



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Ecological Services  
Nebraska Field Office  
203 West Second Street  
Grand Island, Nebraska 68801

June 20, 2008

**FWS-NE: 2008-441**

Gregory F. Suber, Chief  
Environmental Review Branch  
U.S. Nuclear Regulatory Commission  
Mail Stop T-8F05  
Washington D.C. 20555-0001

**RE: Technical Assistance for Information Regarding Federally Endangered and Threatened Species and Critical Habitat Potentially Affected by the Proposed License Renewal and License Amendment for Crow Butte Resources, Inc, Crawford, Dawes County, Nebraska**

Dear Mr. Suber:

**The comments and recommendations in this letter are provided as technical assistance only to assist you in your planning process to avoid or minimize adverse impacts to federal trust fish and wildlife resource caused by the subject project. This letter is not a concurrence by the U.S. Fish and Wildlife Service (Service) under our authorities. Further coordination and consultation is needed once additional information is provided to the Service.**

This responds to your May 15, 2008, request for comments and concurrence from the Service regarding the subject project. The Service has responsibility, under a number of authorities, for conservation and management of fish and wildlife resources. Chief among the federal statutes with which our office deals with are the Endangered Species Act (ESA) of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*), Fish and Wildlife Coordination Act (FWCA) (488 Stat. 401; 16 U.S.C. 661 *et seq.*), Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 688-688d, as amended), and Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712, as amended). Compliance with all of these statutes and regulations are required for compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321-4347). In addition to these statutes, the Service has authority under several other legislative, regulatory, and executive mandates to promote the conservation of fish and wildlife resources for the benefit of the American public.

### **Endangered Species Act (ESA)**

Pursuant to section 7 of the Endangered Species Act (ESA) of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*), every federal agency, in consultation or conference with the Service, is required to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any federally listed or proposed species and/or result in the destruction or

adverse modification of designated and/or proposed critical habitat. In accordance with section 7(a) (2) of ESA, the lead federal agency should determine if any federally listed threatened or endangered species and/or designated/proposed critical habitat would be directly and/or indirectly affected by this proposed project. The assessment of potential impacts (direct and indirect) must include an “affect” or “no effect” determination and be presented to the Service in writing. If the Service agrees with the lead federal agency’s determination, this office would provide a letter of concurrence. If federally listed species and/or designated/proposed critical habitat would be adversely affected by this action, the lead federal agency would need to continue section 7 consultation with the Service prior to making any irretrievable or irreversible commitments of resources in support of the proposed project. In accordance with section 7 of ESA, the Bureau of Indian Affairs (BIA) has determined that the proposed controlled burn projects will not affect federally listed species.

In accordance with section 7 of ESA, enclosed is a list entitled, “***Federally listed Threatened and Endangered Species and Designated Critical Habitat Occurring in Nebraska.***” The Service recommends that the lead federal agency consider the information provided in this list with regard to making its assessment of potential impacts of the proposed project on federally listed species and designated critical habitat and in making the “affect/no affect determination.” Further, the Service recommends that the lead federal agency not limit its consideration of affect to just the above project information, but other potential affects as they become apparent during the course of other project studies and/or project development and modification. If it is determined that the proposed project may affect (beneficial or adversely) federally listed species or federally designated critical habitat, further consultation under section 7 of ESA with this office is required.

In addition, all federally listed species are also State-listed under the Nebraska Nongame and Endangered Species Conservation Act. Further, there maybe State-listed species affected by the proposed project that are not federally listed. To determine if the proposed project may affect State-listed species, the Service recommends that the project proponent contact Kristal Stoner, Nebraska Game and Parks Commission, 2200 N. 33<sup>rd</sup> Street, Lincoln, NE 68503-0370.

