IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiff, v. U.S. DEPARTMENT OF THE INTERIOR and U.S. DEPARTMENT OF COMMERCE, Defendants.	Civil Action No. 18-cv-650

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Natural Resources Defense Council, Inc. (NRDC or Plaintiff), brings this case to compel Defendants, the U.S. Department of the Interior (Interior Department) and the U.S. Department of Commerce (Commerce Department) (collectively, Defendants), to disclose records relating to the agencies' reviews of certain national monuments.

2. Over the course of the past year, Defendants have conducted controversial "reviews" of at least twenty-seven national monuments established by former Presidents Clinton, G.W. Bush, and Obama—including the Bears Ears National Monument in Utah, the Grand Staircase-Escalante National Monument in

Utah, and the Northeast Canyons and Seamounts Marine National Monument in the Atlantic Ocean—for the purpose of making recommendations to the President about whether to preserve those monuments, or to dismantle them and open them to industrial resource extraction and other destructive uses. Despite an outpouring of popular support for preserving existing national monuments, the President has already acted to revoke national monument protections for huge swaths of Bears Ears and Grand Staircase-Escalante.

3. In September and October 2017, NRDC sought production under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, of records relating to the agencies' review processes. As explained below, NRDC sought records relating to the public comments that Defendants received, the meetings and communications Defendants' leadership had with non-governmental individuals and entities (including industry groups), and the criteria by which Defendants weighed the information they gathered. NRDC, its members, and the American public at large have a right to know who is influencing the federal government's decisions about the fate of these iconic American lands and waters.

4. FOIA required Defendants to respond within twenty business days. Yet Defendants did not respond substantively by that deadline, and they still have not done so. Their failure to timely disclose the requested records violates FOIA.

5. NRDC seeks a declaration that Defendants violated FOIA by failing to provide a final determination by the statutory deadline as to whether they will comply with NRDC's requests, and by failing to produce any responsive documents

promptly thereafter. NRDC seeks an injunction ordering that Defendants disclose, without further delay, all non-exempt, responsive records and portions of records to NRDC. NRDC also seeks a declaration that, pursuant to FOIA, it is entitled to a fee waiver in connection with its FOIA requests to the Interior Department.

JURISDICTION AND VENUE

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

7. Venue is proper in the U.S. District Court for the Southern District of New York because NRDC resides and has its principal place of business in this judicial district. 5 U.S.C. § 552(a)(4)(B); 28 U.S.C. § 1391(e)(1).

THE PARTIES

8. Plaintiff NRDC is a national nonprofit advocacy organization with hundreds of thousands of members nationwide. On behalf of its members, NRDC engages in research, advocacy, public education, and litigation to protect public health and the environment. NRDC has a long history of disseminating information of public interest, including information obtained from FOIA requests.

9. Defendant Interior Department is an agency within the meaning of 5 U.S.C. §§ 551(1) and 552(f)(1), and it has possession or control of documents NRDC seeks. The Office of the Secretary of the Interior is a component of the Interior Department.

10. Defendant Commerce Department is an agency within the meaning of 5 U.S.C. §§ 551(1) and 552(f)(1), and it has possession or control of documents

NRDC seeks. The Office of the Secretary of Commerce is a component of the Commerce Department.

STATUTORY AND REGULATORY FRAMEWORK

11. FOIA requires federal agencies to release records to the public upon request, unless one of nine statutory exemptions from disclosure applies. 5 U.S.C. § 552(a)-(b).

12. Within twenty business days of an agency's receipt of a FOIA request, the agency must "determine . . . whether to comply" with the request. *Id.* § 552(a)(6)(A)(i); *see also* 43 C.F.R. § 2.16(a) (Interior FOIA regulation); 15 C.F.R. § 4.6(b) (Commerce FOIA regulation). The agency must "immediately notify" the requester of "such determination and the reasons therefor." 5 U.S.C. § 552(a)(6)(A)(i)(I); 43 C.F.R. § 2.21(b) (requiring Interior Department to "immediately" send a written acknowledgement and tracking number if a request will take longer than ten workdays to process).

13. Once an agency determines that it will comply with a FOIA request, it must "promptly" release responsive, non-exempt records to the requester. 5 U.S.C. § 552(a)(6)(C)(i); *see also* 43 C.F.R. § 2.22(c) (Interior FOIA regulation); 15 C.F.R. § 4.7(c) (Commerce FOIA regulation).

