

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR NATIVE ECOSYSTEMS)
1536 Wynkoop, Suite 301)
Denver, Colorado 80202,)
)
Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT OF THE)
INTERIOR, GALE NORTON in her capacity)
as Secretary of the Interior of the United States, and)
SUE ELLEN WOOLDRIDGE, in her capacity as)
Solicitor of the Department of the Interior,)
)
Defendants.)

Civil No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, challenging the Department of Interior's failure to produce records requested by the Center for Native Ecosystems ("CNE") in a pair of FOIA requests. The records requested by CNE concern the Department of Interior's ("DOI's") recent settlement of a lawsuit with the State of Utah, which could have a dramatic impact on the management of millions of acres of pristine western wildlands managed by the Bureau of Land Management.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

3. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B) and, because DOI resides in this District, under 28 U.S.C. § 1391(b) & (e).

PARTIES

4. Plaintiff Center for Native Ecosystems is a not-for-profit public interest conservation and media organization dedicated to the conservation and recovery of native species and wild areas across Utah, Colorado, and Wyoming. CNE is located in Denver, Colorado. CNE has an established interest in DOI activities, policy, and regulations and has and continues to engage in educational activities, administrative appeals, and litigation to ensure that all DOI lands are administered in a manner consistent with their statutory mandates and with the principles of sound land stewardship. On behalf of its members, CNE regularly submits comments to DOI on a variety of initiatives and programs related to land use planning, endangered species management, oil and gas leasing, and off-road vehicle management. CNE's web site contains specific information about its activities concerning DOI.

5. As part of its species conservation and recovery mission, CNE strives to educate the public about land management issues on DOI lands, including the results of wilderness inventories, the management of Wilderness Study Areas ("WSAs"), and the status of relevant legal actions. CNE's access to government information concerning these issues is essential in order for CNE to fulfill its organizational purposes.

6. Defendant Department of the Interior is the executive branch department that has possession or control of the records CNE seeks in this action.

7. Defendant Gale Norton is the Secretary of the Department of the Interior. In that capacity, Ms. Norton is responsible for ensuring that the DOI complies with all federal law and regulations, including FOIA. Secretary Norton is sued in her official capacity.

8. Defendant Sue Ellen Wooldridge is the Solicitor of the Department of the Interior. In that capacity, Ms. Wooldridge is responsible for ensuring that DOI's Office of the Solicitor

complies with all federal law and regulations, including FOIA. Ms. Wooldridge is sued in her official capacity.

STATUTORY BACKGROUND

10. The Freedom of Information Act requires federal agencies to provide requested documents to the public unless one of the statute's exemptions applies. 5 U.S.C. § 552.

11. Upon receiving a FOIA request, an agency has twenty working days to determine and announce what documents the agency will release, what documents the agency plans to withhold, the reasons justifying any such withholding, and the appeal rights available to the requester. 5 U.S.C. § 552(a)(6)(A).

12. Although an agency may grant itself an extension of ten additional days in "unusual circumstances," FOIA does not permit an agency to delay a response indefinitely. 5 U.S.C. § 552(a)(6)(B). DOI's FOIA regulations identify specific "unusual circumstances" that may justify a 10-day extension in the 20-day deadline. 43 C.F.R. § 2.13. DOI's FOIA regulations also require an agency to notify the requester in writing of such an extension, and to state the justification for the extension. 43 C.F.R. § 2.13(b).

13. FOIA provides that a requester "shall be deemed to have exhausted his administrative remedies... if the agency fails to comply with the applicable time limit provisions." 5 U.S.C. § 552(a)(6)(A).

14. FOIA provides this Court with jurisdiction to enjoin DOI "from withholding agency records and to order the production of any such records improperly withheld from" CNE. 5 U.S.C. § 552(a)(4)(B).

FACTS

15. In the Wilderness Act of 1964, Congress declared that “[i]n order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.” 16 U.S.C. § 1131(a). To that end, Congress directed DOI to review the lands within its national parks and national wildlife refuges to determine what lands could qualify for wilderness designation. 16 U.S.C. § 1132(c). In order to qualify, The Wilderness Act requires that an area be:

undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c). The Wilderness Act also required DOI to make a formal recommendation to the President concerning which of the qualifying lands actually should be proposed for Congressional wilderness designation. 16 U.S.C. § 1132(c).

