

Facsimile Cover Sheet

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Office of External Affairs
U.S. Fish and Wildlife Service
Mountain-Prairie Region
Denver, Colorado

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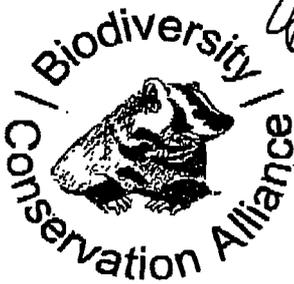
DATE: 2/15/06

TO: Charlene

FROM: Cathy

SUBJECT: FOIA





JJJ
 Charles Beshen
 605-224-8093 x37

Working to Protect Native Species and Their Habitats

P.O. Box 1512, Laramie, WY 82073 (307) 742-7978 fax: 742-7989
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February 1, 2006

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

FOIA Officer
 Region 6, U.S. Fish and Wildlife Service
 134 Union Boulevard
 Lakewood, CO 80228

FOIA REQUEST

Dear FOIA Officer:

Biodiversity Conservation Alliance is a non-profit, public-interest conservation organization whose mission is to conserve imperiled native species and their habitat, and to fulfill the continuing educational goals of our membership and the general public in the process. Consistent with our mission, and consistent with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, we respectfully request the following information from Region 2 of the U.S. Fish and Wildlife Service:

- Any and all records supporting the U.S. Fish and Wildlife Service's January 26, 2006 decision not to proceed with a status review for the Black Hills population of American dipper (*Cinclus mexicanus*) under the U.S. Endangered Species Act. This decision is documented as a "negative" 90-day finding in which the U.S. Fish and Wildlife Service determined the 2003 petition to list the Black Hills population of American dipper did not present substantial scientific information indicating the petitioned action was warranted (see, 71 Fed. Reg. 4341-4344);

We request these records in draft or final form, no matter how produced or reproduced, and in electronic format where possible.

REQUEST FOR FEE WAIVER

Biodiversity Conservation Alliance requests that you waive all fees in connection with this matter. As shown below, we meet the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii):

- Disclosure of this information is in the public interest because it will significantly**

contribute to public understanding of the operations or activities of government.

In considering whether Biodiversity Conservation Alliance meets this fee waiver criteria, it is imperative that the Fish and Wildlife Service remember that FOIA, in general, carries a presumption of disclosure and that the fee waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as Biodiversity Conservation Alliance access to government documents without the payment of fees. As stated by one Senator, “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the 9th Circuit has stated:

“The amended statute ‘is to be liberally construed in favor of waivers for noncommercial requesters.’ (citing Sen. Leahy). The amendment’s main purpose was ‘to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.’” (citing Sen. Leahy).

McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987).

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by watchdog organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the influential District of Columbia Circuit Court has stated:

“This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.”

Better Gov’t Ass’n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

A. The subject of the request concerns “the operations and activities of the government.”

As this is a request for documents from an executive branch agency, U.S. Fish and Wildlife Service, it is clear that this request concerns the operations and activities of government. The information is directly related to the agency’s mission “...to conserve, protect, and enhance the Nation’s fish and wildlife and their habitats for the continuing benefit of the American people.”

B. The disclosure is “likely to contribute” to a public understanding of government operations or activities (the informative value of the information to be disclosed and ability to disseminate).

The information requested will help provide crucial insight into the Fish and Wildlife Service's decision not to proceed with a status review for the Black Hills population of American dipper under the Endangered Species Act.

The informative value of this information is heightened further by the fact that none of the responsive documents have been released to the public. Moreover, public interest in and concern over the American dipper in the Black Hills is extremely high, as is clearly evidenced by recent public interest litigation over the failure of the U.S. Fish and Wildlife Service to make a 90-day finding on the 2003 petition to list the dipper and the subsequent agreement settling that litigation that ordered the Service to make a 90-day finding on or before January 21, 2006. This FOIA will provide documents with highly informative value with respect to this subject, and specifically in relation to the Fish and Wildlife Service's decision not to protect the Black Hills population of American dipper under the Endangered Species Act.

Biodiversity Conservation Alliance has specifically and consistently demonstrated its ability to disseminate information relative to policies and management of fish and wildlife, such as implementation of the Endangered Species Act, and has specifically demonstrated this ability in relation to imperiled species, such as the Black Hills population of American dipper. We accomplish this information dissemination through radio and printed media (both paid media and earned media), our website (www.voiceforthewild.org), our email list, list-serves to which we post, printed publications we write and distribute via mail and the internet, articles and essays for other public interest organizations, and public meetings held or sponsored by us, other nonprofit public interest entities, or federal agencies.