## **REVIEW, COMMENTS, AND RECOMMENDATIONS ON THE PROPOSED PROJECT ACTION UNDER OTHER FISH AND WILDLIFE STATUTES**

### **Bald and Golden Eagle Protection Act**

The BGEPA provides for the protection of the bald eagle (*Haliaeetus leucocephalus*) and golden eagle (*Aquila chrysaetos*) by prohibition, except under certain specific conditions, the taking, possession, and commercial use of such birds. The golden eagle is found in arid, open country with grassland for foraging in western Nebraska and usually near buttes or canyons which serve as nesting sites. Golden eagles are often a permanent resident in the Pine Ridge area of Nebraska. Bald eagles utilize mature, forested riparian areas near rivers, streams, lakes, and wetlands and occur along all the major river systems in Nebraska. The bald eagle southward migration begins as early as October and the wintering period extends from December-March. Additionally, many eagles nest in Nebraska from mid-February through mid-July. Disturbances within 0.5-mile of an active nest or within line-of-sight of the nest could cause adult eagles to discontinue nest building or to abandon eggs. Both bald and golden eagles frequent river systems in Nebraska during the winter where open water and forested corridors provide feeding, perching, and roosting habitats, respectively. The frequency and duration of eagle use of these habitats in the winter depends upon ice and weather conditions. Human disturbances and loss of wintering habitat can cause undue stress leading to cessation of feeding and failure to meet winter thermoregulatory requirements. These affects can reduce the carrying capacity of

preferred wintering habitat and reproductive success for the species. To comply with the BGEPA, it is recommended that the project proponent determine whether the proposed project would impact bald or golden eagles. If it is determined that either species could be affected by the proposed project, the Service recommends that the project proponent notify this office as well as the Nebraska Game and Parks Commission for guidance regarding avoiding adverse impacts to bald and golden eagles.

### **Migratory Bird Treaty Act**

Under MBTA activities in grassland, wetland, stream, and woodland habitats, and those that occur on bridges (e.g., which may affect swallow nests on bridge girders) that would otherwise result in the taking of migratory birds, eggs, young, and/or active nests should be avoided. Although the provisions of MBTA are applicable year-round, most migratory bird nesting activity in Nebraska occurs during the period of April 1 to July 15. However, some migratory birds are known to nest outside of the aforementioned primary nesting season period. For example, raptors can be expected to nest in woodland habitats during February 1 through July 15, whereas sedge wrens which occur in some wetland habitats normally nest from July 15 to September 10. If the proposed construction project is planned to occur during the primary nesting season or at any other time which may result in the take of nesting migratory birds, the Service recommends that the project proponent (or construction contractor) arrange to have a qualified biologist conduct a field survey of the affected habitats and structures to determine the absence or presence of nesting migratory birds. Surveys must be conducted during the nesting season. The Service further recommends that field surveys for nesting birds, along with information regarding the qualifications of the biologist(s) performing the surveys, be thoroughly documented and that such documentation be maintained on file by the project proponent (and/or construction contractor) until such time as construction on the proposed project has been completed.

The Service requests that the following be provided to this office prior to construction proceeding at the proposed project site if the above conditions occur. The purpose of the request is to assist the project proponent to avoid the unnecessary take of migratory birds and the possible need for law enforcement action:

- a) A copy of any survey(s) for migratory birds done in conjunction with this proposed project, if any. The survey should provide detail in regards to survey methods, date and time of survey, species observed/heard, and location of species observed relative to the proposed project site.
- b) Written description of any avoidance measures implemented at the proposed project site to avoid the take of migratory birds.
- c) Written description of any circumstances where it has been determined by the project proponent that one or more active bird nests cannot be avoided by the planned construction activities.

### **Fish and Wildlife Coordination Act**

The FWCA requires that fish and wildlife resources be given equal consideration in the planning, implementation, and operation of federal and federally funded, permitted, or licensed water resource development projects. This statute requires that federal agencies take into consideration the effect that the water related project would have on fish and wildlife resources, to take action

to prevent loss or damage to these resources, and to provide for the development and improvement of these resources. The comments in this letter are provided as technical assistance only and is not the document required of the Secretary of the Interior pursuant to Section 2(b) of the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 *et seq.*) on any required federal environmental review or permit. This technical assistance letter is valid only for the described conditions and will have to be revised if significant environmental changes or changes in the proposed project take place. In order to determine whether the effects to fish and wildlife resources from the proposed project are being considered under FWCA, the project proponent must notify the Service of how the comments and recommendations in this technical assistance letter are being considered into the proposed project.

