

January 5, 2022

Via E-mail & FOIAonline.gov

Noreen Walsh
Regional Director
Mountain-Prairie Region
United States Fish & Wildlife Service
noreen_walsh@fws.gov

Mark Porath
Nebraska Ecological Services Field Supervisor
Nebraska Field Office
United States Fish & Wildlife Service
mark_porath@fws.gov

Nicole Alt
Colorado Ecological Services Field Supervisor
Colorado Field Office
United States Fish & Wildlife Service
nicole_alt@fws.gov

Dr. Wade Harrell
U.S. Whooping Crane Recovery Coordinator
Austin Ecological Services Field Office
U.S. Fish and Wildlife Service
wade.harrell@fws.gov

Re: Freedom of Information Act Request for Records Regarding the Nebraska Public Power District's R-Project

On behalf of our client the Oregon-California Trails Association ("OCTA"), we are writing pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to formally request that the United States Fish & Wildlife Service ("FWS") provide all responsive records in its possession that pertain to the Nebraska Public Power District's ("NPPD") proposed transmission line known as the "R-Project."

The R-Project is a proposed 345 kilovolt (kV) transmission line in Nebraska that will extend from NPPD's Gerald Gentleman substation to NPPD's substation near Thedford, Nebraska. FWS granted NPPD an Incidental Take Permit ("ITP") under the Endangered Species Act ("ESA") for the R-Project, due to the fact that the Project will take the American burying beetle, *Nicrophorus americanus*, within the meaning of that statute. Despite ample information indicating that the Project would also take the Whooping crane, *Grus americana*, FWS did not

cover that species in its ITP. On June 17, 2020, the United States District Court for the District of Colorado vacated the ITP. *See Oregon-California Trails Association v. Walsh*, 467 F. Supp. 3d 1007 (D. Colo. 2020). OCTA served as the lead plaintiff in that litigation, prevailing on claims under the ESA, the National Environmental Policy Act (“NEPA”), and the National Historic Preservation Act (“NHPA”). Since that time, NPPD has stated that the R-Project is “on pause,” but that NPPD “is utilizing the time during the pause to conduct discussions between NPPD and [FWS] regarding various matters associated with NPPD’s application for an Incidental Take Permit for the project.”¹

This request seeks information from FWS, including FWS’s Mountain-Prairie Regional Office, FWS’s Nebraska Field Office, FWS’s Colorado Ecological Services Field Office, and FWS’s Whooping Crane Recovery Program, including any staff members of those offices or any other FWS offices that might possess responsive information.

The time period for this request is from June 17, 2020 until the date that the agency completes its search for information responsive to this request.

In particular, OCTA seeks e-copies of the following information in FWS’s possession:

1. Any and all information regarding the R-Project, including the current status of the R-Project or any necessary permits for the Project such as any Incidental Take Permit under the ESA;
2. Any and all information regarding FWS’s analysis of the R-project’s impacts on species listed as threatened or endangered under the ESA, including but not limited to the American burying beetle and the Whooping crane;
3. Any and all information regarding FWS’s analysis of environmental impacts related to the R-Project under NEPA;
4. Any and all information regarding FWS’s analysis of historic and cultural resource impacts related to the R-Project under the NHPA;
5. Any and all information regarding FWS’s efforts to address the district court’s remand in *Oregon-California Trails Association v. Walsh*, 467 F. Supp. 3d 1007 (D. Colo. 2020);
6. Any and all communications between NPPD and FWS regarding the R-Project, including but not limited to communications regarding the R-Project’s status and any necessary permits or analysis under federal environmental laws including the ESA, NEPA, and the NHPA. This request includes communications to or from any employee or agent of NPPD, including its legal counsel at Holland & Hart LLP or any other law firm.

¹ See Nebraska Public Power District, R-Project Project Status, <https://rproject.nppd.com/project-status/>

As used throughout this request, the terms “information” and “communication” encompasses and records and documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored) in FWS’s possession or control that were generated, received, obtained, held, or created by or for the agency by any entity, agent, or representative within or outside the federal government, including any employees, agents, in-house or outside counsel of NPPD.

