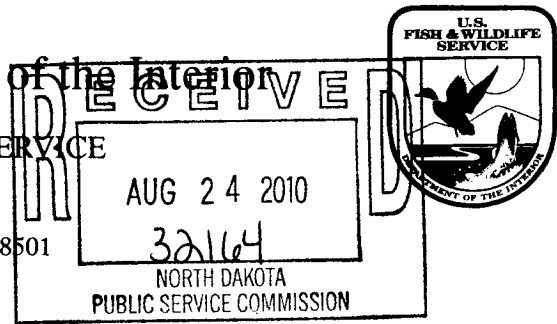




United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services  
3425 Miriam Avenue  
Bismarck, North Dakota 58501



AUG 20 2010

FROM DIRECTOR - RECLAMATION DIV.

Date: \_\_\_\_\_

Action: \_\_\_\_\_

Info. Only: \_\_\_\_\_

Info & File: \_\_\_\_\_

Mr. Kevin Cramer, Chairman  
Public Service Commission  
North Dakota State Capitol  
600 East Boulevard Avenue, Dept. 408  
Bismarck, North Dakota 58501-0480

Re: BNI Coal, Ltd. Revision No. 30, Permit  
BNCR-9702, Oliver County, North Dakota

Dear Mr. Cramer:

This letter is in regard to BNI Coal, Ltd.'s (BNI) application to revise Surface Coal Mining Permit No. BNCR-9702. The revision will allow BNI to add 676.48 acres in Sections 21, 29, and 32 of T. 142 N., R. 84 W. of Oliver County, North Dakota, to the western portion of the permit area. We offer the following comments under the authority of and in accordance with the Migratory Bird Treaty Act (16 U.S.C. 703 et Seq.), and the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.).

**High Value Habitat Avoidance**

Our review of the National Wetlands Inventory (NWI) maps and photographs indicates the proposed planning areas include a limited number of wetland basins. If construction routes intersect wetlands, streams, or rivers, the Corps of Engineers (Corps) may require a Department of the Army permit for the placement of dredge or fill material into waters of the U.S., including wetlands, or other impacts to navigable waters. We suggest you contact Mr. Dan Cimarosti, Regulatory Office, Corps of Engineers, 1513 South 12th Street, Bismarck, North Dakota 58504 (701-255-0015), to determine the Corps' permit requirements.

Construction activities should be conducted in a manner that will avoid or minimize impacts to fish and wildlife resources in the project area. The following recommendations are intended to reduce construction related impacts:

- Schedule land clearing activities for late summer through early winter so as not to disrupt waterfowl or other wildlife during the breeding season (February 1 to July 15). If land clearing is proposed to take place during the breeding season, the Service recommends that the project proponent arrange to have a qualified biologist conduct a field survey of the affected habitats to determine the presence of nesting migratory birds. If nesting

migratory birds are found, we request you contact this office, suspend construction, or take other measures, such as maintaining adequate buffers, to protect the birds until the young have fledged. The Service further recommends that field surveys for nesting birds, along with information regarding the qualification of the biologist(s) performing the surveys, and any avoidance measures implemented at the project site, be thoroughly documented and that such documentation be shared with the Service and maintained on file by the project proponent at least until such time as construction on the proposed project has been completed.

- Replace unavoidable loss of wetland habitat with functionally equivalent wetlands.
- Replant trees in naturally forested areas or riparian zones at a ratio of two trees planted for every one removed.
- Install and maintain appropriate erosion control measures to reduce sedimentation and water quality degradation of wetlands and streams near the project area.
- Reseed disturbed upland areas with native grass and forb species.

### **Migratory Birds**

The Migratory Bird Treaty Act prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the MBTA has no provision for allowing unauthorized take, the Service realizes that some birds may be killed during mine operation even if all reasonable measures to protect them are employed. The Service's Office of Law Enforcement carries out its mission to protect migratory birds through investigations and enforcement, as well as by fostering relationships with individuals, companies, and industries that have taken effective steps to minimize their impacts on migratory birds, and by encouraging others to enact such programs. It is not possible to absolve individuals, companies, or agencies from liability even if they implement avian mortality avoidance or similar conservation measures. However, the Office of Law Enforcement focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without regard for their actions or without following an agreement such as this to avoid take.

### **Threatened and Endangered Species**


If a Federal agency authorizes, funds, or carries out a proposed action, the responsible Federal agency, or its designated agent, is required to evaluate whether the action "may affect" listed species. If the Federal agency or its designated agent determines the action may likely adversely affect listed species, then the responsible Federal agency shall request formal Section 7 consultation with this office, or work with this office to remove the likely adverse effects before proceeding. Your determination of effects to listed species and concurrence by the Service should be completed prior to making any irretrievable or irreversible commitments with regard to your proposed project. If the evaluation shows a "no effect" determination to listed species, further consultation is not necessary.

Enclosed is a list of federally-listed threatened and endangered species that may be present within the proposed project's area of influence. This list fulfills the Service's requirements under Section 7 of the ESA. This list remains valid for 90 days.

Thank you for the opportunity to provide comments on the project proposal. If you have any questions or require additional information, please contact Micah Reuber of my staff at telephone number (701) 355-8507, or at the letterhead address.

Sincerely,



 Jeffrey K. Towner  
Field Supervisor  
North Dakota Field Office

Enclosure

FEDERAL THREATENED, ENDANGERED, AND CANDIDATE SPECIES  
AND DESIGNATED CRITICAL HABITAT FOUND IN  
OLIVER COUNTY, NORTH DAKOTA  
August 2010

**ENDANGERED SPECIES**

Birds

Interior least tern (*Sterna antillarum*): Nests along midstream sandbars of the Missouri and Yellowstone Rivers.

Whooping crane (*Grus Americana*): Aransas-Wood Buffalo Population (264 birds) occurs in North Dakota counties during spring and fall migration between breeding and wintering areas. Whooping cranes prefer to roost overnight in shallow open water wetland habitat with good visibility during migration stopovers.

Fish

Pallid sturgeon (*Scaphirhynchus albus*): Known only from the Missouri and Yellowstone Rivers. No reproduction has been documented in 15 years.

Mammals

Black-footed ferret (*Mustela nigripes*): Exclusively associated with prairie dog towns. No records of occurrence in recent years, although there is potential for reintroduction in the future.

Gray wolf (*Canis lupus*): Occasional visitor in North Dakota. Most frequently observed in the Turtle Mountains area.

**THREATENED SPECIES**

Birds

Piping plover (*Charadrius melodus*): Nests on midstream sandbars of the Missouri and Yellowstone Rivers and along shorelines of saline wetlands. More nest in North Dakota than any other state.

## **CANDIDATE SPECIES**

### Invertebrates

Dakota skipper (Hesperia dacotae): Found in native prairie containing a high diversity of wildflowers and grasses. Habitat includes two prairie types: 1) low (wet) prairie dominated by bluestem grasses, wood lily, harebell, and smooth camas; 2) upland (dry) prairie on ridges and hillsides dominated by bluestem grasses, needlegrass, pale purple and upright coneflowers and blanketflower.

## **DESIGNATED CRITICAL HABITAT**

### Birds

Piping Plover - Missouri River - Critical habitat includes sparsely vegetated channel sandbars, sand and gravel beaches on islands, temporary pools on sandbars and islands, and the interface with the river.