14. In "unusual circumstances," an agency may extend the twenty-day time limit for responding to a FOIA request by up to ten working days. 5 U.S.C. § 552(a)(6)(B)(i); *see also* 43 C.F.R. § 2.19(a)(1) (Interior FOIA regulation); 15 C.F.R. § 4.6(b) (Commerce FOIA regulation).

15. The agency must provide requested records at no or reduced cost "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a) (Interior FOIA regulation); 15 C.F.R. § 4.11(*l*) (Commerce FOIA regulation).

16. If the agency fails to notify the requester of its determination within the statutory time limit, the requester is "deemed to have exhausted his administrative remedies" and may immediately file suit. 5 U.S.C. § 552(a)(6)(C)(i).

17. FOIA grants federal district courts authority to "enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.* § 552(a)(4)(B).

FACTS

18. On April 26, 2017, President Donald J. Trump issued Executive Order 13,792, titled "Review of Designations Under the Antiquities Act," which directed Secretary of the Interior Ryan Zinke to conduct a review of twenty-seven national monuments created by President Trump's predecessors. Exec. Order 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017). The Executive Order directed Secretary Zinke to provide "recommendations for such Presidential actions, legislative proposals, or other actions consistent with the law as the Secretary may consider appropriate" to

"balance the protection of . . . objects against the appropriate use of Federal lands and the effects on surrounding lands and communities." *Id.*

19. Two days later, on April 28, 2017, President Trump issued another executive order, this one titled "Implementing an America-First Offshore Energy Strategy." Exec. Order 13,795, 82 Fed. Reg. 20,815 (April 28, 2017). The order, among other things, directed Secretary of Commerce Wilbur Ross to review marine national monuments and national marine sanctuaries that had been designated or expanded within the previous ten years. The executive order required the Secretary of Commerce to "report the results of the review" within 180 days. *Id.*

20. The Interior Department and the Commerce Department subsequently accepted public comments regarding the covered national monuments and marine sanctuaries. *See* 82 Fed. Reg. 22,016 (May 11, 2017) (Interior review); 82 Fed. Reg. 28,827 (June 26, 2017) (Commerce review). On information and belief, Secretaries Zinke and Ross and other agency officials also met with a variety of stakeholders, including representatives of industry groups expressing interest in commercial exploitation of the national monuments and marine sanctuaries under review.

21. On information and belief, Defendants collectively received over three million public comments during their review period, and the overwhelming majority of those comments called on Defendants and the Trump Administration to preserve existing national monuments and marine sanctuaries.

22. Plaintiff NRDC submitted comments to the Interior and Commerce Departments in support of national monuments in general, and in support of Bears

Ears National Monument, Grand Staircase-Escalante National Monument, and Northeast Canyons and Seamounts Marine National Monument in particular. In addition, tens of thousands of NRDC's individual members submitted comments to the Interior and Commerce Departments in support of national monuments and marine sanctuaries.

23. On August 24, 2017, Interior Secretary Zinke submitted his final report to the President. Neither Secretary Zinke nor President Trump released the report publicly at the time, but national news reporters obtained what appears to be a leaked copy of the report, and Secretary Zinke released a substantially similar version to the public on December 5, 2017. Both versions of the Interior report recommended that the President unilaterally revoke or substantially weaken protections for several national monuments, including the Bears Ears National Monument, the Grand Staircase-Escalante National Monument, and the Northeast Canyons and Seamounts Marine National Monument.

24. On October 25, 2017, Secretary Ross's report describing the results of the Commerce review was due to be completed and submitted to the President. To date, neither Secretary Ross nor any other government official has released the Commerce report publicly.

25. On December 4, 2017, President Trump issued two proclamations dismantling Bears Ears National Monument and Grand Staircase-Escalante National Monument. President Trump and other federal officials have indicated that additional proclamations dismantling other national monuments would follow.

26. The American public has a strong interest in understanding the Interior and Commerce Departments' monument review processes and the basis for the Secretaries' reports and recommendations to the President. That includes understanding the criteria by which Interior and Commerce Department officials reviewed, weighed, or discounted the public comments they received; the contents of those comments; and the identities of industry representatives with whom Interior and Commerce Department officials met and the contents of those meetings.