#### Wetlands, Streams, and Riparian Habitats

If wetlands or streams will be impacted by the proposed project, a Department of the Army permit from the U.S. Corps of Engineers may be needed. The Service recommends that impacts to wetlands, streams, and riparian areas be avoided or minimized. If unavoidable impacts are to occur to aquatic habitats, the Service recommends that compensation (i.e., restoration of a degraded wetland or creation) occur for like wetland type at a ratio of 2:1 (acres of wetlands restored/created to acres of wetlands impacted). For unavoidable impacts to streams, the Service recommends that stream pattern, profile, and dimension be mitigated at a ratio of no less than 1:1 (stream length and number, pattern, and length of meanders created/restored versus stream length and number, pattern, and length of meanders impacted; sequence and number of pools and riffles created/restored versus sequence and number of pools and riffles impacted). Additionally, compensation for impacts to riparian habitats should occur at a minimum ratio of 3:1 (i.e., acres of riparian habitat replaces for acres of riparian habitat impacted). The 3:1 ratio is based on the loss of the habitat and the amount of time that will be required for planted trees to reach maturity.

#### Animal Passage and Aquatic Biota

Land use practices that allow soil to runoff into waterways following rainfall events cause the siltation of streams, and increase turbidity which can result in a lowering of water quality and thus, a loss in the diversity of natural aquatic systems. The Service recommends that the project proponent incorporate rigorous soil erosion control practices both during and after the proposed construction, including temporary construction activities or any other alignment procedures in order to avoid impacts to fish and other aquatic organisms. Culverts should also be constructed at elevations so as to not impede animal/fish movement (i.e. either new culvert installation or culverts used in a temporary crossing). The Service further recommends that the project proponent not alter or install culverts in any way that would result in reductions in current channel width. Additionally, the Service has enclosed recommended best management practices to minimize potential impacts to native fish and other aquatic resources, including spawning timeframes for Nebraska fish species.

#### **National Wildlife Refuges**

In Nebraska, the Service manages six refuges and one wetland management district under the National Wildlife Refuge System. Based on the information provided, the Service has determined that the proposed project does not appear to impact any of these seven wildlife areas.

Information contained in this letter represents the public interest for fish and wildlife resources and should warrant full consideration in the project planning process. The Service requests that no part of this letter be taken out of context and if reproduced, the letter should appear in its entirety.

The Service appreciates the opportunity to review and comment on the referenced project proposal. If you have any questions regarding these comments, please contact me at [John\\_Cochnar@fws.gov](mailto:John_Cochnar@fws.gov) or telephone number (308)382-6468, extension 20.

Sincerely,

A handwritten signature in black ink that reads "John Cochran". The signature is written in a cursive, flowing style.

John Cochran

Assistant Nebraska Field Supervisor

cc: NGPC; Lincoln, NE (Attn: Kristal Stoner)  
NGPC; Lincoln, NE (Attn: Carey Grell)

## Enclosure

### Federally Listed Threatened and Endangered Species and Designated Critical Habitat Occurring in Nebraska (June 2008)

Pursuant to section 7 of Endangered Species Act (ESA) of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*), every federal agency, in consultation or conference with the U.S. Fish and Wildlife Service (Service), is required to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any federally listed or proposed species and/or result in the destruction or adverse modification of designated and/or proposed critical habitat. In accordance with section 7(a) (2) of ESA, the lead federal agency should determine if any federally listed threatened or endangered species and/or designated/proposed critical habitat would be directly and/or indirectly affected by this proposed project. The assessment of potential impacts (direct and indirect) must include an "affect" or "no effect" determination and be presented to the Service in writing. If the Service agrees with the lead federal agency's determination, the Nebraska Ecological Field Office in Grand Island, Nebraska would provide a letter of concurrence. If federally listed species and/or designated/proposed critical habitat would be adversely affected by this action, the lead federal agency would need to continue section 7 consultation with the Service prior to making any irretrievable or irreversible commitments of resources in support of the proposed project or action.