16. In 1976, Congress passed the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1784, which, among other things, broadened The Wilderness Act's wilderness inventory requirement by requiring BLM to inventory and identify all of its lands that would qualify for wilderness designation. 43 U.S.C. § 1782(a).

17. In the decades since the passage of the Wilderness Act and FLPMA, DOI has inventoried millions of acres of land. Based at least in part on these inventories, Congress has designated 6.5 million acres of wilderness on BLM lands, 43.6 million acres of wilderness on National Park Service lands, and 20.7 million acres on National Wildlife Refuge System lands. DOI also has identified tens of millions of acres of additional lands that are eligible for protection as wilderness.

18. Of particular relevance to the instant matter is BLM's inventory process in the State of Utah. BLM's initial wilderness inventory, carried out in the 1970s, concluded that only 3.2 million of the nearly 24 million acres of BLM lands in the state qualified as wilderness. Those 3.2 million acres are treated as Wilderness Study Areas by BLM. Because only Congress may designate an area as wilderness under the Wilderness Act, FLPMA preserves Congress's prerogative to do so by requiring BLM to manage such WSAs so that their wilderness character is not impaired. 43 U.S.C. § 1782(c).

19. In 1996, the Secretary of Interior ordered BLM to re-inventory portions of its Utah lands in response to the claim by conservation organizations and others that the agency's initial inventory had overlooked significant amounts of wilderness-quality lands. The State of Utah quickly filed suit to prevent the re-inventory from even taking place. This effort failed when the Tenth Circuit Court of Appeals dismissed all of the State's inventory-related claims for lack of standing in State of Utah v. Babbitt, 137 F.3d 1193 (10th Cir. 1998). With the go-ahead from the courts, BLM proceeded with its wilderness re-inventory and ultimately concluded that, in fact, the agency's earlier inventory had overlooked 2.8 million acres of wilderness quality lands in Utah. As a result of their exclusion, these lands had improperly been denied WSA status by the agency.

20. The Tenth Circuit declined to dismiss one of the State's eight claims, its claim that DOI was imposing an illegal "de facto wilderness" management standard on non-WSA public lands in Utah. *Id.* at 1215-1216. Following the Tenth Circuit remand of this one claim, the case languished for several years in the district court without any significant proceedings taking place.

21. The State of Utah suddenly reanimated the long-dormant case on March 31, 2003, filing a third amended complaint. Just 11 days later, on Friday April 11, 2003, Utah and BLM filed a Stipulation and Join Motion to Enter Order Approving Settlement. The district court in Utah approved the settlement the following business day. In that settlement, DOI agreed to a radically new interpretation of the wilderness provisions of FLPMA, an interpretation contradicted by 26 years of agency practice and federal caselaw. Under this new interpretation, BLM would no longer be able to carry out wilderness inventories on its lands and would not be able to protect wilderness quality lands by designating them as WSAs through the agency's land management planning process.

22. While the district court's approval of the settlement has been challenged through an appeal to the Tenth Circuit Court of Appeals, DOI has not provided to the public an accounting of the legal basis for the settlement, or why the agency suddenly reversed its long-held position concerning the BLM's authority to protect wilderness-character lands. In fact, DOI's failure to provide information responsive to another FOIA request related to the settlement has led to litigation before this court. See *The Wilderness Society v. United States Department of the Interior*, Civ. No. 03-CV-01801 (RBW) (D.D.C.)

The Center for Native Ecosystems' FOIA Requests

23. On February 19, 2004, CNE filed a FOIA request letter addressed to DOI and to DOI's Office of the Solicitor in Washington, DC ("headquarters FOIA"). On February 28, 2004,

CNE filed a second FOIA request letter addressed to Office of the Regional Solicitor, Alaska Region, to the Office of the Regional Solicitor, Rocky Mountain Region, and to the Office of the Field Solicitor, Salt Lake City Field Office (“regional offices FOIA”).