27. The Interior and Commerce Departments' reviews of national monuments and marine sanctuaries have generated intense, widespread, and sustained public interest and concern. NRDC and its members are particularly keenly interested in these review processes and their outcomes. Yet, despite the public's desire for transparency and input into the Administration's review process, Defendants have made very little information publicly available about their information-gathering and review processes.

28. To better inform the American public at large, and NRDC members in particular, about a topic of intense public concern, NRDC submitted the following FOIA requests to the Interior Department and the Commerce Department.

NRDC's first FOIA request to the Interior Department

 # OS-2017-01247

29. According to the Regulations.gov website, the Interior Department received more than 2.8 million public comments through its online portal relating to the Department's national monument review. Only 782,460 comments—less than a

third of the total count of online submissions—were made publicly available online as of the close of the comment period. The Regulations.gov website notes that "agencies may choose to redact, or withhold, certain submissions . . . such as those containing private or proprietary information . . . or duplicate/near duplicate examples of a mass-mail campaign."

30. Interior Secretary Zinke's report to President Trump acknowledged that the public "[c]omments received were overwhelmingly in favor of maintaining existing monuments." Memorandum for the President from Secretary Zinke, "Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act" at 3 (Aug. 24, 2017). Secretary Zinke nevertheless opined that the overwhelming public support for national monuments reflected not genuine popular will, but rather, in his words, "a well-orchestrated national campaign organized by multiple organizations." *Id*. The report went on to dismiss what it called "form comments associated with NGO-organized campaigns, which far outnumbered individual comments," opining that "[t]oo often it is the local stakeholders who lack the organization, funding, and institutional support to compete with well-funded NGOs." *Id.* at 3, 8.

31. On September 22, 2017, in an effort to better understand the Interior Department's review process and the information underlying Secretary Zinke's report and recommendations, NRDC submitted a FOIA request to the Interior Department. *See* Exhibit A.

32. NRDC's request sought the following records:

a. "Any and all comments the [Interior] Department received on or after April 26, 2017 (whether via online submission, by mail, or by any other means) that relate to national monuments, and that are not among the 782,460 comments publicly available on the Regulations.gov website. This includes but is not limited to comments that include "private or proprietary information" or that are considered "duplicate/near duplicate examples of a mass-mail campaign." If you determine that any such comments (or any portions thereof) are exempt from disclosure, please produce a detailed ledger explaining the basis for each withheld comment or portion thereof.

b. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's directives, policies, standards, or procedures for reviewing or analyzing public comments relating to national monuments.

c. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's review of, assessment of, or findings about public comments relating to national monuments.

d. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's inquiry into or findings about "NGO-organized campaigns" relating to the

Department's monument review, or directions or instructions concerning such inquiry or findings.

e. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the basis for the Secretary's statement that there was "a well-orchestrated national campaign organized by multiple organizations" to submit public comments.

f. "Any records created or transmitted by the Department (or any official or staff-member thereof) on or after April 26, 2017, that relate to the Natural Resources Defense Council (NRDC)." *Id.*

33. NRDC explained that, for purposes of its request, the term "records" is consistent with the meaning of the term under FOIA, including "documents of any kind, including electronic as well as paper documents, e-mails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained." *Id.*

34. NRDC also requested that the Interior Department waive any fees for the search and production of the requested records. NRDC is entitled to a waiver of all fees pursuant to FOIA's fee waiver provisions and the agency's regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a).

35. NRDC submitted its request to the Interior Department's Office of the Secretary via the Interior Department's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

36. The Interior Department's online portal sent NRDC an automated e-mail response acknowledging receipt of the request on September 22, 2017.

37. The Interior Department's response was due within twenty business days of the request—i.e., by October 23, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i). NRDC received no response of any kind by that date.

38. On October 24, 2017—the day after FOIA's statutory deadline had run—a FOIA Officer from the Interior Department's Office of the Secretary e-mailed an acknowledgement letter to NRDC's counsel. That letter stated that NRDC's "request was received in the Office of the Secretary FOIA office on September 22, 2017, and assigned control number OS-2017-01247."

39. The letter further stated: "Because we will need to consult with one or more bureaus of the Department in order to properly process your request, the Office of the Secretary FOIA office is taking a 10-workday extension under 43 C.F.R. § 2.19. For the same reason, we are placing your request under the 'Complex' processing track. *See* 43 C.F.R. § 2.15."