Because FOIA provides that if portions of a document are exempt from release, the remainder must nevertheless be segregated and disclosed, 5 U.S.C. § 552(b), we request that you provide us with all non-exempt portions of the requested information, along with an explanation of which documents, if any, may be privileged or exempt from disclosure and the basis for any exemption applied.

Fee Waiver Request

OCTA, which is a leading non-profit organization specializing in historic and cultural resource protection, respectfully requests that FWS waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 43 C.F.R. § 2.45. FOIA provides that agencies “shall” provide records “without any charge” or at a reduced rate where “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.” *Id.* § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.48 (enumerating criteria for fee waivers). The relevant statutory and regulatory standards are easily met here.

1. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities

As an initial matter, the requested records all concern FWS’s implementation of its duties under federal environmental laws including the ESA, NEPA, and the NHPA, including what efforts, if any, the agency is undertaking to protect the critically endangered whooping crane, which is threatened by the R-Project, a high-energy transmission line sited in the heart of the species’ migratory corridor. Because these records relate to both FWS’s implementation of an important federal law as well as the compliance or lack thereof by NPPD, whose actions threaten to violate the ESA’s “take” prohibition, *id.* § 1538(a)(1)(B), these activities concern the operations or activities of the government and seek to vindicate the extremely important purpose underlying Congress’s creation of the ESA’s citizen suit provision. *See, e.g., Bennett v. Spear*, 520 U.S. 154, (1997) (stating that the ESA’s citizen suit provision’s “obvious purpose is to encourage enforcement by so-called ‘private attorneys general’”). By the same token, the requested information plainly “concern[s] the operation or activities of the Federal government,” because they “concern discrete, identifiable agency activities,” namely the agency’s implementation of its duties under the ESA with regard to the R-Project. 43 C.F.R. § 2.48(a)(1). Moreover, the requested records concern FWS’s efforts to comply with NEPA and the NHPA, and in particular with the agency’s obligations under federal law to minimize and/or mitigate impacts to iconic historic and cultural resources such as O’Fallon’s Bluff and various nationally significant wagon trail ruts.

Accordingly, OCTA seeks information that will directly promote the vitally important purposes underlying the ESA, NEPA, and the NHPA by helping the public better understand the current status of NPPD's compliance efforts to date, and FWS's role in ensuring its compliance with these and other federal laws. In this manner, and as discussed further below, "disclosure is likely to contribute significantly to public understanding of [FWS's] operations or activities." *Id.* § 2.48(a)(2). Likewise, because these records reveal the agency's implementation of its statutory duties, "the logical connection . . . between the content of the records and the operations or activities of the Federal government" is self-evident. *Id.* § 2.48(a)(2)(ii).

Furthermore, disclosure of the requested records will contribute significantly to the public's understanding of the government's operations or activities. *Id.* § 2.48(a)(2). The public has a strong interest in FWS's implementation of the ESA, NEPA, and the NHPA. Disclosure of the requested records will serve the public interest in understanding the manner in which FWS has implemented, or intends to implement in the future, various provisions of the ESA, NEPA, and the NHPA as they apply to the proposed transmission line, including through correspondence between FWS and representatives of NPPD. Because the R-Project presents a serious threat to imperiled species, historic and cultural resources, and ecologically sensitive resources, information about how FWS is implementing its duties under federal law "are meaningfully informative." *Id.* § 4.28(a)(2)(i). Similarly, because this information has not been made public, it is not "already readily available . . . from other sources or easily accessible to the public." *Id.* Likewise, the requested information, which is not already available, does not merely "confirm or clarify data that has been released previously." *Id.* § 2.48(a)(2)(vi).