Section 9 of ESA prohibits the taking of any federally listed endangered or threatened species. Section 3(18) of ESA defines take to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Our regulations (50 CFR 17.3) define harm to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. Harassment is defined as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering. The ESA provides for civil and criminal penalties for the unlawful taking of listed species. Exemptions to the prohibitions against take may be obtained through coordination with the Service in two ways: through interagency consultation for projects with federal involvement pursuant to section 7 or through the issuance of an incidental take permit under section 10(a)(1)(B) of ESA.

**Please note that the Service's position on a project under ESA cannot be assumed without our official written response. The following is a list of species under ESA that occur in Nebraska. This information should be used to determine whether a proposed action/project may affect a listed species or adversely modify critical habitat.**

#### LISTED SPECIES

##### 1. **American Burying Beetle (*Nicrophorus americanus*) - Endangered Species**

###### **Occurrence:**

Riparian corridors, grasslands, agricultural land. Recent records (1993-2003) are from **Antelope, Cherry, Custer, Blaine, Boone, Boyd, Brown, Dawson, Frontier, Garfield, Gosper, Holt, Keya Paha, Lincoln, Loup, Rock, Thomas, and Wheeler counties.**

2. **Black-Footed Ferret (*Mustela nigripes*) - Endangered Species**

**Occurrence:**

Prairie dog towns; no wild population known in Nebraska.

3. **Blowout Penstemon (*Penstemon haydenii*) - Endangered Species**

**Occurrence:**

This plant is found in blowouts in the Nebraska Sandhills and central Wyoming. There are extant populations in **Morrill, Box Butte, Sheridan, Garden, Grant, Hooker, Thomas, and Cherry counties.**

4. **Colorado Butterfly Plant (*Gaura neomexicana coloradensis*) - Threatened Species**

**Occurrence:**

Floodplains created and maintained by streams. Found along Lodgepole Creek (**Kimball County**) above Oliver Reservoir.

5. **Eskimo Curlew (*Numenius borealis*) - Endangered Species**

**Occurrence:**

Spring migrant; status unknown. Highest potential for occurrence in **Adams, Buffalo, Douglas, Hall, Hamilton, Holt, Howard, Lincoln, Madison, and York counties.**

6. **Interior Least Tern (*Sterna antillarum*) - Endangered Species and**

7. **Piping Plover (*Charadrius melodus*) - Threatened Species:**

**Occurrence:**

Nests on riverine sandbars and sand/gravel piles resulting from mining on Platte, Missouri, Elkhorn, Niobrara, and Loup rivers, and at Lake McConaughy. **Known to occur in Boyd, Brown, Buffalo, Butler, Cass, Cedar, Colfax, Cuming, Custer, Dakota, Dawson, Dixon, Dodge, Douglas, Gosper, Hall, Hamilton, Holt, Howard, Kearney, Keith, Keya Paha, Knox, Lincoln, Madison, Nance, Phelps, Platte, Polk, Rock, Sarpy, and Saunders counties.**

8. **Pallid Sturgeon (*Scaphirhynchus albus*) - Endangered Species**

**Occurrence:**

Missouri River and lower Platte River. Known to occur in **Boyd, Knox, Cedar, Dixon, Dakota, Thurston, Burt, Washington, Douglas, Sarpy, Cass, Otoe, Nemaha, Richardson, and Saunders counties.**

9. **Salt Creek Tiger Beetle (*Cicindela nevadica lincolniana*) - Endangered Species**

**Occurrence:**

Found in saline wetlands and saline streams in eastern Nebraska, namely northern **Lancaster County.**

**Critical Habitat:**

Federally designated critical habitat has been proposed for the Salt Creek tiger beetle in **Lancaster and Saunders counties.**

**10. Scaleshell Mussel (*Leptodea leptodon*) - Endangered Species**

**Occurrence:**

Found in 1982 and 2005 in Missouri River downstream from Gavins Point Dam.

