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SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF FISH
AND WILDLIFE,

Defendant.

No. _____

COMPLAINT FOR RELIEF PURSUANT
TO RCW 42.56.550 (PUBLIC RECORDS
ACT)

Plaintiff Center for Biological Diversity, by and through counsel, brings this Complaint against the Washington Department of Fish and Wildlife for violation of the Public Records Act, ch. 42.56 RCW (“PRA”), and in support of its cause of action alleges as follows.

I. PARTIES

1. Plaintiff Center for Biological Diversity (the “Center”) is a California non-profit corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. The Center is headquartered in Tucson, Arizona, and has offices throughout the United States, including in Washington, with more than 1.5 million members and supporters, many of whom reside in Washington.

2. Defendant Washington Department of Fish and Wildlife (“WDFW”) is an agency of the State of Washington.

3. The Center made the public record act requests at issue in this case.

1 **II. JURISDICTION AND VENUE**

2 4. This Court has jurisdiction pursuant to RCW 42.56.550(1).

3 5. Venue in Thurston County is appropriate pursuant to RCW 42.56.550(1) and
4 RCW 4.92.010(5).

5 6. The Center’s public records requests were sent to the official agency email
6 address for WDFW’s designated public disclosure officer and all responses have come from
7 Thurston County. The public records at issue are located in Thurston County, or in other agency
8 facilities over which WDFW exercises control.

9 **III. STATEMENT OF FACTS**

10 **A. Background**

11 7. Gray wolves are listed as a federal endangered species in the western two-thirds
12 of Washington, where they are under the management of the U.S. Fish and Wildlife Service.
13 Gray wolves are listed as a state endangered species throughout Washington. WDFW manages
14 the wolf population in portions of the state where wolves are not a federal endangered species,
15 under the auspices of the 2011 Wolf Conservation and Management Plan (“Wolf Plan”). The
16 Wolf Plan’s goals include restoring a self-sustaining population of wolves to Washington,
17 managing wolf-livestock interactions without negatively impacting wolf recovery, and
18 promoting human coexistence with wolves. The management of wolf-livestock interactions is
19 an issue of fierce public and political interest. In particular, news organizations, environmental
20 groups, and livestock owner lobbying groups take an interest in what WDFW terms “lethal
21 removal” actions, in which WDFW kills endangered gray wolves in response to wolf conflicts
22 with livestock.

23 8. The Wolf Plan emphasizes non-lethal management of wolf-livestock
24 interactions. Among other things, WDFW is to work with livestock producers to provide
25 proactive technical assistance to avoid wolf conflicts. Recognized effective husbandry
26 techniques include the use of range riders and sheepherders, burying of livestock carcasses,
27 moving sick or injured livestock off grazing allotments, delaying the turnout of cattle until

1 calving is finished or wild ungulates are born, allowing calves to reach at least 200 pounds
2 before turning them out, and avoiding grazing livestock near wolf territory core areas—
3 especially dens and rendezvous sites, the location of which WDFW shares with cooperating
4 landowners and livestock producers. Lethal removal is only to be considered if it is documented
5 that livestock have clearly been killed by wolves; non-lethal methods have been tried but failed
6 to resolve the conflict; conflicts are likely to continue; and there is no evidence of intentional
7 feeding or unnatural attraction of wolves by the livestock owner.

8 9. Since 2011, WDFW has undertaken lethal control actions against five wolf
9 packs, killing a total of 18 endangered gray wolves. Three of those kill operations, representing
10 15 of the 18 wolves killed, were undertaken at the behest of a single livestock owner, Diamond
11 M Ranch. Diamond M grazes its cattle on a large tract of federal public land within the Colville
12 National Forest in northeastern Washington, which is in the center of the territories of several
13 different wolf packs. Diamond M has refused to sign a Damage Prevention Cooperative
14 Agreement (“Cooperative Agreement”) with the state, to cooperate with WDFW on non-lethal
15 deterrent measures, to accept the generous compensation offered by the state for livestock losses
16 caused by wolves, or to follow the recommendations of conservation biologists for best
17 management practices. As a result, Diamond M experiences livestock loss rates to wolves that
18 are 30 times higher than other cattle livestock owners in wolf country.

19 10. The Center has sought information about WDFW’s wolf kill orders through a
20 series of public records requests.

