



# Montana Fish, Wildlife & Parks

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Ref: DO0127-05  
March 29, 2005

Mr. Patrick Davison  
Tongue River Railroad  
P.O. Box 80902  
Billings, MT 59108-0902



Dear Mr. Davison:

This letter is written in response to your letter of March 11, 2005 regarding the meeting on March 8 to discuss issues surrounding the issuance of an easement across Fish, Wildlife and Parks (FWP) Miles City Hatchery for the Tongue River Railroad (TRR). As expressed in the March 8 meeting, FWP also believes with further discussion/negotiation that mutually agreed to solutions can be found to allow issuance of an easement across the FWP Miles City Hatchery property. Your letter summarizes the discussion into four points, which are responded to below.

1. FWP has provided comments to the Surface Transportation Board (STB) regarding the Supplemental EIS. FWP believes the comments were appropriate for STB consideration in its Supplemental Review. The STB must make the determination whether there is a need for additional studies to complete the EIS based on all of the information available. As the decision-maker, STB will ultimately make the determination on the issuance of a permit.

Rep. Lange floated the idea of some type of tax/assessment on coal being transported via the TRR. Those tax/assessment revenues could be deposited in an account earmarked for mitigation of impacts to fish, wildlife and recreation by the TRR. FWP applauds Rep. Lange's idea and believes it is worthy of further consideration.

2. FWP concurs with the points enumerated in #2. However, TRR needs to be aware that FWP currently holds three conservation easements on private land that will also be impacted by right of way needs. Two easements are on land owned by the Hirsch Ranch and the third is owned by the Bice Ranch. TRR negotiations with these landowners will require additional coordination with FWP and mitigation of impacts to the conservation values protected by the easements. If copies of these conservation easements are needed, please let FWP know.
3. FWP concurs that there is no empirical evidence to demonstrate whether vibrations caused by the train movement will create biological impacts. FWP has expressed that the studies conducted by TRR did not address all of FWP's concerns, thus the continued interest in conducting the necessary monitoring studies to make this determination. These concerns were not just from FWP Fisheries personnel, but also from a Department of Natural Resources and Conservation engineering review of the Womack study (Robert Kingery, April 22, 1999, attached). FWP cannot back away from its responsibility to ensure that the proposed line does not adversely affect the Miles City Hatchery. FWP and TRR need to agree to the appropriate equipment and methodology necessary to establish baseline and future monitoring of vibration at the facility. If the TRR is constructed and causes increased vibration above the baseline that is linked to reduced production at the hatchery, FWP expects TRR to assume responsibility for that impact and to

mitigate and/or compensate FWP for the reduction. This will be a condition of any easement across the Miles City Hatchery as is discussed later in this letter.

4. FWP and the sportsmen and women of Montana have invested over \$10 million dollars in the Miles City Hatchery over the past 20 years to maintain its production capabilities. Total replacement of the hatchery would probably cost in the neighborhood of \$25 million. The hatchery produces fish that benefit the recreational economy of many towns in eastern Montana. FWP has a responsibility to protect that investment. Not surprisingly, indeed there is concern about the possibility of a derailment, and how the impact of a derailment will be mitigated. However unlikely a derailment may be, FWP believes that the responsibility to remediate any derailment should be a condition of the easement.

In addition to potential stress impacts and derailment concerns at the hatchery, TRR should be aware that the hatchery's physical improvements were made partially with federal funds provided by the U. S. Fish and Wildlife Service Wallop Breaux Act. These improvements must continue to serve the purpose for which the funding was provided. If they do not, for whatever reason, then they must be replaced with equally useful improvements or repayment made to the granting agency. In short, if the usefulness of improvements made with federal money is diminished, then the federal program would have to be compensated in some way for the loss. Mitigation usually either means providing replacement property of equal or greater program value or outright payment for damages. FWP takes this obligation very seriously as failure to address federal aid issues can reach beyond the individual site impacts to the entire agency's federally funded programs.

As requested at the March 8 meeting, FWP will begin the process for granting an easement across FWP lands. The process involves several steps including: obtaining a current appraisal of the property to be impacted (TRR will be responsible for the cost of the appraisal); negotiating the terms of the easement; addressing the federal aid requirements for disposition of property acquired, upgraded or maintained with federal funds; preparing an environmental assessment and soliciting public comment on the easement; and presenting the proposed easement to the FWP Commission for its action.

Negotiation of the terms of the easement will include:

- a. Installation of the appropriate equipment and data collection to establish a baseline for vibration now experienced throughout the hatchery. Sustained monitoring will be required during construction and for a period of time after TRR is in operation.
- b. Provisions that hold TRR responsible for mitigation of any impacts experienced as a result of construction or TRR operation. These provisions should describe mitigations that may be utilized. Because of the uniqueness of the hatchery operation, FWP believes that clear language in the easement regarding mitigations would be more appropriate than the STB arbitration process. With TRR's confidence that there will be no impacts to the hatchery from the TRR operation, there should not be concerns with more specific commitments to mitigation. FWP continues to believe that TRR putting up a bond sufficient to finance moving of the hatchery elsewhere or to mitigate any damages/loss in production at the current site would alleviate most of the concerns that still exist and should be seriously considered as an alternative.
- c. A one-time up-front easement payment and/or a provision for an annual fee to be paid to FWP by TRR for the value of the land taken, damages and depreciation, and any impediments to additional remaining lands as a result of the easement. Since the hatchery improvements were constructed, updated and maintained with federal aid funds, the federal aid requirements for

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disposition of property encumbered with federal aid dollars must also be met, if appropriate. FWP is requesting further information and guidance from the United States Fish and Wildlife Service on what the federal aid requirements would be in this instance.

- d. A provision that if the TRR is not completed, and the rights under the easement not fully exercised within five years, or if at any time the rail line ceases to operate for a full year, the easement will be null and void, and TRR shall be responsible for removing any track and appurtenances and returning the lands to pre-existing conditions.
- e. BLM approval of the easement grant by FWP. A provision in the 168 acre 1987 land patent issued by the USA to FWP requires that if the land upon which the hatchery is located ever ceases to be used for hatchery purposes, it will revert to the USA. Therefore, any grant of easement to the TRR will need to be approved by the BLM prior to FWP approval. A 1958 deed for 70 acres was granted to FWP from Miles City. Miles City acquired that land via federal patent also; therefore, the stipulations in that patent must be thoroughly examined to assure FWP that any easement granted will be in compliance with that original patent also. If TRR needs copies of the acquisition documents, please let me know.

FWP will keep TRR apprised of the status of the easement review process. The primary contact for status reviews will be Debby Dils, Land Section Supervisor (406-444-3939). A copy of this letter has been forwarded to the STB per your request that FWP update them on the progress of our discussions.

Sincerely,



M. Jeff Haggner  
Director

Enc.

c: Rep. Gary Matthews  
Rep. Michael Lange  
Mike Volesky  
Steve Doherty  
Surface Transportation Board *w/enc*  
Debby Dils