24. Both FOIA request letters sought:

- (1) all records generated, modified, or acquired by the Department of the Interior’s Office of the Solicitor related to *State of Utah v. Norton*, including (BUT NOT LIMITED TO):
 - (a) all records related to the settlement agreement in the above-mentioned matter; and
 - (b) all records of any discussions with state or local governments concerning BLM’s review and recommendation of Bureau of Land Management (BLM) Wilderness Study Areas (WSAs) and citizen proposed wilderness; and
- (2) all records generated, modified, or acquired by the Department of the Interior’s Office of the Solicitor related to the Bureau of Land Management’s Wilderness Inventory Handbook (issued January 2001), including (BUT NOT LIMITED TO) the handbook’s revocation; and
- (3) all records generated, modified, or acquired by the Department of the Interior’s Office of the Solicitor related to the management of wilderness character lands and/or WSAs on BLM lands.

DOI’s Response to CNE’s FOIA Requests

25. On February 24, 2004, the Office of the Secretary signed a letter to CNE acknowledging CNE’s February 19, 2004 DOI headquarters FOIA. DOI’s letter indicated that the request had been received on February 20, 2004. DOI’s response did not indicate when DOI intended to respond to the request or provide information concerning the availability of administrative appeal if DOI failed to provide the requested records by the statutory deadline.

26. On March 29, 2004, the Acting Deputy Regional Solicitor for the Intermountain Region acknowledged CNE's February 28, 2004 DOI regional offices FOIA. The March 29 acknowledgement stated that "[t]he Office of the Solicitor will respond to your request as well the February 19, 2004 FOIA request you submitted to the Department of the Interior and the Washington, DC office of the Office of the Solicitor through the Department's FOIA Officer, Sue Ellen Sloca. We understand that Ms. Sloca or her representative will be contacting you today to coordinate the responses to your requests."

27. Despite the statement in Acting Deputy Regional Solicitor for the Intermountain Region's March 29, 2004 letter, CNE has received no further telephone or other communication from DOI concerning CNE's two FOIA requests.

FIRST CAUSE OF ACTION

(Violation of the Freedom of Information Act -- February 19, 2004 Headquarters FOIA)

28. The allegations contained in paragraphs 1-27 are incorporated herein by reference.

29. FOIA requires that a federal agency make available records "promptly" upon request, 5 U.S.C. § 552(a)(3)(A), that a federal agency determine "within 20 days" whether to comply with a request, and that the agency "immediately" notify the requester of the agency's determination and of the right to appeal any adverse determination. 5 U.S.C. § 552(a)(6)(A)(i); see also 43 C.F.R. § 2.12(a) (DOI regulations implementing FOIA).

30. DOI has failed to make available the records requested of DOI's Office of the Solicitor headquarters office on February 19, 2004 by CNE, has failed to make a determination as to whether it would provide or withhold requested records, and has failed to notify CNE that it has the right to appeal any such decision.

31. DOI's failure to comply with its above-described duties violates FOIA, 5 U.S.C. §552(a)(6), and DOI regulations, 43 C.F.R. § 2.12(a), is arbitrary, capricious, and otherwise not

in accordance with law, and/or constitutes final agency action unlawfully withheld or unreasonably delayed.

SECOND CAUSE OF ACTION

(Violation of the Freedom of Information Act- February 28, 2004 Regional Offices FOIA)

32. The allegations contained in paragraphs 1-27 are incorporated herein by reference.

33. FOIA requires that a federal agency make available records “promptly” upon request, 5 U.S.C. § 552(a)(3)(A), that a federal agency determine “within 20 days” whether to comply with a request, and that the agency “immediately” notify the requester of the determination and of the right to appeal any adverse determination. 5 U.S.C. § 552(a)(6)(A)(i); see also 43 C.F.R. § 2.12(a) (DOI regulations implementing FOIA).

34. DOI has failed to make available the records of DOI’s Office of the Solicitor’s regional and field offices requested on February 28, 2004 by CNE, has failed to make a determination as to whether it would provide or withhold requested records, and has failed to notify CNE that it has the right to appeal any such decision.

35. DOI’s failure to comply with its above-described duties violates FOIA, 5 U.S.C. §552(a)(6), and DOI regulations, 43 C.F.R. § 2.12(a), is arbitrary, capricious, and otherwise not in accordance with law, and/or constitutes final agency action unlawfully withheld or unreasonably delayed.

PRAYER FOR RELIEF

The Center for Native Ecosystems respectfully requests that this Court:

- (1) Declare that DOI’s failure to provide CNE with all of the documents requested in CNE’s February 19, 2004 and February 28, 2004 FOIA request letters violated FOIA as set forth above;