40. Finally, the letter stated that the Interior Department had "classified [NRDC's] request as an 'other-use request.'" Seeking clarification, NRDC's counsel asked the FOIA Officer by e-mail whether this meant the Interior Department had denied NRDC's fee waiver request. In an e-mail dated November 1, 2017, the FOIA Officer responded: "It is not a denial of your fee waiver request. We are waiting to determine if a fee waiver i[s] necessary depending on whether there will be any fees."

41. NRDC never received any further communications from the Interior Department relating to its FOIA request.

42. Even accounting for the belated ten-day extension, the Interior Department's response was due on November 7, 2017.

43. To date, the Interior Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, claimed any exemptions, or made a determination on NRDC's fee waiver request.

NRDC's second FOIA request to the Interior Department

 # OS-2018-00232

44. On October 29, 2017, NRDC submitted a second FOIA request to the Interior Department, this time seeking records relating to meetings between Secretary Zinke or other Interior Department leadership and outside groups or individuals regarding national monuments. *See* Exhibit B.

45. Specifically, NRDC sought the following records:

a. "[A]ny and all records in the possession, custody, or control of the [Interior] Department . . . that pertain to meetings on or after January 20, 2017, attended by Secretary Ryan Zinke, Scott Hommel, Lori Mashburn, James Cason, Doug Domenech, and/or Downey Magallanes, relating to any national monument and/or to the Department's review of national monuments under Executive Order No. 13792, including:

b. "Any calendar entries, invitations, itineraries, or communications referencing such meetings;

c. "Any agendas, minutes, attendee lists, or presentations relating to such meetings;

d. "Any records of individuals who attended these meetings or accompanied the above-named officials on any of these occasions, excluding current career federal employees;

e. "Any briefings, summaries, or materials prepared or transmitted in relation to such meeting, whether before, during, or after the meeting itself; and

f. "Any notes taken by any federal employee, including the above-named officials." *Id.*

46. NRDC explained that, for purposes of its request, the term "records" is consistent with the meaning of the term under FOIA, including "documents of any kind, including electronic and paper documents, emails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained." *Id.*

47. NRDC also requested that the Interior Department waive any fees for the search and production of the requested records. NRDC is entitled to a waiver of all fees pursuant to FOIA's fee waiver provisions and the agency's regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a).

48. NRDC submitted its request to the Interior Department's Office of the Secretary via the Interior Department's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

49. The Interior Department's online portal sent NRDC an automated e-mail response acknowledging receipt of the request on October 29, 2017.

50. The Interior Department's response was due within twenty business days of the request—i.e., by November 28, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i).

51. On November 21, 2017, a FOIA Officer from the Interior Department's Office of the Secretary e-mailed an acknowledgement letter to NRDC's counsel. That letter stated that NRDC's "request was received in the Office of the Secretary FOIA office on October 29, 2017, and assigned control number OS-2018-00232."

52. The letter further stated: "Because we will need to consult with one or more bureaus of the Department in order to properly process your request, the Office of the Secretary FOIA office is taking a 10-workday extension under 43 C.F.R. § 2.19. For the same reason, we are placing your request under the 'Complex' processing track. *See* 43 C.F.R. § 2.15."

53. Finally, the letter stated that the Interior Department had "classified [NRDC's] request as an 'other-use request,'" and went on to explain: "[W]e are in the process of determining whether or not your entitlements are sufficient to enable us to process your request, or if we will need to issue a formal determination on your request for a fee waiver."

54. NRDC never received any further communications from the Interior Department relating to its FOIA request.

55. Accounting for a ten-day extension, the Interior Department's response was due on December 12, 2017.

56. To date, the Interior Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, claimed any exemptions, or made a determination on NRDC's fee waiver request.

NRDC's FOIA request to the Commerce Department

 # DOC-IOS-2018-000178

57. Also on October 29, 2017, NRDC submitted a FOIA request to the Commerce Department, seeking records relating to meetings between Secretary Ross or another member of the Commerce Department's leadership and outside groups or individuals regarding national marine monuments or sanctuaries. *See* Exhibit C.

