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Working to protect and restore Western Watersheds

Western Watersheds Project

Animal and Plant Health Inspection Service
 Director, Freedom of Information and Privacy Act Staff
 4700 River Road, Unit 50
 Riverdale, MD 20737
 Via US Mail
 VIA FACSIMILE: 301-734-5941
 and
 Email: foia.officer@aphis.usda.gov

RE: Freedom of Information Act Request

Dear FOIA Officer,

Pursuant to the Freedom of Information Act, 5 U.S.C. Sec. 552-et seq., Western Watersheds Project hereby requests that you send the following documents, all of which are matters of public record and should be easily available to you.

Western Watersheds Project (WWP) is requesting information pertaining to U.S.D.A. A.P.H.I.S. Wildlife Services activities related to the gray wolf in Idaho for the period from August 5, 2010 to the present.

WWP would like the documentation that you may have concerning depredations that occurred in Idaho.

Specifically we would like internal communications and communications with the Idaho Department of Fish and Game; US Fish and Wildlife Service officials and US Fish and Wildlife Service Law Enforcement officials in Regions 1 and 6; and the Nez Perce Tribe

- Which discuss the role that the Idaho Fish and Game has in wolf management now that wolves are once again listed as an endangered species;
- Which discuss the role that Idaho Fish and Game has in law enforcement;
- The communications relating to the renewal of a Memorandum of Agreement or Memorandum of Understanding which would hand over lead management authority to the Idaho Department of Fish and Game from the USFWS.

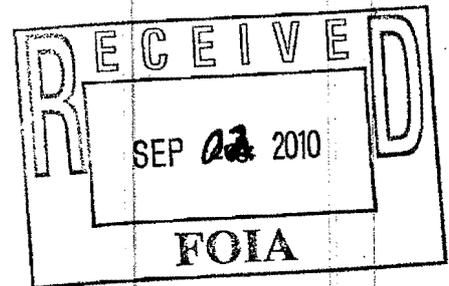
Also, we would like to have any documents which discuss the legality of any wolf control actions taken during the period during which there is no current Memorandum of Agreement giving the

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Idaho Department of Fish and Game lead management authority.

We would like to have any documents pertaining to any control actions conducted by Wildlife Services under the assumed authority of the Idaho Department of Fish and Game during the period subsequent to the relisting of wolves as an endangered species.

We are requesting all Wildlife Services Depredation Investigation Reports and associated photographs from August 5, 2010 to the present for incidents that occurred in Idaho during this period.

Any other documents which include information on depredation, control, trapping, gunning, non-lethal control, etc.:

- The location of the depredation(s). Township, Range, Section, drainage, GPS locations, as precise as possible.
- Whether the depredation occurred on public or private lands.
- The name of the agent(s) who investigated the depredation(s).
- The number and type of livestock killed.
- The number and type of livestock injured.
- The type and manner of control undertaken.
- The control actions recommended for such depredations.
- The control actions which actually took place for said depredation(s).
- The method of control (i.e. aerial control, shooting, trapping and killing etc.).
- Resources and costs associated with control actions, the date(s) of control action(s).

We are also requesting any other information on gray wolves, including communications (emails, letters, faxes, meeting minutes, memos, photographs, phone logs, appointment logs) regarding the management and/or control of wolves in Idaho from individuals within APHIS (Wildlife Services) or within/between the Idaho Department of Fish and Game, U. S. Fish and Wildlife Service and the Nez Perce Tribe.

This also includes any info associated with planning for future actions, research, memoranda, or any other information.

This information is requested for all APHIS WS offices and personnel in Idaho.

All of the above-requested information includes any reports, memos, e-mails, letters, phone logs, meeting minutes, field notes or reports, photos, or any other information related to the above-requested monitoring information.

If you believe that any portions of the documents requested are exempt from disclosure under FOIA, you are required by the Act to segregate those portions and provide the rest of the information.

If you wish to withhold any documents referred to in this request, please send us an administrative Vaughn Index pursuant to U.S.C. Sec 552 (b) and Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. Denied 415 U.S. 977 (1974). This index should specify the following information about each document withheld:

- The title, author, date of each document withheld.

- A description of each document withheld, including the subject and conclusion of the document.
- A legal citation to the exemption for each document withheld and an explanation of how the exemption applies to each document.
- A list of all documents, including memos, electronic mail, and other communications which are referenced in the withheld document, or are referenced by the withheld document.

This letter describes how and why Western Watersheds Project (WWP) meets the factors entitling WWP to a fee waiver under the Freedom of Information Act. See 5 U.S.C. § 552(a)(4)(A)(iii). See also 43 C.F.R. Part 2, Appendix D.