OCTA is a national, non-profit organization headquartered in Independence, Missouri, with eleven chapters throughout the western United States, and more than a thousand members across the country. OCTA is the nation's pre-eminent guardian and promoter of the inspirational story of the 19th century westward migration, which is unique in world history. OCTA's mission is to protect the Historic Emigrant Trails legacy through preservation, research, education, and raising public awareness of the trails. To that end, OCTA maintains a website that is regularly trafficked by its members and by numerous members of the general public, and OCTA additionally disseminates information through social media and press releases that reach many more members of the general public. OCTA intends to disseminate information from the requested records through these means, including by writing reports and/or press releases that will be used in education, advocacy, and public outreach efforts.

As FWS is likely aware, OCTA was the lead plaintiff in the litigation concerning the R-Project, *Oregon-California Trails Association v. Walsh*, due to the fact that the R-Project will not only harm species listed pursuant to the ESA, but will also irreparably damage and degrade irreplaceable historic resources—namely the Oregon-California Trails that OCTA was formed to protect. As such, OCTA and its members have strong interests in ensuring that any federal permitting process—including FWS's issuance of an ITP under the ESA and any related NEPA analysis and NHPA evaluation and measures—fully comply with the requirements of federal law. OCTA will use the information from the requested records to disseminate information about FWS's implementation of its statutory duties to a broad, nationwide audience.

For these reasons, “disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject.” 43 C.F.R. § 2.48(a)(2)(iii). Likewise, because OCTA has, as described above, a proven track-record of disseminating information to its members, the broader public, and the media, and because OCTA is uniquely well-equipped to understand and communicate about how the requested information affects the environment in Nebraska due to OCTA’s extensive familiarity with the region’s historic and natural resources, which includes vital habitat for the Whooping crane and other imperiled species, OCTA has “expertise in the subject area” as well as a specific “plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons.” *Id.* § 2.48(a)(iv). For similar reasons, OCTA’s proven track-record of disseminating information demonstrates that it has the “ability and intent to disseminate the information to a reasonably broad audience.” *Id.* § 2.48(a)(2)(v). Finally, for all these reasons, including that the requested information is not already available, these records will illuminate how FWS is implementing its duties with regard to imperiled species, and will be communicated to a reasonably broad audience, “the public’s understanding of the subject in question will be enhanced to a significant extent by the disclosure.” *Id.* § 2.48(a)(2)(vii).

2. Disclosure of the Requested Information is Not Primarily in the Commercial Interest of the Requesters

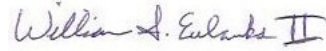
OCTA does not have any commercial interest in the requested information. OCTA is a non-profit organization that does not make commercial use of information obtained through FOIA requests or other record disclosure forums. Once again, OCTA is comprised of thousands of members and supporters, and it works through advocacy, education, and public outreach to ensure protection for historic resources and other important resources along the route of the Oregon-California Trails, including the location of the R-Project. OCTA has no commercial interests in these records, and instead intends to utilize such records exclusively to ensure compliance with the ESA, NEPA, and the NHPA during the planning, construction, and operation phases of this transmission line that is located in the heart of Whooping crane core migratory habitat and directly intersects and would irreparably degrade the historic trails that OCTA aims to protect.

In short, because OCTA is a non-profit organization with no commercial interest in the disclosure of the requested information, disclosure is clearly not primarily in the commercial interest of the requester. Instead, disclosure is in the public interest, which will be well-served by OCTA obtaining and disseminating this information to the public. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Further, because as a non-profit organization OCTA has no commercial interest in the information, the extensive public interest in this information, as described above, vastly outweighs the non-existent commercial interest here. *See* 43 C.F.R. § 2.48(b)(4) (noting that the agency “will not find that disclosing the requested records will be primarily in your commercial interest where the public interest is greater than any identified commercial interest in disclosure”).

CONCLUSION

Please respond to this request within 20 working days, as FOIA requires. Thank you for your time and attention to this matter. Due to COVID-19, e-mail is the best way to reach me regarding this FOIA request; please use the email address in my signature block below for any such correspondence.

Respectfully,

A handwritten signature in purple ink that reads "William S. Eubanks II".

William S. Eubanks II
Owner & Managing Attorney
Eubanks & Associates PLLC
1331 H Street N.W. Suite 902
Washington, D.C. 20005
(970) 703-6060
bill@eubankslegal.com