

United States Department of the Interior

EI-1575



FISH AND WILDLIFE SERVICE

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M.24 - ICC Tongue River Railroad

June 21, 2005

Ms. Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Dear Ms. Rutson:

This letter acknowledges the U.S. Fish and Wildlife Service's (Service) May 23, 2005 receipt of your May 13, 2005 letter requesting initiation of formal section 7 consultation under the Endangered Species Act. The consultation concerns the possible effects of Tongue River Railroad Company's (TRRC) proposed rail construction and operation of the Western Alignment (Tongue River III) in Rosebud and Big Horn Counties, Montana on the bald eagle (*Haliaeetus leucocephalus*), whooping crane (*Grus americana*), the black-footed ferret (*Mustela nigripes*), the pallid sturgeon (*Scaphirhynchus albus*), and the interior least tern (*Sterna antillarum athalassos*). There is no designated critical habitat for these species.

The Service has not received all of the information necessary to initiate formal consultation on Tongue River III, as outlined in the regulations governing interagency consultations (50 CFR 402.14). Some of the information needs were identified in the Department of the Interior's December 2, 2004 comments to the Surface Transportation Board's (STB) Section of Environmental Analysis (SEA) on the Draft Supplemental Environmental Impact Statement (DSEIS). To complete the initiation package, we will need the following information:

1. Refer to 50 CFR 402.14(c) to identify information requirements.
2. The Tongue River Corridor is an important breeding and wintering area for the bald eagle in Montana.
 - A. Please update your information on the number of active bald eagle nesting territories and inactive satellite nests within each territory. The State and the Service would prefer the use of current Montana Bald Eagle Nesting Territory numbers and names. Please consult with the State non-game biologist in Billings to address any discrepancies in activity and identification in the State's database.

- B. Recommendations were provided to TRRC's consultants to coordinate with the state, federal agency, coal mine and coalbed methane company biologists to gather complimentary data on bald eagle use and productivity in the Tongue River Corridor. The construction and operation of the Tongue River Railroad with other cumulative activities may adversely affect the bald eagle and its habitat in the Tongue River Corridor. As stated in the Service's 1995 Biological Opinion (U.S. Fish and Wildlife 1995) and within comments on the DSEIS, incidental take was, and is expected to occur during construction and operation of the Tongue River Railroad. When incidental take is anticipated, the terms and conditions must include provisions for monitoring project activities to determine the actual project effects on listed fish or wildlife species (50 CFR 402.14(i)(3)). Monitoring as described by the Montana Bald Eagle Working Group (MBEWG) is necessary to evaluate the affects of those activities. The MBEWG recommends surveys to determine occupancy, activity and results of all breeding attempts in the population (MBEWG 1994). Productivity surveys may require two flights to determine nestlings and fledglings. Montana Fish, Wildlife and Parks (FWP) can only survey for activity in early April and for fledglings in May. It is therefore recommended that TRRC compliment the states' surveys with March occupancy and May nestling surveys. These surveys should start in 2006 and run each year until construction of the railroad, and during operation of the railroad until maximum number of railroad cars and movements are reached.
- C. We also recommend that TRRC continue with winter surveys annually, up to construction and operation to assess impacts to winter roosts. Current and past winter use locations should be mapped and impacts analyzed in reference to construction and operation of the railroad. A prescribe buffer only identifies a level of risk of a deleterious impact. Loss of wintering habitat may not be limited to the direct loss of 30 acres of tree/shrub cited in your Biological Assessment. Disturbance may render many more acres unsuitable as winter roost habitat. The Service notes TRRC's willingness to purchase tracts of cottonwoods identified as important roost habitat for conservation.
3. Our concerns on the possible impact of the Tongue River Railroad on pallid sturgeon at the Miles City Fish Hatchery (MCFH) were presented in comments to the DSEIS. Montana Fish, Wildlife and Parks also had concerns and stated, "the studies commissioned by Womack, did not address FWP concerns relating to MCFH." Montana Fish, Wildlife and Parks has expressed that they will do the studies necessary to provide sound science to assure that zero impacts resulting from the construction and operations of TRR. Without the additional information requested by FWP, the Service can not concur with your current determination of effects of the Tongue River Railroad (TRR) on pallid sturgeon.
4. As mentioned in our comments to the SEA, all cumulative impacts need to be included in your analysis. Besides the "effects of the action," the aggregate effects of factors under the "environmental baseline," and "cumulative effects" in the action area must be analyzed. This

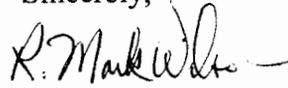
includes the Reasonable Foreseeable Development scenario on Coal Bed Methane Gas production along the Tongue River Corridor. Incidental take was anticipated and given for Coal Bed Methane production in the Powder River Basin (USFWS 2002), and therefore needs to be included in your determination. Additionally, and as cited in the Biological Opinion (USFWS 1995), Tongue River Dam operations could affect use of those waters by prey species, or affect the maintenance of floodplain forest required by bald eagles for nesting and roosting.

5. The STB has requested a biological opinion from the Service, although the SEA concluded that the construction of the proposed Western Alignment, with recommended mitigation measures, is not likely to adversely affect the bald eagle. Formal consultation is necessary only if a "may affect" situation exists. Please review your determination
6. The Service currently recognizes only nine counties in Montana as having potential for whooping crane occurrence. These are Sheridan, Roosevelt, Wibaux, Custer, Fallow, McCone, Dawson, Richland, and Valley Counties. Therefore, the whooping crane does not have to be included in your assessment.

The formal consultation process for the project will begin when we receive all of the necessary information, or a statement explaining why that information cannot be made available. We will notify you when we receive this additional information. Our notification letter will also outline the dates within which formal consultation should be complete and the biological opinion delivered on the proposed action.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to call Lou Hanebury in our Billings Sub Office at 406-247-7367.

Sincerely,



R. Mark Wilson
Field Supervisor

cc: USFWS, Billings, MT (Attn: Lou Hanebury)
USFWS, Denver, CO. (Attn: Connie Young-Dubousky)
DOI, Office of the Secretary, Denver, CO (Attn: Robert Stewart)
EPA, Helena, MT. (Attn: Steve Potts)
MTFWP, Helena, MT. (Attn: Gary Bertellotti)
MTFWP, Billings, MT. (Attn: Allison Putniak)
Circle Point, San Francisco, CA (Attn: Mary Bean)

References

- U.S. Fish and Wildlife Service. 1995. Biological opinion on Tongue River Railroad Company's additional rail line from Ashland to Decker, Montana. Montana Field Office. Helena, Montana. 18 pp.
- U.S. Fish and Wildlife Service. 2002. Final Biological Opinion for Coal Bed Methane (CBM) Production in Blaine, Gallatin, Park, Carter, Powder River, Custer, Rosebud, Treasure, Wheatland, Sweet Grass, Stillwater, Carbon, Golden Valley, Musselshell, Yellowstone, and Big Horn Counties Montana Field Office, Helena.