58. Specifically, NRDC requested the following records:

a. "[A]ny and all records in the possession, custody, or control of the [Commerce] Department . . . that pertain to meetings on or after January 20, 2017, attended by Secretary Wilbur Ross and/or Earl Comstock, relating to any national marine sanctuary or marine national monument and/or to the Department's review of national marine sanctuaries and monuments under Executive Order No. 13795, including:

b. "Any calendar entries, invitations, itineraries, or communications referencing such meetings;

c. "Any agendas, minutes, attendee lists, or presentations relating to such meetings;

d. "Any records of individuals who attended these meetings or accompanied Secretary Ross or Mr. Comstock on any of these occasions, excluding current career federal employees;

e. "Any briefings, summaries, or materials prepared or transmitted in relation to such meeting, whether before, during, or after the meeting itself; and

f. "Any notes taken by any federal employee, including Secretary Ross or Mr. Comstock." *Id.*

59. NRDC explained that, for purposes of its request, the term "records" is consistent with the meaning of the term under FOIA, including "documents of any kind, including electronic as well as paper documents, e-mails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained." *Id.*

60. In its request, NRDC requested that the Commerce Department waive any fees for the search and production of the requested records, pursuant to FOIA's and the agency's fee waiver provisions. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(*l*).

61. NRDC submitted its request to the Commerce Department's Office of the Secretary via the federal government's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

62. The federal government's online FOIA portal sent NRDC an automated e-mail response acknowledging receipt of the request on October 29, 2017, and assigning it tracking number # DOC-OS-2018-000178.

63. On October 31, 2017, NRDC's counsel received another e-mail from the federal government's online FOIA portal advising that the request's tracking number had been changed to # DOC-IOS-2018-000178.

64. The Commerce Department's response was due within twenty business days of the request—i.e., by November 28, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i).

65. On November 14, 2017, the Commerce Department sent NRDC's counsel an e-mail advising that NRDC's fee waiver request had been "fully granted." Exhibit K. The Commerce Department did not respond substantively to NRDC's FOIA request by the statutory deadline, however.

66. To date, the Commerce Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, or claimed any exemptions.

* * *

67. NRDC seeks a declaration that Defendants have violated the FOIA by failing to respond to NRDC's FOIA requests and failing to promptly release all responsive, non-exempt records. NRDC also seeks an injunction ordering Defendants to provide the requested records without further delay.

68. NRDC brings this action on behalf of itself and its members. NRDC and its members have been and continue to be injured by Defendants' failure to provide responsive records. The requested relief will redress these injuries.

CLAIM FOR RELIEF

COUNT ONE
5 U.S.C. § 552(a) (FOIA)
All Defendants

69. NRDC incorporates by reference all preceding paragraphs.

70. NRDC has a statutory right under FOIA to the records it seeks.

71. Defendants have violated their statutory duties under FOIA, 5 U.S.C. § 552(a), and the applicable implementing regulations, to release all non-exempt, responsive records to NRDC. Defendants have identified no basis, let alone any valid basis, for withholding or partially withholding the records that are responsive to NRDC's FOIA requests.

72. NRDC is entitled to all non-exempt responsive documents at no cost because disclosure of the requested records would contribute significantly to public understanding and is not primarily in NRDC's commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a); 15 C.F.R. § 4.11(*l*).

73. NRDC is being harmed by Defendants' unlawful withholding of the requested records, and it will continue to be harmed unless Defendants are compelled to comply with FOIA's statutory requirements.

REQUEST FOR RELIEF

NRDC respectfully requests that this Court enter a judgment against Defendants as follows:

A. Declare that Defendants have violated FOIA by failing to provide a final determination as to whether they will comply with NRDC's FOIA requests and by failing to produce non-exempt records responsive to NRDC's FOIA requests by the statutory deadline;

B. Declare that Defendant Interior Department has violated FOIA by failing to make a determination as to NRDC's fee waiver requests;

C. Order Defendants to release to NRDC, without further delay and at no cost to NRDC, all responsive, non-exempt records in their possession, custody, or control;

D. If either Defendant contends that any responsive records are exempt or partially exempt from disclosure under FOIA, order that Defendant to produce a log identifying any such records or parts thereof and the basis for the withholdings, and require Defendant to prove that its decision to withhold or redact any such records is justified by law;

E. Order Defendant Interior Department to grant NRDC's fee waiver in full;

F. Award NRDC its reasonable costs and attorneys' fees; and

G. Grant such other and further relief as the Court deems just and proper.

Dated: January 24, 2018

Respectfully submitted,

/s/ Nancy S. Marks

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