



Center for Biological Diversity

Protecting and restoring natural ecosystems and imperiled species through science, education, policy, and environmental law.

July 29, 2003

TO: Annie Eissler, FOIA Officer
Mail Stop C-4
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208
Fax: 503-230-4508

Sent via Facsimile, hard copy

RECEIVED BY BPA to follow FOIA OFFICE THIS DATE: 8/13/03
DUE DATE: 9/11/03
LOG # 03-033

FROM: Noah Greenwald
Conservation Biologist
Center for Biological Diversity
917 SW Oak St.
Portland, OR 97205

RE: Request for documents related to installation of turbines at Libby Dam to comply with the December 20, 2000 biological opinion concerning operations of Libby Dam and protection of the Kootenai River Sturgeon.

REQUEST FOR MATERIALS

The Center for Biological Diversity (CBD) 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, we respectfully request the following information (including all documents held at Field Offices):

- 1.) All inter and intra agency correspondence (letters, email messages, phone conversation records, inter and intra office memos, facsimiles, meeting minutes, notes, and others) with any congressional representatives, senators, or their aids concerning implementation of reasonable and prudent alternatives prescribed in the December 20, 2000 biological opinion related to operations of Libby Dam and protection of the Kootenai River Sturgeon.
- 2.) Any documents or correspondence (as defined above) concerning measures necessary to transmit power from additional turbines at Libby Dam, particularly those related to the Elmo-Kerr Project.

REQUEST FOR FEE WAIVER

CBD 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). In considering whether CBD meets this fee waiver criteria, it is imperative that the BPA 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 CBD 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 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 (9th 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).

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. The information requested will help provide crucial insight into the policies and activities of the Bonneville Power Administration as they relate to the Kootenai River Sturgeon and its habitat. The Service has issued a biological opinion (December 20, 2000) establishing operational guidelines for Libby Dam that are designed to prevent extinction by encouraging reproduction of the sturgeon. The public has a right to know whether the Bonneville Power Administration is actively working to thwart these guidelines by seeking legislative relief or by downplaying cost effective measures to transmit power from a modified Libby Dam.

Public oversight and enhanced understanding of BPA’s role in ensuring the survival and recovery of the sturgeon, is absolutely necessary. CBD members’ track record of active participation in oversight of BPA 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 (2nd 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 CBD 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 nearly 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.

CBD is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws. We have been substantially involved in the operations of a host of government agencies 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, BPA, 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 CBD'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) CBD possesses the expertise to explain the requested information to the public, (4) CBD possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that CBD is an established expert in the field of imperiled species and their threatened habitat.

II. Obtaining the information is of no commercial interest to CBD.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to CBD's role of educating the general public. CBD, 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,



D. Noah Greenwald
Conservation Biologist
Center for Biological Diversity