

#E1-2667



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

**Ecological Services  
5353 Yellowstone Road, Suite 308A  
Cheyenne, Wyoming 82009**

In Reply Refer To:  
ES-61411/W.24/WY07TA0078

JAN 10 2007

Ms. Kelly Farrell  
Environmental Scientist  
c/o DM&E Railroad  
140 North Phillips Avenue  
Sioux Falls, SD 57104

Dear Ms. Farrell:

Thank you for your telephone call of December 5, 2006, regarding the proposed construction and operation of the Dakota, Minnesota and Eastern Railroad (DM&E) Company's Powder River Basin Expansion Project (Project) in south-central Minnesota, southwest South Dakota, and east-central Wyoming. You have requested our review and update of the list of Federally endangered, threatened, proposed, and candidate species potentially affected by the project. Additionally, you requested clarification regarding the continued applicability of portions of the U.S. Fish and Wildlife Service's (Service) October 26, 2001, biological and conference opinion for the project (2001 BO/CO) as they apply to the mountain plover (*Charadrius montanus*). We are providing the following information in accordance with the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*).

### Species List

The Service originally provided a species list for use in preparing the biological assessment for the Project to Steve Thornhill of Burns and McDonnell on June 12, 1998. However, the 1998 list provided by the Service included only species likely to occur in Wyoming and South Dakota, but not Minnesota. The Surface Transportation Board (STB) addressed a more complete list of species in its August 2000 Biological Assessment for the Project (enclosed). The Service has reviewed the list of species addressed in the STB's August 2000 Biological Assessment for the Project and provides the following information.

Few changes have occurred regarding the status of listed species addressed in the 2000 Biological Assessment. On July 27, 2004, critical habitat was designated for the Topeka shiner (*Notropis topeka*) (69 FR 44736). The Final Rule can be accessed at <http://mountain-prairie.fws.gov/species/fish/shiner/FRtshinerfinalCH.pdf>. Additionally, we have enclosed a map of critical habitat in Minnesota and *Recommendations for Construction Projects Affecting Waters Inhabited by Topeka Shiners (Notropis topeka) in Minnesota*.

Some changes may have occurred in the actual distribution of listed species within the project area. The natural heritage programs within each state should have the most current information on species locations. For example, please check with Minnesota Department of Natural Resources Natural Heritage Program for most recent information regarding bald eagle nest locations and prairie bush clover and western prairie fringed orchid locations in Minnesota, as they may have completed additional survey work since 2001.

The species list should also be adjusted to reflect some changes regarding those species that are proposed or candidates for listing under the Act. The mountain plover is no longer proposed for listing under the Act, nor does it have candidate status. Thus, the mountain plover can be removed from the species list. The mountain plover is discussed in more detail below. The swift fox (*Vulpes velox*), sturgeon chub (*Macrohybopsis gelida*), and black-tailed prairie dog (*Cynomys ludovicianus*) are no longer candidates for listing under the Act and can be removed from the species list. However, the Dakota skipper (*Hespera dacotae*) should be added as a candidate in Minnesota and South Dakota. Information regarding the Dakota skipper can be found at <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?sPCODE=I011>, with a link to an in-depth status review ([http://ecos.fws.gov/docs/candforms\\_pdf/r3/I011\\_I01.pdf](http://ecos.fws.gov/docs/candforms_pdf/r3/I011_I01.pdf)).

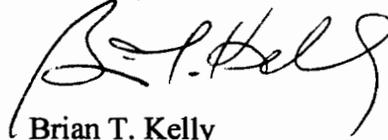
### **Mountain Plover**

You have specifically asked whether the reasonable and prudent measures identified in the 2001 BO/CO to minimize the impacts of incidental take of mountain plovers still apply, since the mountain plover is no longer proposed for listing under the Act. The prohibitions against taking a listed species found in section 9 of the Act do not apply until the species is listed. Since the proposal to list the mountain plover was never finalized but rather was withdrawn on September 9, 2003 (68 FR 53083), the Service did not confirm the Conference Opinion as a Biological Opinion and the reasonable and prudent measures, with their implementing terms and conditions, identified in the 2001 BO/CO never became non-discretionary. Therefore, you are not required to implement the terms and conditions for the mountain plover to maintain compliance with the Act. However, the mountain plover is a migratory bird and, as such, does have protection under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703.

