



February 27, 2012

TO: Donna Niffen, FOIA Coordinator  
Idaho State Office  
1387 S. Vinnell Way, Suite 368  
Boise, ID 83709  
Donna\_niffen@fws.gov

FROM: Noah Greenwald  
Endangered Species Program Director  
Center for Biological Diversity  
PO Box 11374  
Portland, OR 97211

RE: FOIA Request for records related to the potential for incidental take of lynx or grizzlies from trapping permitted or carried out by Idaho Department of Fish and Game.

Dear Ms. Laxalt Mackey,

### **REQUEST FOR MATERIALS**

The Center for Biological Diversity (the “Center”) is a non-profit, public interest conservation organization whose mission is to conserve imperiled native species and their threatened 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, 5 U.S.C. § 552 (“FOIA”), we respectfully request the following information (including all documents held at Field Offices within the respective Regional Offices receiving this request):

All records relating to the potential for trapping permitted or carried out by Idaho Department of Fish and Game for wolves or other animals to incidentally take federally listed lynx or grizzly bear, including but not limited to all inter and intra agency correspondence (letters, email messages, phone conversation records, inter and intra office memos, facsimiles, meeting minutes, notes, and others) and memos related to the decisions.

All records related to any incidental take permits that have been conceived or issued to Idaho Department of Fish and Game related to trapping, including but not limited to all inter and intra agency correspondence (letters, email messages, phone conversation records, inter and intra office memos, facsimiles, meeting minutes, notes, and others) and memos related to the decisions.

We are requesting all documents and materials directly or indirectly considered by agency decision makers. In addition, please include all correspondence from the Department of Interior, Washington office, and regional office to any party concerning this decision.

### **REQUEST FOR FEE WAIVER**

The Center 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), as implemented by the Department of Interior's fee waiver regulations at 43 C.F.R. § 2.21

**I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.**

This requested information will significantly contribute to public understanding of the issues involved, as defined by the Department of Interior's three factors at § 2.22 (each factor is addressed below). In considering whether the Center 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 the Center 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 9<sup>th</sup> Circuit has stated that:

*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 (9<sup>th</sup> Cir. 1987)(emphasis added).

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 Ettliger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984)(emphasis added).*

**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.

**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 policies and decision-making processes of the Fish and Wildlife Service as they relate to oversight of potential take of federally listed lynx and grizzly bears by trapping that is permitted or carried out by the Idaho Department of Fish and Game. This FOIA request will allow the Center to gain a better understanding of the Fish and Wildlife Service’s efforts to ensure endangered species are not harmed or driven extinct by the extensive trapping permitted and carried out by the Idaho Department of Fish and Game.

The Center 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 management for years, and have consistently displayed our ability to disseminate information granted to us through FOIA fee waivers.

U.S. Government agencies including the Air Force, Animal Damage Control, Army, Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Department of Agriculture, Department of Commerce, Department of Defense, Department of the Interior, Department of Justice, Department of Transportation, Federal Bureau of Investigation, Federal Aviation Administration, Fish and Wildlife Service, Forest Service, General Accounting Office, National Aeronautical and Space Administration, National Science Foundation, Office of Management and Budget, Rural Economic Community Development Agency, and the Smithsonian Institution, among others, consistently grant our request for the waiving of FOIA fees. Recent substantive FOIA responses consistently conforming with the spirit of the FOIA and consistently conforming with the FOIA fee waiver have been provided to our members from these Federal agencies on July 24, 1990, July 27, 1990, August 10, 1990, May 20, 1991, December 18, 1991, December 23, 1991, December 24, 1991 (2), December 27, 1991, January 2, 1992, January 3, 1992, January 7, 1992, January 8, 1992, January 10, 1992, January 13, 1992 (2), January 14, 1992, July 29, 1992, October 30, 1992, December 8, 1992, January 28, 1993, March 22, 1993, September 21, 1993, September 23, 1993, October 19, 1993, December 1, 1993, December 2, 1993, December 6, 1993, December 10, 1993, December 20, 1993, December 27, 1993, October 4, 1994, October 27, 1994, December 12, 1994, December 16, 1994, March 21, 1995, May 4, 1995, May 12, 1995, May 19, 1995, June 22, 1995, October 25, 1995, February 14, 1996, February 15, 1996, February 16, 1996, April 2, 1996, October 1, 1996, December 31, 1996, May 6, 1997, May 12, 1997, June 1, 1997, August 19, 1997, October 28, 1997, March 27, 1998, March 30, 1998, April 16, 1998, May 28, 1998, and July 10, 1998.

In consistently granting the Center’s 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) THE CENTER possesses the expertise to explain the requested information to the public, (4) THE CENTER possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that the Center is an established expert in the field of imperiled species and their threatened habitat.

**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's compliance with the Endangered Species Act, and Fish and Wildlife Service's role in ensuring and promoting this compliance, is absolutely necessary. The Center members' track record of active participation in oversight of Fish and Wildlife Service activities and our consistent contribution to the public's understanding of these agencies' 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 (2<sup>nd</sup> Cir. 1994)(emphasis added).

The information requested in this FOIA request will be used to contribute to one or more of the following: production of or defense of multiple listing petitions, court documents, public interest litigation, local and national newsletters, public presentations, local and national news stories contributed to or written by the Center and its members. In addition to the above channels of dissemination, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail Biodiversity alerts, which is sent to over 3,000 people approximately once a week, and our web page, which is accessed several hundred times each month.

(<http://www.biologicaldiversity.org/>). Information acquired in this FOIA will be disseminated through both of these means.

**II. Obtaining the information is of no commercial interest to the Center.**

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, 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 (503) 484-7495 if you have any questions about this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Greenwald", followed by a checkmark.

Noah Greenwald  
Endangered Species Program Director  
Center for Biological Diversity