Biodiversity Conservation Alliance is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws. We have been substantially involved in Fish and Wildlife Service operations for many years and have consistently displayed our ability to disseminate information granted to us through FOIA fee waivers.

U.S. government agencies including the U.S. Forest Service, Army Corps of Engineers, Department of Agriculture, Department of the Interior, Fish and Wildlife Service, Environmental Protection Agency, U.S. Housing and Urban Development, among others, consistently grant our request for the waiving of FOIA fees.

In consistently granting Biodiversity Conservation Alliance fee waivers, all of these agencies, among others, have recognized that (1) our requested information contributes significantly to the public understanding of the operations or activities of the government, (2) our requested information enhances the public's understanding to a greater degree than currently exists, (3) Biodiversity Conservation Alliance possesses the expertise to explain the requested information to the public, (4) Biodiversity Conservation Alliance possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that Biodiversity Conservation Alliance is an established expert in the field of conservation of imperiled species and their threatened habitats.

Biodiversity Conservation Alliance staff and contractors responsible for interpreting, compiling and presenting this information to the public in an understandable manner clearly possess the requisite experience, intelligence and expertise to carry out this task. This staff includes wildlife biologists and environmental monitoring specialists holding post-graduate degrees as well as professional writers, community organizers, and engineers. Biodiversity Conservation Alliance has consistently proven its ability to disseminate information relating to Fish and Wildlife Service conservation of imperiled species and decisions made pursuant to the Endangered Species Act.

C. The disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Public oversight and enhanced understanding of Fish and Wildlife Service efforts to conserve rare and imperiled species is absolutely necessary to determine and measure the progress towards preventing endangerment and/or extinction. Public oversight and enhanced understanding of decisions not to protect species under the Endangered Species Act is also necessary to determine whether an informed and justified decision was rendered and to ensure species, including distinct population segments, do not become extinct or endangered.

Biodiversity Conservation Alliance's track record of active participation in oversight Fish and Wildlife Service activities and our consistent contribution to the public's understanding of Fish and Wildlife Service activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is:

"whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject."

Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994)(emphasis added).

The information requested in this FOIA request will be used to contribute to one or more of the following: court documents, public interest litigation, local and national newsletters, public presentations, e-mail and postal mail publications, and local and national news stories contributed to or written by Biodiversity Conservation Alliance and its supporters. The most likely sources of dissemination will be through the print and radio media, although it may also be disseminated through litigation and associated media work and mailed publications.

1. The use of these records will add new and different information to the public understanding.

The information requested has not yet been analyzed, summarized, and disseminated by any member of the public, thus its use will add new and different information to public understanding.

2. Whether all or a portion of the broadscale records will be used to enlighten the public.

We do not consider this request to be broadscale, but a specific and focused request for agency documents relating to the Fish and Wildlife Service's decision not to proceed with a status review to determine whether the Black Hills population of American dipper warrants listing under the Endangered Species Act. All the documents will be used, because all are necessary for gaining a true understanding of the Service's decision.

3. Whether any of the records consist of generic information which lack substantial informative value.

It is our belief that there is no 'generic' information on this topic, due to the public's limited perception of this subject. In addition, it is our belief that all requested records were utilized when rendering the negative 90-day finding for the petition to list the Black Hills population of American dipper and thus, are all substantially informative and valuable.

4. Whether any of the requested information has already been publicly available either in a duplicative or a substantially identical form, or is readily available from another source.

To the best of our knowledge, very few to none of the documents requested in this FOIA have been released to the public. If portions of the requested information have been released to the public and are readily available from another source, we request the Fish and Wildlife Service please inform us of this situation.

II. Obtaining the information is of no commercial interest to Biodiversity Conservation Alliance.

Access to government documents and records through FOIA requests is essential to Biodiversity Conservation Alliance's role of educating the general public. Biodiversity Conservation Alliance, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

Should you decide not to waive fees, we request that you contact us prior to incurring any costs in excess of \$25. Please feel free to request additional information concerning our fee waiver request if you believe it is needed to make a final decision.

If you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

- 1) Why is each document predecisional?
 - a. To what decision are each of the documents leading?
 - b. Has this decision been finalized?

- 2) Why is each document deliberative?
 - a. To what extent does each make a recommendation on a legal or policy matter?
- 3) What policy recommendation qualifies this document for exemption?

We look forward to your reply within twenty working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). Please call me at (303) 454-3370 if you have any questions about this request.

Sincerely,



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