The MBTA, prohibits the taking of any migratory birds, their parts, nests, or eggs except as permitted by regulations and does not require intent to be proven. Section 703 of the MBTA states, "Unless and except as permitted by regulations ... it shall be unlawful at any time, by any means or in any manner, to ... take, capture, kill, attempt to take, capture, or kill, or possess ... any migratory bird, any part, nest, or eggs of any such bird..." Work that could lead to the take of a migratory bird including an eagle, their young, eggs, or nests should be coordinated with our office before any actions are taken. Removal or destruction of such nests or causing abandonment of a nest could constitute violation of the above statute. No permits will be issued for an active nest of any migratory bird species, unless removal of an active nest is necessary for reasons of human health and safety. Therefore, we recommend you maintain DM&E's existing commitment to survey for mountain plovers prior to ground disturbance and implement timing restrictions if nests are found, in accordance with the most current guidance provided by the Service.

Thank you for your efforts to ensure the conservation of threatened and endangered species in Wyoming. If you have any questions regarding this letter or your responsibilities under the Act or MBTA, please contact Mary Jennings at (307) 772-2374, extension 232.

Sincerely,



Brian T. Kelly  
Field Supervisor  
Wyoming Field Office

Enclosures (3)

cc: FRA, Associate Administrator, Railroad Development, Washington, D.C. (M. Jachmetz)  
STB, Section of Environmental Analysis, Washington, D.C. (V. Rutson)  
WGFD, Non-Game Coordinator, Lander (B. Oakleaf)  
WGFD, Statewide Habitat Protection Coordinator, Cheyenne (V. Stelter)