**11. Topeka Shiner (*Notropis topeka*) - Endangered Species**

**Occurrence:**

Small headwater prairie streams with high quality and cool temperatures. Found in **Cherry and Madison Counties.**

**Critical habitat:**

Critical habitat has been designated for the Topeka shiner on the lower 6 miles of Taylor Creek in **Madison County.**

**12. Ute Ladies'-Tresses Orchid (*Spiranthes diluvialis*) - Threatened Species**

**Occurrence:**

Population (estimated 4,000 plants) confirmed in 1996 within Niobrara River floodplain, **Sioux County.**

**13. Western Prairie Fringed Orchid (*Platanthera praeclara*) - Threatened Species**

**Occurrence:**

This plant occurs in tall-grass prairie, wet meadows; populations in **Boone, Cherry, Garfield, Greeley, Hall, Holt, Lancaster, Loup, Madison, Otoe, Pierce, Rock, Saline, Sarpy, Seward, and Wheeler Counties.**

**14. Whooping Crane (*Grus americana*) - Endangered Species**

**Occurrence:**

Migrant, one bird summered in 1991; May occur in any Nebraska counties west of the 98th Meridian (**Adams, Antelope, Arthur, Blaine, Boone, Boyd, Brown, Buffalo, Butler, Chase, Cherry, Clay, Custer, Dawson, Fillmore, Franklin, Frontier, Furnas, Garfield, Gosper, Grant, Greeley, Hall, Hamilton, Harlan, Hayes, Hitchcock, Holt, Hooker, Howard, Jefferson, Kearney, Keith, Keya Paha, Knox, Lincoln, Logan, Loup, Madison, McPherson, Merrick, Nance, Nuckolls, Perkins, Phelps, Platte, Polk, Red Willow, Rock, Saline, Seward, Sherman, Thayer, Thomas, Valley, Webster, Wheeler, York counties**). Migration peaks in Late October and April.

**Critical Habitat:**

A strip of Platte River bottom with a north-south width of 3 miles, and I-80 as the north boundary, between Lexington and Shelton has been designated as **critical habitat** for the whooping crane.



## ENCLOSURE

### **Recommended Best Management Practices for Proposed Construction Activities Associated with Streams/Rivers in Nebraska:**

- Avoid earth moving activities or fill/bank armoring during native fish spawning periods from May 15 – July 31, construct stream crossings or other associated temporary embankments during low flow periods (likely August – October).
- Minimize work area at stream locations. The majority of the work (including heavy equipment and storage sites) should occur above the high bank line. Avoid driving equipment through the streambed.
- Implement comprehensive and effective erosion and sediment controls. These methods should be implemented and maintained for the duration of the project and considered at all stages of the project planning and design. Close attention is warranted for the placement and maintenance of temporary erosion control measures at the construction site to minimize sediment loading. These erosion/sediment control techniques should keep sediments from entering the stream and remain in place until work areas become re-vegetated and stable. Such erosion control measures may include properly placed sediment/silt screens or curtains and hay bales. Proper techniques are important to the placement of these types of structures and include trenching, staking and backfilling as well as using the appropriate number of bales. These techniques are best used in combination with each other rather than separately.
- Erosion and sediment controls should be monitored daily during construction to ensure effectiveness, particularly after storm events, and only the most effect techniques should be utilized. Clean, repair and replace structures as necessary.
- Exposed stream banks must be stabilized immediately after construction activity. Eroded surfaces should not be left exposed for greater than one day. If rain is predicted, no construction should commence unless eroded surfaces are immediately treated with geotextile fabric, mulch, seeding or some techniques that would stabilize the bank or exposed areas from eroding.
- Erosion repair and stream bank restoration should use appropriate bioengineering solutions.
- Develop and implement a hazardous materials safety protocol. This would include that all temporary storage facilities for petroleum products, other fuels and chemicals must be located and protected to prevent accidental spills from entering streams within the project area.

FISRWG. 1998. Stream Corridor Restoration: Principles, Processes, and Practices. By the Federal Interagency Stream Restoration Working Group (FISRWG) (15 Federal agencies of the U. S. Government). GPO item No. 0120-A; SuDocs No. A 57.6/2:EN 3/PT.653. ISBN-0-934213-59-3.