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2 application for admission *pro hac vice* pending
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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA
11 PHOENIX DIVISION

12 CENTER FOR BIOLOGICAL DIVERSITY,)
13) Case No. _____
14 Plaintiff,)
15) COMPLAINT FOR
16 v.) DECLARATORY AND
17) INJUNCTIVE RELIEF
18 U.S. BUREAU OF LAND MANAGEMENT,)
19)
20 Defendant.)
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INTRODUCTION

1. Plaintiff Center for Biological Diversity challenges Defendant Bureau of Land Management’s (“BLM”) failure to disclose records requested by Plaintiff pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, *as amended* (“FOIA”). The requested records concern BLM’s management of several uranium mines located on public lands near the Grand Canyon National Park. Plaintiff requested the records over six months ago, but BLM has failed to disclose all responsive records within the statutory timeframe of 20 working days, or even identify – let alone justify – any lawful basis for withholding them from Plaintiff.

1 through science, law, and creative media to secure a future for all species, great or small,
2 hovering on the brink of extinction.

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4 6. Defendant BLM is an agency within the U.S. Department of the Interior
5 (“DOI”), is responsible for managing federal public lands, and is an agency within the
6 meaning of the FOIA. 5 U.S.C. § 552(f).

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8 **FACTUAL ALLEGATIONS**

9 7. On July 30, 2009, Taylor McKinnon, public lands campaigns director at the
10 Center, sent a request for three categories of records to the BLM Arizona State Office
11 (“ASO”), pursuant to the FOIA. Mr. McKinnon requested the information in order to
12 better understand and shed light on BLM’s administration of federal public lands,
13 environmental, and mining laws and regulations in connection with numerous
14 controversial uranium mines located on sensitive public lands within the Grand Canyon
15 watershed. Mr. McKinnon sought the information because BLM has allowed certain
16 uranium mines located within the Grand Canyon watershed to resume or commence
17 mining operations or exploration for uranium ore, despite a July 21, 2009 Order of the
18 Department of Interior that temporarily “segregates” certain public lands within the
19 Grand Canyon watershed from location and entry under the 1872 Mining Law, 30 U.S.C.
20 § 22 (“Mining Law”), while DOI considers whether to proceed with a withdrawal of the
21 lands from location and entry under the Mining Law for 20 years in order to “protect the
22 Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration
23 and mining.” 74 Fed. Reg. 35887 (July 21, 2009).
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1 8. First, Mr. McKinnon requested “[a]ll records that address, disclose,
2 document, or otherwise discuss Endangered Species Act Section 7 consultation and
3 compliance relating to construction, authorization, approval or operation” of several
4 uranium mines or “deposits” located on BLM lands in the agency’s Arizona Strip
5 District, including the Arizona 1, Pinenut, Kanab North, EZ 1, EZ 2, DB, WHAT, and
6 Moonshine Springs uranium mines or deposits (collectively “Mines”). Section 7 of the
7 Endangered Species Act, 16 U.S.C. § 1536(a)(2) (“ESA” or “Act”), and its implementing
8 regulations at 50 C.F.R. Part 400, require federal agencies to consult with the U.S. Fish
9 and Wildlife Service or the National Marine Fisheries Service to consider the effects of
10 their actions to species listed as “threatened” or “endangered” under the Act and “critical
11 habitat” that has been designated for the conservation of listed species.
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15 9. Second, Mr. McKinnon requested all records that “address, disclose,
16 document, or otherwise discuss requirements or obligations of [BLM] pursuant to the
17 National Environmental Policy Act [“NEPA”], including the potential need to consider
18 new information and/or prepare supplemental NEPA analyses, concerning the
19 authorization or operations” of the Mines. NEPA, 42 U.S.C. § 4321, *et seq.*, and its
20 implementing regulations at 40 C.F.R. Part 1500, require federal agencies to consider the
21 environmental consequences of major actions that affect the quality of the human
22 environment. This is typically done through preparation of an “environmental impact
23 statement” and/or “environmental assessment.”
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27 10. Third, Mr. McKinnon requested all “validity exams and reports that have
28 been approved by a BLM mineral examiner and other non-proprietary records that

1 demonstrate the establishment of valid existing rights on or before 21 July 2009 for all
2 mining claims comprising” the Mines. Mr. McKinnon requested this information in
3 order to understand whether BLM has determined whether any of the Mines have valid
4 existing mineral rights in light of the Segregation Order. 74 Fed. Reg. 35887 (July 21,
5 2009) (Segregation Order removing approximately one million acres of public lands in
6 the Grand Canyon watershed from location and entry under the Mining Law for two
7 years, subject to valid existing rights).