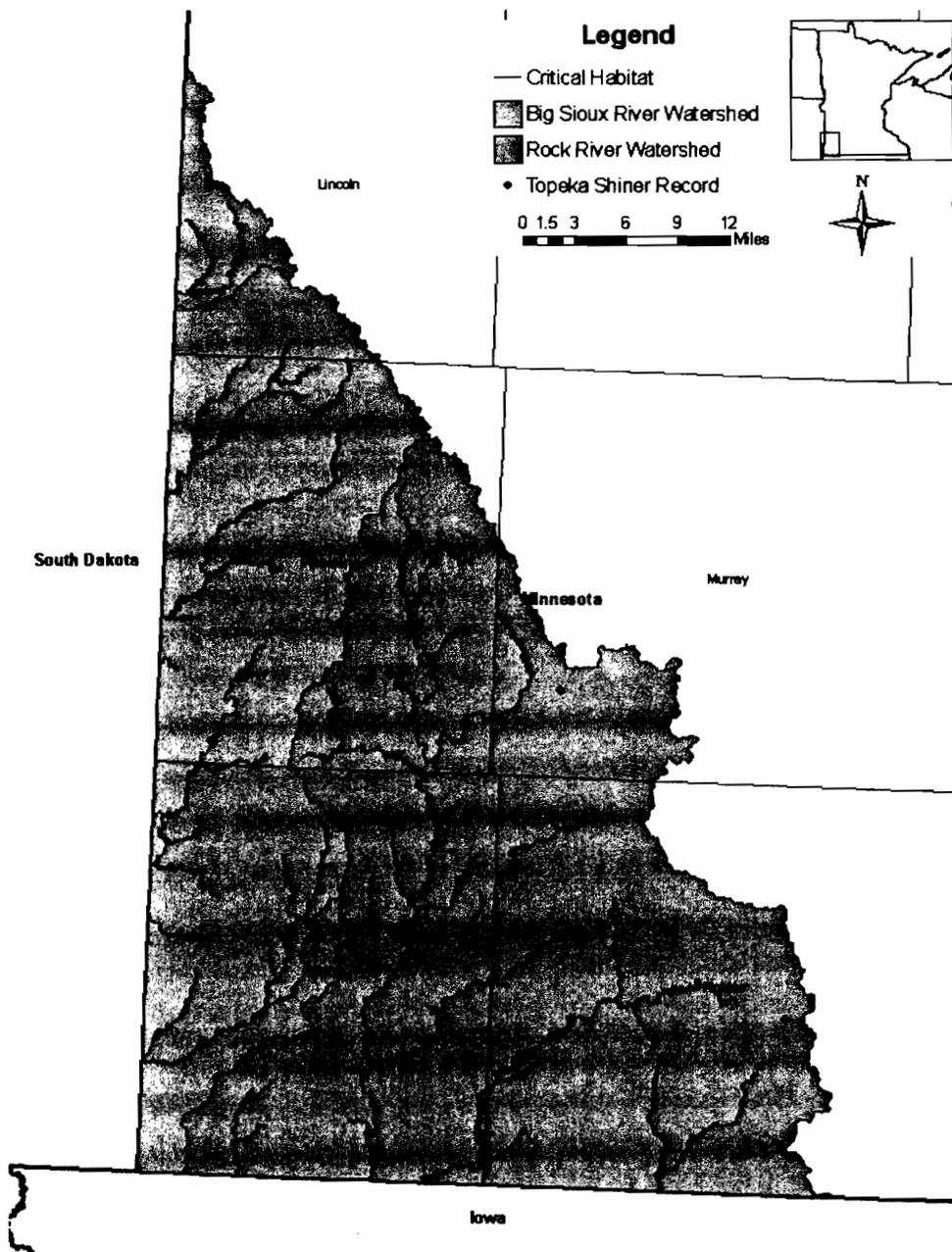


**Preliminary Determination of Effects to Federally Listed Endangered, Threatened, Proposed, Candidate and Petitioned Species**

TABLE 0-1

Species	Rebuild in MN and SD		New Build in Minnesota		B	New Build Alternatives in South Dakota and Wyoming			
	Estading		Manikato	Owatonna		C	Phaney Flat	W G Flat	D
Black-footed ferret	No Effect	No Effect	No Effect	No Effect	Likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect
Piping plover	No Effect	No Effect	No Effect	No Effect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect
Whooping crane	No Effect	No Effect	No Effect	No Effect					
Interior least tern	Not likely to adversely affect	Not likely to adversely affect	No Effect	No Effect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect
Topeka shiner	Not likely to adversely affect	Not likely to adversely affect	No Effect	No Effect	No Effect	No Effect	No Effect	No Effect	No Effect
Pallid sturgeon	Not likely to adversely affect	Not likely to adversely affect	No Effect	No Effect	No Effect	No Effect	No Effect	No Effect	No Effect
American burying beetle	Not likely to adversely affect	Not likely to adversely affect	No Effect	No Effect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect
Minnesota dwarf trout lily	No Effect	No Effect	No Effect	No Effect					
Higgins' eye pearl mussel	No Effect	No Effect	No Effect	No Effect					
Karnet blue butterfly	Not likely to adversely affect	Not likely to adversely affect	No Effect	No Effect	No Effect	No Effect	No Effect	No Effect	No Effect
Use ladies'-tresses orchid	No Effect	No Effect	No Effect	No Effect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect
Prairie bush-clover	Not likely to adversely affect	No Effect	No Effect	No Effect	No Effect	No Effect			
Leedy's roseroot	No Effect	No Effect	No Effect	No Effect					
Western prairie fringed orchid	Not likely to adversely affect	No Effect	No Effect	No Effect	No Effect	No Effect			
Bald eagle	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect					
Mountain plover	No Effect	No Effect	No Effect	No Effect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect
Swift fox	No Impact	No Impact	No Impact	No Impact	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect
Sturgeon club	No Impact	No Impact	No Impact	No Impact	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect
Black-tailed prairie dog	No Impact	No Impact	No Impact	No Impact	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect	Not likely to adversely affect





**Figure 1. Topeka shiner records and critical habitat in Minnesota. U.S. Fish and Wildlife Service (Service ) only designated critical habitat in stream reaches where Topeka shiner had been recorded as of August 2002, when it first proposed the designation of critical habitat in Minnesota. Surveys conducted after August 2002 found Topeka shiners in additional stream reaches, including some that the Service had not proposed as critical habitat. Therefore, some records do not occur in critical habitat. Surveys for this species are limited and ongoing. Therefore, Topeka shiners are likely to occur in additional areas and stream reaches that are not indicated on this map. Nevertheless, surveys for this species outside of the Rock River or Big Sioux River watersheds seem to strongly indicate that the species is limited to these two watersheds in Minnesota. For information on Topeka shiner distribution in a specific location, contact U.S. Fish and Wildlife Service (612/725-3548).**