21 **B. Incomplete Response to 2016 Public Records Request**

22 11. In August 2016, WDFW targeted an entire wolf pack for extermination at the
23 behest of the Diamond M Ranch, against the recommendations of Washington State University
24 (“WSU”) wildlife biologists who were working with wolves and livestock in that area. WDFW
25 announced its decision to kill a portion of the Profanity Peak pack on August 3, 2016, and issued
26 an order to exterminate the remainder of the pack on August 19, 2016. WDFW ultimately killed
27 7 of the pack’s 11 wolves, or about 10% of the state’s confirmed wolf population at the time.

1 12. In a September 2, 2016 email update on the Profanity Peak pack kill operation
2 to members of WDFW’s Wolf Advisory Group, WDFW indicated that it knew by the end of
3 June that the Profanity Peak pack’s den was four to five miles from Diamond M’s cattle turnout
4 area, and that cattle had been concentrated at a Profanity Peak pack “rendezvous site” through
5 the use of salt blocks placed there by the livestock owner. The email update claimed that
6 “[o]nce that overlap was detected, the Department contacted the producer, who removed the
7 salt blocks from the area.” **Attachment A.**

8 13. While not known to the Center or to the public at the time, information revealed
9 later shows that the livestock owner had placed salt blocks within 200 yards of a wolf *den*,
10 rather than just near a “rendezvous site”; and that WDFW and the livestock owner both knew
11 of this proximity by the end of June. However, rather than removing the salt blocks “once that
12 overlap was detected,” as WDFW indicated in its September 2, 2016 email update, the livestock
13 owner did not move the salt blocks until August 8, 2016—*after* WDFW had already started
14 killing wolves for preying on the livestock that had been swarming around the den site.

15 14. Although the salt block issue has been the focus of significant attention by the
16 press, including articles in the *Seattle Times* on August 25, 2016, and August 10, 2017,¹ WDFW
17 has never corrected the misleading statement made in its September 2, 2016 email that the salt
18 blocks were removed upon discovery of their proximity to a rendezvous site.

19 15. On September 8, 2016, the Center requested public records from WDFW
20 pursuant to the Public Records Act (“2016 PRA Request”). **Attachment B.**

21 16. The Center’s 2016 PRA Request explicitly requested:

- 22 a. “All records that reference the Profanity Peak wolf pack and the Sherman
23 wolf pack from January 1, 2016 to the date of [WDFW’s] search”; and,
24

25 ¹ See Lynda V. Mapes, *Profanity Peak Wolf Pack in State’s Gun Sights After Rancher Turns out Cattle on Den*,
26 *Seattle Times*, Aug. 25, 2016, <http://www.seattletimes.com/seattle-news/environment/profanity-peak-wolf-pack-in-states-gun-sights-after-rancher-turns-out-cattle-on-den/> and Lynda V. Mapes, *A War Over Wolves: Outspoken Researcher Says His University and Lawmakers Silenced and Punished Him*, *Seattle Times*, August 10, 2017,
27 http://projects.seattletimes.com/2017/wsu-wolf-researcher-wielgus/?utm_source=email_share&utm_medium=email&utm_campaign=projects.

1 b. “All records that mention the latitude and longitude of all wolf-livestock
2 depredation sites involving the Profanity Peak pack and all location
3 information regarding placement of salt blocks within the Profanity Peak
4 pack territory.”

5 17. On September 16, 2016, WDFW acknowledged receipt of the 2016 PRA
6 Request, assigning it identification number PDR #16419, and provided the first installment of
7 responsive records.²

8 18. WDFW responded to the 2016 PRA Request in a total of six installments,
9 beginning with the first installment on September 16, 2016. On December 12, 2016, WDFW
10 provided the Center with its final installment of responses and indicated that its response to
11 PDR #16419 was complete. **Attachment C.**

12 19. The documents disclosed by WDFW have notable gaps that reflect a failure to
13 search for documents in the custody of the very staff who were most likely to hold primary
14 records and data related to the Profanity Peak pack and the location of the salt blocks within the
15 pack’s territory. Namely, WDFW appears to have failed to search for and collect documents
16 in the custody of at least two WDFW biologists who were actively studying and monitoring the
17 Profanity Peak pack during the 2016 grazing season: wolf biologist Scott Becker and statewide
18 wolf biologist Trent Roussin. Those biologists were likely custodians of records referencing
19 the pack and the location of salt blocks within its territory. Moreover, WDFW disclosed only
20 a handful of records that appear to have been collected from Joey McCanna, WDFW Private
21 Lands and Wildlife Conflict Supervisor and WDFW’s designated “incident commander” for
22 the Profanity Peak pack wolf kill order; or from Jay Shepherd, another WDFW field biologist
23 actively studying and monitoring the Profanity Peak pack in 2016. All four of those
24 individuals—Messrs. Becker, Roussin, McCanna, and Shepherd—were obvious and likely
25 custodians of records responsive to the Center’s 2016 PRA Request. The paucity of records

26 _____
27 ² The Center submitted separate public records requests to WDFW regarding other wolf management-related
records on September 20, 2016 (PDR #16439) and September 28, 2016 (PDR #16455). In some of its subsequent
responses to the Center, WDFW addressed all three requests together.