Under the fee waiver provisions as enacted by Congress, a requester qualifies for a fee waiver 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). Through its own FOIA regulations, the Department of Agriculture has articulated the following four-part test to determine if a requestor meets the statutory requirements for a fee waiver: (1) Do the records concern the operations or activities of the government?; (2) If so, will disclosure likely contribute to public understanding of these operations and activities?; (3) If so, will release of the requested information contribute significantly to public understanding?; and (4) Is disclosure primarily in the requestor’s commercial interest? See also 43 C.F.R. Part 2, Appendix D.

WWP meets the four-part test articulated in the Department of the Agriculture regulations implementing FOIA, and, therefore, the Wildlife Services must waive the fees associated this FOIA request.

Factor 1: Do the requested records concern “the operations or activities of the government”?

Yes. Our request is for documents relating to the Wildlife Services’ management and control of wolves in Idaho. Such management is “operations or activities of the government”.

Factor 2: If so, will disclosure likely contribute to public understanding of these operations and activities?

WWP is an Idaho non-profit membership organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West, and informing the public of Wildlife Services’ management and control of wolves across the State of Idaho. WWP has over 1400 members, including many members who live in Idaho. WWP is active in seeking to protect and improve the riparian areas, water quality, fisheries, wildlife, and other natural resources and ecological values of western watersheds.

All of the records requested in this FOIA are essential to WWP’s mission to protect the land, water and wildlife of the Interior West, including Idaho and to educate its members and the general public to enable and empower them to advocate for protection of our public lands and wildlife. The informative value of the records requested is that this information enables WWP to inform and educate the public on the management and control of wolves – which are a public resource held in trust and managed by State and Federal agencies.

WWP intends to increase public awareness of the Wildlife Services’ management and control of wolves within the State of Idaho by (1) collecting documents from the Wildlife Services addressing

its management and control of wolves within the State of Idaho, (2) employing the substantial analytical abilities of WWP's experts and employees, trained in the fields of biology, range management, riparian ecology, as well as other scientific disciplines, to conduct an independent analysis and assessment of the Forest Service's actions in managing our public lands and resources, and (3) disseminating this analysis and assessment through public education and outreach activities including, presentations at local, regional and national conferences, presenting the information to national, regional and local media outlets, posting the information on WWP's website, participation in administrative processes, litigation and other enforcement of federal environmental laws.

Specifically, the requested information will contribute to the public understanding of the Wildlife Services' management and control of wolves in the State of Idaho. There is no other way to obtain information on the management and control of wolves except through these documents, which are public documents, available to the public for comment or reference. These documents help educate the public about what the Wildlife Services is doing to manage wolves under its management. There is substantial public interest in Wildlife Services activities relating to wolves and in the quality of the data and science that the Wildlife Services uses to undergird its management decisions. The public interest to be served by disclosure of these documents is, therefore, informing and educating the public about Wildlife Services' management and control of wolves and public resources within the State of Idaho.

Furthermore, Wildlife Services planning and decision making are supposed to be public processes in which information is supposed to be readily available to the public at large. Unfortunately, in many instances such documents as the ones requested here are long, tedious to read, and difficult to understand. Also, in many instances, they are not provided to the general public. Accordingly, it is groups such as WWP that compile this information into a more readily understandable form for the general public, as well as for our members. WWP's staff has amassed a wealth of expertise and knowledge in examining and analyzing similar documents, and reaching tenable, scientific observations and conclusions on the effectiveness of the Wildlife Services' management of public lands and wildlife. Specifically, WWP's current staff includes scientists with expertise in ecology (Dr. John Carter, PhD, Utah State University), biology (Katie Fite, MS, Utah State University), and biology (Michael J. Connor, PhD.). Furthermore, all of WWP's staff, volunteers, and board members have vast experiences examining and assessing documents and information similar to the information sought.

Finally, as previously stated, WWP intends to undertake dissemination of the information by distributing the results of WWP's analysis and assessment at a local, state, regional and national level. Specifically, WWP plans on disseminating the assessment and analysis through the following means: (1) presenting the material to its 1400 members, as well as members of other state and national conservation organizations; (2) presenting the materials at local high schools throughout Idaho when invited; (3) presenting the materials at national and regional conferences, including the 2011 Public Interest Environmental Law Conference (at which WWP employees have presented information obtained via FOIA for three years running); (4) participating in other public forums, such as local government hearings; (5) issuing press releases and presenting the information to national, regional and local media; (6) posting the information (in a compiled and more readily understandable form) and as suitable on WWP's internet web site, which has over 12,000 visitors a week; and (7) posting, as suitable, the information on the website of the National Public Land Grazing Campaign, of which WWP is a founding member.