# **Recommendations for Construction Projects Affecting Waters Inhabited by Topeka Shiners (*Notropis topeka*) in Minnesota**

**U.S. Fish and Wildlife Service  
Twin Cities Field Office  
(612) 725-3548**

## **Background**

Topeka shiner (*Notropis topeka*) occurs throughout the Big Sioux and Rock River Watersheds in five counties in southwestern Minnesota (Figure 1). The U.S. Fish and Wildlife Service (Service) listed Topeka shiner as an endangered species in 1998 and designated critical habitat<sup>1</sup> for it in 2004. The Endangered Species Act (ESA) prohibits the taking<sup>2</sup> of this species.

## **Endangered Species Act Requirements for Actions in Topeka Shiner Habitat**

### **Federal Agency Actions**

Federal agencies or their designated non-federal representatives must consult with the Service on any action that they fund, authorize, or carry out that may affect Topeka shiner or its critical habitat. If an agency proposes to implement an action that is likely to result in adverse effects to Topeka shiner, it must undergo formal consultation with the Service. If the agency determines that an action may affect Topeka shiners, but that those effects are not likely to be adverse, it may avoid formal consultation by receiving written concurrence on this determination from the Service.

### **Private or Local (Non-federal) Actions**

Private landowners, corporations, state or local governments, and other non-federal entities or individuals who wish to conduct activities that might incidentally harm (or “take”) Topeka shiners must first obtain an incidental take permit from the U.S. Fish and Wildlife Service (Service). To determine whether an action may require an incidental take permit, coordinate with the Service when planning actions that may affect streams or off-channel habitats in the

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<sup>1</sup> See 69 Federal Register 44,736 (July 27, 2004) or <http://www.fws.gov/midwest/endangered/fishes/index.html#topeka> for further information about Topeka shiner critical habitat.

<sup>2</sup> The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

Rock River or Big Sioux River watersheds in Minnesota. Contact the Service's Twin Cities Field Office (612/725-3548) for further information or see the following website for information regarding Endangered Species permits -- <http://endangered.fws.gov/permits/index.html?#forms>.