10 11. BLM did not provide a determination in response to the Center’s request
11 within 20 working days, the statutory deadline for a determination required by the FOIA.
12 5 U.S.C. § 552(a)(6)(A)(i). Instead, during the following weeks and months, Mr.
13 McKinnon exchanged several communications with BLM personnel working in the
14 Arizona Strip District Office and Arizona State Office. Through the course of these
15 communications, Mr. McKinnon agreed to narrow the scope of the Center’s request to
16 exclude the third category of records – *i.e.*, validity exams and records that demonstrate
17 the establishment of valid existing rights on or before July 21, 2009 – based on BLM’s
18 representation that there are no records responsive to this portion of the Center’s request.

22 12. For the other two categories of records, BLM stated that there are no
23 responsive records related to construction, authorization, approval, or operation of the
24 EZ1, EZ2, DB, WHAT, and Moonshine Springs mines. However, BLM stated that there
25 are a “significant number of records for the Arizona 1, Pinenut, and Kanab North Mines”
26 – in fact, “8 linear feet” of such documents – and asked CBD to provide a time range for
27 responsive records for those mines.
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1 13. In response, Mr. McKinnon stated that the Center would like to “sequence”
2 its response and receive all records related to ESA consultation and NEPA compliance
3 “for the Arizona 1 mine first” and for the Pinenut and Kanab North mines later. After
4 receiving no response for several weeks, the BLM Arizona State FOIA Officer, Toni
5 Klimek, finally responded to Mr. McKinnon and stated that personal reasons had
6 precluded timely processing of the Center’s request.
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9 14. After hearing nothing additional for two weeks, on November 20, 2009,
10 Mr. McKinnon again inquired about the status of BLM’s response, and was informed that
11 Ms. Klimek was “working on [the Center’s] request” and asked Mr. McKinnon whether
12 he wanted to receive copies of comment letters submitted to BLM by members of the
13 public during the agency’s development of an Environmental Assessment for the Arizona
14 1 Project in 1988. Mr. McKinnon responded and confirmed that he would like to receive
15 the comment letters, and also made clear that the Center’s request encompassed the
16 following specific categories of records related to the Arizona 1 Mine:
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- 18 (1) The original plan of operations
- 19 (2) The original EA and Decision Record
- 20 (3) The modified plan of operations
- 21 (4) Records related to ESA-listed species, critical habitat, and/or consultation
- 22 (5) Records related to cessation of operations
- 23 (6) Records related to any operations or activities since operations ceased

24 15. BLM subsequently provided two responses to the Center’s FOIA request:
25 one dated November 23, 2009 and a final response dated November 27, 2009. The
26 November 23, 2009 response incorrectly stated that the Center had “modified” its
27 original request to include only responsive records related to the Arizona 1 Mine; in fact,
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1 Mr. McKinnon had simply requested that BLM sequence its processing of the Center's
2 request, and provide all records related to the Arizona 1 mine first and for the Pinenut and
3 Kanab North mines later.
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5 16. For Arizona 1-related records, BLM's November 23, 2009 response
6 provided two records dated May 1988 and seven e-mails dated between May 17, 2009
7 and September 14, 2009. Although it improperly construed the Center's request to have
8 been modified to forego access to such records related to other mines, BLM's November
9 23, 2009 response nevertheless disclosed five records related to the Kanab North,
10 Pinenut, and Canyon mines.
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13 17. BLM's November 23, 2009 release also stated that comment letters
14 submitted to BLM regarding the 1988 Environmental Assessment for the Arizona 1 Mine
15 were undergoing additional review prior to release. These records, with certain
16 information redacted, were subsequently provided to Mr. McKinnon with BLM's
17 November 27, 2009 response.
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19 18. In its November 27, 2009 response, BLM again incorrectly reiterated that
20 the Center had modified its request to completely forego access to records related to the
21 Pinenut and Kanab North mines, and concluded that this "complete[s] the processing of
22 this request."
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25 19. Thus, other than records related to the Arizona 1 Mine from 1988, seven
26 more recent e-mails related to the Arizona 1 Mine, and a few records related to the Kanab
27 North, Pinenut, and Canyon mines, no additional records were provided in response to
28 the Center's request, even though BLM had previously estimated that there are "8 linear

1 feet” of responsive records related to the Arizona 1, Kanab North, Pinenut, and Canyon
2 uranium mines.