By way of example only, WWP has recently disseminated similar analysis and assessment of the

Forest Service's management of our federal public lands and resources through the following outreach avenues: (1) teaching classes at local high schools in Idaho, (2) presenting the information at national environmental conferences, including the 2010 Public Interest Environmental Law Conference (attended by several thousand individuals); (3) disclosure to media outlets in local, national and international media outlets, (4) dissemination through WWP's regular on-line newsletter, and (5) posting the information on its website. WWP specifically intends to disseminate its analysis and evaluation to the public through each and every avenue discussed previously.

With respect to WWP's ability to disseminate the information to the public, WWP does so in a wide variety of ways, including: communicating with local, regional and national press outlets (television, radio and print); presentations to our members, presentations to the general public, presentations to members of other conservation organizations; and participation in numerous conferences and public events across the country. For example, WWP has successfully placed approximately 400 stories in the print media from January 2006 through January 2010. In addition to these outreach and dissemination efforts, WWP publishes a regular newsletter, including an email newsletter, and has its own web site, in addition to contributing submission to the National Public Lands Grazing Campaign's website, of which WWP is a founding member.

Factor 3: If so, will release of the requested information contribute significantly to public understanding

Release of the information will contribute significantly to public understanding of Wildlife Services management and control of wolves within the State of Idaho. First, the information being sought includes information supporting wolf control activities in the State of Idaho. As such, this information is new, and has not been previously distributed to WWP or the public. In fact, organizations such as WWP provide the primary means by which the public at large is apprised of, and has access to, this information. Furthermore, because the information is supporting data, it would also clarify pre-existing information on wolf control decisions about Wildlife Services management and control of wolves within the State of Idaho.

As one of the organizations specifically dedicated the preservation and protection of the lands, waters, and wildlife of the State of Idaho, WWP is a critically important hub of information for both its members and the public who have an interest in the health and management of our public lands, waters, and wildlife.

As discussed above, disclosure of the requested documents will contribute significantly to the public understanding of government operations and activities relating to wolf management and control. WWP provides a way for the public to better understand Wildlife Services management and control of wolves. The release of these documents and their dissemination to the public through public events, web sites, the media, newsletters and other avenues will increase the knowledge of the public on the management and control of wolves in the State of Idaho.

Factor 4: Is disclosure primarily in WWP's commercial interest?

A commercial interest is one that furthers a commercial, trade, or profit interest. WWP has no commercial interest in obtaining this information and requested fee waiver. Rather, WWP is a not-for-profit group that strives to protect the natural resources of the State of Idaho, and inform the public on Wildlife Services management and control of wolves in the State of Idaho. Nowhere in WWP's mission statement, by-laws, or charter, does the organization state a profit-motive goal.

Additional Information Concerning Fee Waiver: Legal Background.

In 1986, Congress amended the judicial review section for fee waivers under FOIA, replacing the "arbitrary and capricious" threshold of review, by which courts are required to grant deference to agencies, with the more rigorous de novo review standard. 5 U.S.C. § 552(a)(4)(A)(vii). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information, which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information

132 Cong. Rec. S14298 (Sen. Leahy).

FOIA's amended fee waiver provision was intended specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See *Better Government Association v. Department of State*, 708 F.2d 86, 88-89 (D.C. Cir. 1986).

Fee waivers are essential to such groups, which rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions

The fee 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 a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups.

Id. at 93-94 (emphasis added).

Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations that actively challenge agency actions and policies.

Public-interest fee waivers are to be "liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). "[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public." *Ettlinger v. FBI*, 596 F.Supp. 867, 873 (D. Mass. 1984) (quoting legislative history). An agency may not refuse a fee waiver when "there is nothing in the agency's refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public." *Id.* at 874, quoting *Fitzgibbon v. Central Intelligence Agency*, Civil No. 76-700 (D.D.C. Jan. 10, 1977). "Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver." *Id.*, citing 5 U.S.C. §

552(a)(4)(B).

In light of these principles, based on WWP's FOIA request, it is clear WWP, a non-profit group interested in oversight of agency management of and control of wolves in the State of Idaho, and in disseminating information on this issue to its members, members of other local, state, regional and national conservation organizations, the public, and the media, is entitled to a fee waiver for the specific documents requested.

Accordingly, WWP asserts that a fee waiver is proper as it complies with the fee waiver requirements of FOIA, see 5 U.S.C. § 552. If Wildlife Services should deny our fee waiver, please notify us immediately of the costs for these documents so we can proceed from there. Thank you in advance for your prompt reply.

Kenneth Cole

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To foia.officer@aphis.usda.gov
cc Jon Marvel <jon@westernwatersheds.org>, Brian Ertz
<brian@westernwatersheds.org>, Laurie Rule
<lrule@advocateswest.org>, Ralph Maughan
bcc
Subject FOIA Request

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