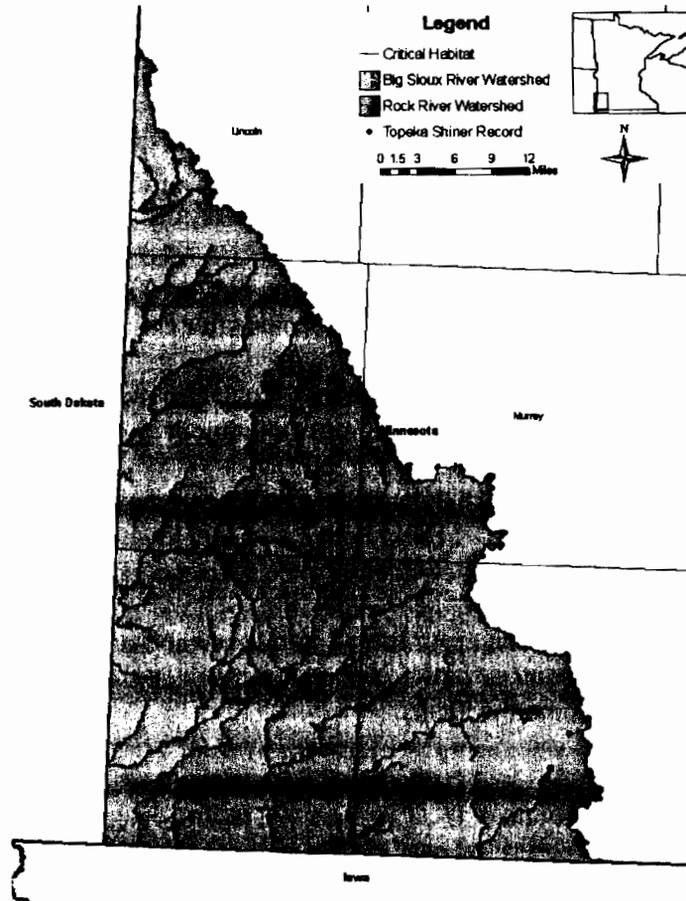
### **Project Recommendations**

The following recommendations are provided to help design actions that would avoid or minimize adverse effects to Topeka shiner. These recommendations may not address every way in which proposed actions may affect this species and may not preclude the need for formal consultation for federal actions or for an incidental take permit for non-federal actions. Therefore, we highly recommend that you coordinate early in the planning process with the Service's Twin Cities Field Office (612/725-3548) when contemplating any action that may affect streams or associated off-channel habitats (oxbows, abandoned channels, etc.) in the Big Sioux River or Rock River watersheds in Minnesota (Fig. 1).

1. Ensure that contractors and subcontractors understand all permit provisions that are necessary to avoid or minimize adverse effects to Topeka shiners.
2. Do not dewater stream reaches or temporarily divert streams for construction.
3. Do not conduct in-stream work before August 15 to avoid disrupting Topeka shiner spawning.
4. Follow all applicable requirements and best management practices for stormwater and erosion control – for example, requirements contained within stormwater permits from Minnesota Pollution Control Agency (MPCA). Useful resources for designing effective stormwater and erosion control include the MPCA Stormwater Best Management Practices Manual (see <http://www.pca.state.mn.us/water/pubs/sw-bmpmanual.html>) and the Minnesota Department of Transportation Erosion Control Handbook for Local Roads (see <http://www.lrrb.gen.mn.us/PDF/200308.pdf>). Other resources are available at <http://www.pca.state.mn.us/water/stormwater/stormwater-c.html#factsheets>. General suggestions for minimizing effects of erosion on Topeka shiners are shown below.
5. Minimize removal of riparian (streamside) vegetation; such removal should occur sequentially as needed over the length of the project.
6. Mulch areas of disturbed soils and reseed promptly.
7. Implement appropriate erosion and sediment prevention measures to the maximum extent practicable. Inspect devices frequently to ensure that they are effective and in good

repair, especially after precipitation.

8. Leave existing features, such as bridge abutments, retaining walls, and riprap, in place as much as is feasible.
9. Ensure that erosion prevention measures are in place and in adequate condition when leaving work site.
10. Design and install instream structures (e.g., box culverts) in a manner that will not impair passage of Topeka shiners and other fish species after construction is completed.
11. Do not operate motorized vehicles instream. Excavation, culvert placement, etc. should be conducted from streambanks outside of standing or flowing water.
12. Backfill placed in the stream shall consist of rock or granular material free of fines, silts, and mud. Machinery parts (i.e., backhoe buckets, etc.) shall be cleaned of all such material and free of grease, oil, etc. before their instream use.
13. Prevent materials and debris from falling into the water during construction. If materials or debris fall into the water or into riparian areas retrieve them promptly by hand or with equipment working from the banks.
14. If the project is modified, or if field conditions change, the applicant or agency representative should contact U.S. Fish and Wildlife Service before proceeding.



**Figure 1. Recorded occurrences of Topeka shiner and officially designated critical habitat in Minnesota. [See 69 Fed. Reg. 44,736 (July 27, 2004) or <http://www.fws.gov/midwest/endangered/fishes/index.html#topeka> for further information about Topeka shiner critical habitat.] U.S. Fish and Wildlife Service (Service) designated critical habitat only in stream reaches where Topeka shiner had been recorded as of August 2002, when critical habitat was originally proposed. Surveys conducted after August 2002 have found Topeka shiners in additional locations, including some that the Service had not proposed as critical habitat. Therefore, some records shown above occur outside of officially designated critical habitat. Surveys for this species are limited and ongoing. Although Topeka shiners are likely to be found in additional sites not indicated on this map, it is unlikely that the species occurs outside of the Rock River or Big Sioux River watersheds. For information on potential Topeka shiner occurrence in a specific location, contact U.S. Fish and Wildlife Service (612/725-3548).**