3
4 20. Specifically, a 1984 Environmental Assessment and Decision Record for
5 the Arizona 1 Mine were not disclosed with any response. Nor were any drafts of the
6 1984 or 1988 Environmental Assessments or Decision Records related to the Arizona 1
7 Mine disclosed, nor any memoranda, meeting notes, phone records, etc. that relate to,
8 concern, or discuss BLM’s development of these documents. Moreover, BLM did not
9 disclose the original or modified plans of operations for the Arizona 1 Mine, or any
10 records related to operations, including the cessation and/or resumption of operations,
11 that have occurred since May 1988. BLM never identified or described the records
12 comprising the “8 linear feet” of responsive records, or cited any basis for withholding
13 them from the Center.
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17 21. By letter dated December 12, 2009, which was received by Defendant on
18 December 24, 2009, the Center appealed BLM’s failure to make a determination in
19 response to its FOIA request. Twenty working days have elapsed since Defendant
20 received Plaintiff’s appeal, with no determination with respect to the requested records or
21 resolution of Plaintiff’s appeal.
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23 **STATUTORY BACKGROUND**

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25 22. The FOIA is a disclosure statute that was enacted to facilitate public access
26 to Government documents. A federal agency that receives a FOIA request must make a
27 determination within 20 working days whether to release the requested documents. 5
28 U.S.C. § 552(a)(6)(A)(i). Although an agency may seek a brief extension of this

1 deadline, *id.* § 552(a)(6)(B), it may only continue to withhold responsive records if they
2 fall within one or more of the nine exemptions to the FOIA's disclosure mandate. *Id.* §
3 552(b)(1)-(9).
4

5 23. If the agency decides to withhold access to records pursuant to one of the
6 FOIA's nine, narrowly-construed exemptions, it must identify and describe the records
7 and cite one or more of the exemptions that form the basis of the agency's determination.
8 5 U.S.C. §§ 552(b)(1)-(9).
9

10 24. The FOIA provides requesters with a right to an appeal of an agency's
11 denial of a request for records. 5 U.S.C. § 552(a)(6)(A)(ii). When presented with an
12 appeal, the agency must make a determination on the appeal within 20 working days. *Id.*
13 A violation of statutory time limits may be construed as a denial.
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15 PLAINTIFF'S CLAIM

16 25. There is no statutory basis for BLM's failure to disclose the requested
17 information, and the Center has right of access to this information under the FOIA.
18 There are many records, responsive to the Center's request, which BLM has neither
19 released to Plaintiff nor claimed to be subject to any FOIA exemption.
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22 26. By failing to fully respond to the Center's July 30, 2009 FOIA request, the
23 Defendant is in violation of the FOIA. 5 U.S.C. § 552(a)(6).
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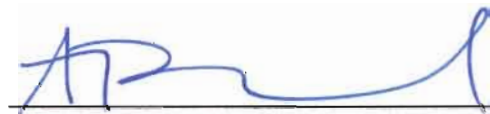
25 27. By failing to respond to the Center's December 16, 2009 FOIA appeal, the
26 Defendant is in violation of the FOIA. 5 U.S.C. § 552(a)(6).
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28 **WHEREFORE**, Plaintiff requests that this Court:

- 1 (1) Declare that Defendant has violated the FOIA by improperly withholding
2 the records requested by Plaintiff;
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4 (2) Order Defendant to make the requested records immediately available to
5 Plaintiff;
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7 (3) Award Plaintiff its costs and reasonable attorneys' fees in this action;
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9 (4) Grant such other and further relief as the Court may deem just and proper.

10 Respectfully submitted,

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12 February 11, 2009



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