1 from those individuals reflects an inadequate and unreasonable search undertaken by WDFW
2 for the requested records.

3 20. Notably, the records WDFW disclosed in response to the Center's 2016 PRA
4 Request did not contain any primary data or documents related to the location of the Diamond
5 M salt blocks. Of the few salt block-related records produced by WDFW, most were third-
6 party communications, such as letters from environmental groups requesting details about the
7 salt blocks and the timing of their placement and removal. The only documents the Center
8 received from WDFW that contained information from WDFW related to the location of the
9 salt blocks were various drafts of the September 2, 2016 email, which contained different
10 versions of the false statement that the salt blocks were removed once an overlap with the wolf
11 rendezvous site was detected.

12 21. In September and October 2017, the Center obtained records from other sources
13 that were within WDFW's custody and control and were responsive to the Center's 2016 PRA
14 Request, but which were not produced by WDFW in response to the 2016 PRA Request. Those
15 unproduced, responsive records include the following, included in **Attachment D**:

- 16 a. A note from WDFW field biologist Scott Becker dated August 8, 2016,
17 related to the removal of a salt block on that day from its location near the
18 Profanity Peak pack den ("Becker Note") (responsive to the request for
19 information on the location of the salt blocks);
- 20 b. Two emails to WDFW Wolf Policy Lead Donny Martorello from WSU
21 professor Robert B. Wielgus, dated August 4, 2016, responding to and
22 discussing problems with WDFW's Profanity Peak pack lethal removal
23 order, including the fact that the killing of wolves could have been avoided
24 if the livestock owner had been cooperative, including by agreeing to move
25 his cattle away from the Profanity Pack den site ("Wielgus Emails")
26 (responsive to the request for records referencing the Profanity Peak pack);
27 and

1 c. An email from WSU researcher Gabriel Spence to WDFW employee Trent
2 Roussin regarding wolf camera surveys, including of the Profanity Peak
3 pack, dated January 19, 2016 (responsive to the request for records
4 referencing the Profanity Peak pack).

5 22. The wrongfully withheld Becker Note shows that WDFW's September 2, 2016
6 statement that the salt blocks were removed once the overlap was detected was false, because
7 it demonstrates that WDFW did not request the removal of the Diamond M salt blocks from the
8 location near the Profanity Peak pack's den until August 8, 2016, more than a month after
9 WDFW learned of the salt block's proximity to the Profanity Peak pack's den site, and only
10 after WDFW had already started to kill wolves at that site. The Wielgus Emails suggest that
11 additional public statements by WDFW regarding the livestock owner's cooperation with non-
12 lethal deterrence measures for the Profanity Peak pack were also false, because the Wielgus
13 Emails reference the owner's refusal to cooperate, including his refusal to sign a Cooperative
14 Agreement and to move his cattle away from the known den site.

15 23. WDFW's failure to locate and disclose the above known responsive records
16 makes it apparent that WDFW failed to perform an adequate search for records responsive to
17 the Center's 2016 PRA Request, and indicates that it is likely that WDFW has likewise failed
18 to locate and disclose additional responsive records that remain unknown to the Center.

19 24. Moreover, WDFW's failure to disclose records that contradict its public
20 statements on a controversial public issue raises the inference that such failure was in bad faith
21 and in knowing contravention of its duties under the Public Records Act. This inference is
22 particularly strong in relationship to the Wielgus Emails, since they would have been easily
23 located through any search of the emails of WDFW's Wolf Policy Lead Donny Martorello. The
24 Wielgus Emails were written in response to an email sent by Martorello on August 4, 2016, to
25 the "Wolf Advisory Group and Interested Parties," which focused on the Profanity Peak pack,
26 and which *was* produced in response to the 2016 PRA Request.

