5 of the FOIA, we withheld eighty-eight (88) partial pages and one (1) document in full under the attorney-client privilege. We withheld three (3) partial pages under the deliberative process privilege.

Under Exemption 6 of the FOIA, we withheld 105 partial pages, which contain personally identifiable information. We enclose additional information on Exemptions 5 and 6 of the FOIA for further explanation.

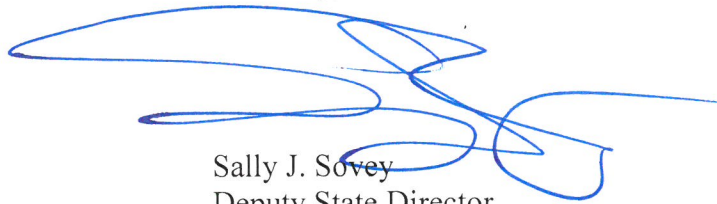
We excluded two (2) email attachments, in full, that are non-responsive to your request. The following protests were submitted by Klamath Siskiyou Wildlands Center: "20170831_Protest KSWild_DR_2" and "ShadyElk_ElkCamel_KSWild_Protest_31Aug17". Neither of these documents address the Pickett Hog portion of the Pickett West Project.

The undersigned is responsible for this partial denial. The decision to withhold information was made in consultation with Carmen Thomas, Attorney-Advisor, Department of the Interior, Office of the Solicitor, Pacific Northwest Region. We enclose a mandatory statement (MES), your rights to liaison and mediation services, and the right to appeal this response.

There is no fee for the processing of this request; we granted your fee waiver.

If you have any questions concerning this response, please contact Sally Sheeks, FOIA Specialist, at 503-808-6430, BLM_OR_SO_FOIA@blm.gov, or by facsimile at 503-808-6615.

Sincerely,



Sally J. Sovey
Deputy State Director
Management Services, Oregon/Washington

Enclosures

Responsive records
Exemptions 5 and 6 of the FOIA
MES, Public Liaison, OGIS Mediation Services, and Appeal Rights

cc: Medford District Office FOIA Coordinators

Exemption 5 of the Freedom of Information Act

Exemption 5 allows an agency to withhold inter-agency or intra-agency memorandums or letters that would not be available by law to a party, other than an agency in litigation with the agency, provided the deliberative process privilege shall not apply to records created twenty-five (25) years or more before the date the records are requested. See 5 U.S.C. § 552(b)(5).

This exemption incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges.

Attorney-Client Communication Privilege

The attorney-client privilege protects “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice” and is not limited to the context of litigation. See *Mead Data Cent, Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977). Moreover, although it fundamentally applies to confidential facts divulged by a client to her/his attorney, this privilege also encompasses any opinions given by an attorney to her/his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect confidential client-supplied information. See *Elec. Privacy Info. Ctr. v. United States Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 114-15 (D.D.C. 2005).

The information we withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between agency attorneys and agency clients, Federal attorneys and agency clients, and agency and Federal attorneys related to legal matters for which the client sought professional legal assistance and services. Additionally, the BLM and other Federal employees who communicated with the attorneys regarding this information were clients of the attorneys at the time the information was generated, and the attorneys were acting in their capacities as lawyers at the time they communicated legal advice. Finally, the BLM has held this information confidential and has not waived the attorney-client privilege.

Deliberative Process Privilege

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring that agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to:

- (1) assure that subordinates will feel free to provide the decision maker with their uninhibited opinions and recommendations;
- (2) protect against premature disclosure of proposed policies; and
- (3) protect against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both pre-decisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process and may include recommendations, draft documents, proposals, suggestions, and other subjective documents, which reflect the personal opinions of the writer rather than the policy of the agency.

The materials we withheld under the deliberative process privilege of Exemption 5 are both pre-decisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. All parties have held their contents confidential and public dissemination of this information would expose the agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine its ability to perform its mandated functions.

Exemption 6 of the Freedom of Information Act

Exemption 6 of the FOIA, at 5 U.S.C. § 552(b)(6), allows an agency to withhold "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The phrase "similar files" covers any agency records containing information about a particular individual that one can identify as applying to that individual. See *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982).

To determine whether releasing records containing information about a particular individual would constitute a clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that disclosure would affect against any public interest in the information. See *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

The only relevant public interest to consider under this exemption is the extent to which the information sought would "shed light on an agency's performance of its statutory duties." See *United States Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495-96 (1994). The burden is on the requester to establish that disclosure would serve the public interest. See *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004).

When the privacy interest at stake and the public interest in disclosure have been determined, we must weigh the two competing interests, the harm to personal privacy or the benefit to the public, to determine which one is the greater result of disclosure. The purposes for making a request for information do not affect this balancing test, as a release of information requested under the FOIA constitutes a release to the general public. See *Reporters Comm.*, 489 U.S. at 771.

With regard to the above withholdings, we reasonably foresee that disclosure would "harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure."

Foreseeable Harm Statement as to the Above Exemption Withholdings

We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure.

MES, Public Liaison, OGIS Mediation Services, and Appeal Rights

Mandatory Exclusionary Statement

Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). Our response is limited to those records that are subject to the requirements of the FOIA. We give this standard notification to all our requesters, and you should not take this notice as an indication that excluded records do, or do not, exist.

Public Liaison and OGIS Mediation Services

Please note that you may seek dispute resolution services by contacting our FOIA Public Liaison, Ryan Witt, as follows:

BLM FOIA Officer
1849 C. Street NW, Rm 2134LM
Washington, D.C. 20240
Telephone: 202-912-7562
Fax: 202-245-0027
Email: rwitt@blm.gov

Alternatively or in addition, you may seek dispute resolution services from the Office of Government Information Services (OGIS). The purpose of the OGIS is to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a nonexclusive alternative to appeal and litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001
Email: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770 or 877-684-6448
Facsimile: 202-741-5769

Be advised that using OGIS mediation services does not suspend the timing of filing an appeal with the Department of the Interior FOIA Appeals Office.

Appeal Rights

You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal **no later than 90 workdays** from the date of this response letter to which this document is an enclosure. Please be advised that the FOIA/PA Appeals Office considers appeals received or delivered after 5 p.m. (Eastern Time), Monday through Friday, as received on the next workday. **Your appeal must be in writing.**

You may submit your appeal and accompanying materials to the FOIA/PA Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe that the Bureau of Land Management's (BLM's) response is in error.

You must also include with your appeal copies of all correspondence between you and the BLM concerning your FOIA request, including your original FOIA request and the BLM's response. Failure to include with your appeal all correspondence between you and the BLM will result in the Department of the Interior's rejection of your appeal, unless the FOIA/PA Appeals Officer determines (in the FOIA/PA Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/PA Appeals Officer needs additional information or clarification of your appeal. You must send your appeal to the following:

Department of the Interior
Office of the Solicitor
Attn: FOIA/Privacy Act Appeals Officer
1849 C Street, NW
MS-6556 MIB
Washington, DC 20240
Telephone: 202-208-5339
Facsimile: 202- 208-6677
Email: FOIA.Appeals@sol.doi.gov

(b)(5) Attorney-Client Privilege



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Document titled "Chapter 1_2_4 with highlighting+perron comments" withheld under Exemption 5 attorney-client privilege. 78 pages withheld in full.