1 **C. 2017 Denial of Smackout Pack Public Records Request**

2 25. On July 20, 2017, WDFW posted an update to the Gray Wolf Conservation and
3 Management section of its public website, which was also emailed to interested members of the
4 public signed up for such updates, titled “WDFW documents legal caught-in-the-act wolf kill
5 and the fourth depredation by the Smackout wolf pack.” The update reported that on June 30,
6 2017, a ranch employee in Smackout wolf pack territory reported witnessing two wolves in the
7 act of attacking livestock, and that this individual then shot and killed one of the wolves. The
8 WDFW report stated that the killing was “investigated by WDFW Enforcement and was found
9 to be consistent with state regulations.” The report also stated that confirmed depredations by
10 Smackout wolf pack members on September 21, 28, and 29, 2016, and July 18, 2017, justified
11 a kill order for members of the Smackout wolf pack. **Attachment E.**

12 26. That same day, July 20, 2017, the Center made another PRA request to WDFW
13 (“2017 PRA request”). **Attachment F.**

14 27. The Center’s 2017 PRA request explicitly requested records related to the
15 investigations of alleged depredations by members of the Smackout wolf pack September 21,
16 2016, September 28, 2016, September 29, 2016, and July 18, 2017, as well as the investigative
17 report of the alleged “caught-in-the-act killing” on June 30, 2017.

18 28. On July 21, 2017, WDFW acknowledged receipt of the 2017 PRA request,
19 assigning it identification number PDR # 17399.

20 29. In response, also on July 21, 2017, WDFW provided records related to the
21 depredation investigations on September 21, 28, and 29, 2016, as well as July 18, 2017. No
22 records were provided related to the “caught-in-the-act killing” on June 30, 2017. WDFW
23 stated that additional records would be provided by August 15, 2017.

24 30. On August 15, 2017, additional records were provided; however, the
25 investigative report of the “caught-in the-act-killing” was not provided. WDFW stated that
26 additional records would be provided by September 9, 2017.

27 31. On September 8, 2017, WDFW stated that “additional time is needed for

1 program staff to research, review and respond” to the PRA request and that the agency
2 “anticipate[d] our next response no later than September 22, 2017.”

3 32. On October 5, 2017, WDFW reversed its prior public position that it had
4 completed its investigation of the alleged “caught-in-the-act killing” of June 30, 2017. Instead,
5 it issued a denial of the Center’s PRA request for the “caught-in the-act-killing” investigative
6 report on the basis that the requested documents are “part of an open and active Enforcement
7 Investigation” and thus exempt from disclosure under RCW 42.56.240(1). The denial letter
8 further stated: “Once WDFW Enforcement Officers have referred the case the prosecutor [sic],
9 the related files may be available. You may wish to resubmit your request at a later date.”
10 WDFW then indicated that its response to PDR # 17399 was complete. **Attachment G.**

11 33. WDFW’s refusal to provide its investigative report of the June 30, 2017 wolf
12 killing on the basis that it is an open investigation is belied by the agency’s own public
13 statements proclaiming that it had concluded its investigation of the “caught-in-the-act-killing”
14 by July 20, 2017. Although it gives regular public updates on its wolf activities, WDFW has,
15 to date, neither retracted or corrected this statement that its investigation had found the wolf kill
16 to be “consistent with state regulations.”

17 34. WDFW had a responsibility to either promptly supply the record of the
18 investigation as requested, or to promptly reveal that its July 20, 2017 statement was inaccurate,
19 and that the record was exempt from disclosure because the matter was still “part of an open
20 and active Enforcement Investigation.” Either the WDFW’s investigation was closed at the
21 time of its initial public records response on July 21, as it had claimed (in which case the
22 completed report should have been produced promptly at that time), or the investigation was
23 still open or had been reopened (in which case WDFW should have promptly explained that the
24 record was exempt from disclosure).

25 35. WDFW’s unjustified and repeated failure to provide the records requested
26 within the timeline of its own production estimates is an improper denial of access to the
27 records. By continuously delaying and providing no explanation for the delay, WDFW failed

1 to provide a reasonable estimate of the time it will take to provide records related to the alleged
2 “caught-in-the-act killing” by a member of the Smackout pack. Its serial extensions of time
3 had the effect of improperly denying the Center access to public records. This delay in either
4 providing the records or disclosing the grounds for an exemption means the Center was unable
5 to refer to the records, or to WDFW’s admission that the investigation was ongoing, during the
6 public debate over WDFW’s operation to kill members of the Smackout Pack, which took place
7 from July through September 2017. The delay in providing the records or providing grounds
8 for an exemption is particularly unreasonable given that the requested records were referenced
9 in WDFW’s July 20, 2017 statement, and obviously readily available.

10 **D. No Further Records or Responses Provided**

11 36. As of the date of this Complaint, Plaintiff has received no further records or
12 explanations from WDFW in response to the PRA requests discussed above.

13 **IV. CAUSE OF ACTION: VIOLATIONS OF PUBLIC RECORDS ACT**

14 37. Plaintiff incorporates by reference the preceding paragraphs.

15 38. Defendant WDFW is an “agency” under RCW 42.56.010(1), and is subject to
16 the provisions of the Public Records Act, ch. 42.56 RCW.

17 39. Due to the acts and omissions described above, Defendant WDFW failed to meet
18 its burdens in disclosing and/or responding to Plaintiff’s 2016 and 2017 public records requests,
19 in violation of chapter 42.56 RCW.

20 40. RCW 42.56.080 requires an agency to make records “promptly available.”

21 41. RCW 42.56.520 requires an agency to provide a “reasonable estimate” of the
22 time of production.

23 42. RCW 42.56.550(3) provides: “Courts shall take into account the policy of this
24 chapter that free and open examination of public records is in the public interest, even though
25 such examination may cause inconvenience or embarrassment to public officials or others.”

26 43. RCW 42.56.550(4) provides:

27 Any person who prevails against an agency in any action in the courts seeking

1 the right to inspect or copy any public record or the right to receive a response
2 to a public record request within a reasonable amount of time shall be awarded
3 all costs, including reasonable attorney fees, incurred in connection with such
4 legal action. In addition, it shall be within the discretion of the court to award
such person an amount not to exceed one hundred dollars for each day that he
or she was denied the right to inspect or copy said public record.

5 44. Where exemptions to the PRA are asserted, the agency bears the burden of
6 establishing that the particular exemption applies. RCW 42.56.550(1).

7 45. The records requested by Plaintiff are not exempt in their entirety from
8 disclosure within the meaning of the Public Records Act.

9 46. WDFW failed to conduct a sincere and adequate search for records in response
10 to Plaintiff's 2016 PRA Request, as evidenced by its failure to disclose records in its possession
11 and in the custody of WDFW employees who were readily identifiable as likely custodians of
12 records related to the Profanity Peak pack and the location of salt blocks within the Profanity
13 Peak territory, which records are responsive to Plaintiff's 2016 PRA Request and contradict
14 WDFW's public statements regarding its lethal removal of Profanity Peak wolves.

15 47. WDFW failed to promptly make available its investigative report of the June 30,
16 2017 wolf killing by a ranch worker, as required by the PRA. The exemption claimed by
17 WDFW, RCW 42.56.240(1), applies only to records of active investigations. WDFW's claim
18 that its investigation of the June 30, 2017 wolf killing is "active" is contrary to its own public
19 statement on July 20, 2017, indicating that its investigation had already concluded and that the
20 killing was "consistent with state regulations."

21 48. To the extent WDFW is accurate in its October 5, 2017 claim that its
22 investigation of the June 30, 2017 wolf killing remained "active," WDFW's previous letters
23 delaying its response to the request for that document failed to give a reasonable estimate of the
24 time of production and unjustifiably delayed WDFW's ultimate claim that the record was
25 exempt, in contradiction of its previous prior statements on the matter.

26 49. As set forth above, and on information and belief, Defendant WDFW has
27 violated the PRA by withholding records that are not exempt from public disclosure or which

1 should have been disclosed in redacted form rather than withheld in their entirety.

2 50. Plaintiff is entitled to an award of all costs, attorneys' fees, and other expenses
3 associated with this litigation pursuant to the PRA, RCW 42.56.550(4). Plaintiff is also entitled,
4 at the Court's discretion, to an award of up to \$100 per day for each day that it has been denied
5 access to the public records. RCW 42.56.550(4).

6 **V. PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiff prays for judgment to be entered against Defendant WDFW as
8 follows:

9 1. An order directing WDFW to show cause why it failed to produce all responsive
10 records in response to Plaintiff's 2016 PRA Request;

11 2. An order that WDFW conduct a reasonable search for, and disclose any and all
12 non-exempt documents and information requested, but not yet disclosed or produced by
13 WDFW;

14 3. An order directing WDFW to produce a detailed privilege log for all responsive
15 but withheld records that provides an explanation of how claimed statutory exemptions apply
16 to each of the individual withheld records;

17 4. In camera review by the Court of all withheld responsive records including those
18 listed in any and all privilege logs by the agency to determine whether the individual claimed
19 exemption applies to the individually withheld responsive record;

20 5. Penalties awarded to Plaintiff under RCW 42.56.550(4) for all records that were
21 wrongfully withheld;

22 6. Reasonable attorneys' fees and costs under RCW 42.56.550(4) and to the extent
23 otherwise permitted by law; and,

24 7. Such further relief as the Court deems appropriate and just.

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DATED: November 14, 2017

LANE POWELL PC

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