



# Public Service Commission

## State of North Dakota

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*sent via email and regular mail*

April 12, 2024

Mr. Luke Toso  
U.S. Fish and Wildlife Service  
3425 Miriam Avenue  
Bismarck, ND 58501-7926  
[luke\\_toso@fws.gov](mailto:luke_toso@fws.gov)

Dear Mr. Toso:

The Reclamation Division is in the process of reviewing Revision No. 11 and Renewal No. 2 to Surface Coal Mining Permit BNCR-1101 at the BNI Center Mine. Revision No. 11 updates various sections of the permit for the next 5-year permit term including the legal and financial section, operations and reclamation plans, ground water, surface water management, transportation, post-mining land uses, wildlife monitoring plan, and the worst-case bond estimate. The next permit term is from May 28, 2024 through May 28, 2029. The Reclamation Division recently approved Revision No. 8 to BNCR-1101 which included a permit addition area and plans for mining federal coal.

Reclamation Division staff used the USFWS decision support tool, IPaC, to realize species listed and designated critical habitats in and immediately adjacent to Permit BNCR-1101 and have prepared the attached draft written findings. Our office provided you with a notice of receipt of Renewal No. 2 and Revision No. 11 February 2, 2024 but we did not provide you with a copy of the Revision. A thumb drive copy of Revision No. 11 is attached.

Please review the attached findings and provide us with any comments prior to May 17, 2024.

If you have any questions, please contact this office.

Sincerely,

Jonathan Emmer  
Director  
Reclamation Division

Attachment

Center Mine\Permits\BNCR - 1101\Revisions & Renewals\No. 11 Ren 2\Rev11\_Ren2\_USFWS\_Concurrence\_ltr\_4-12-24

## Revision 11 to BNCR-1101 Species Specific Effects Finding

**Finding No. 9. The operations will not affect the continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitats [NDAC 69-05.2-10-03(6)(d)].**

Surface coal mining and reclamation activities will not jeopardize or adversely affect any proposed, threatened, or endangered species or proposed or designated critical habitat. No federal threatened, endangered, or proposed species have been observed within or adjacent to Permit BNCR-1101, and there are no proposed or designated critical habitats in or adjacent to the permit.

USFWS Information for Planning and Consultation (IPaC) identifies five threatened or endangered species, one candidate species, and designated piping plover critical habitat in Oliver County ND. The **whooping crane and northern long-eared bat** are listed as endangered; the **piping plover, red knot, and Dakota skipper** are listed as threatened; and the **monarch butterfly** is a candidate species for listing in Oliver County.

### **Whooping Crane – Endangered**

There is no suitable whooping crane stopover habitat in Permit BNCR-1101 and the permit is not within the whooping crane breeding or wintering ranges. It is conceivable that whooping cranes could fly over the permit and that they could utilize the upland native grassland and cropland at the mine, but this is unlikely given the absence of suitable wetland habitat in the permit and anthropogenic activities in the mine area. Therefore, the Commission finds that the proposed mining and reclamation activities will have “no effect” to the continued existence of the whooping crane.

### **Northern Long-Eared Bat – Endangered**

The northern long-eared bat is a medium-sized bat that is not common in North Dakota. Its historic range includes essentially all of North Dakota and it has been documented in the Little Missouri Badlands, Missouri River Valley, and the Turtle Mountains. The species range is limited to the major waterways in Oliver County, including Square Butte Creek and the lower reach of Hagel Creek, which are in or adjacent to Permit BNCR-1101. This species spends its winters in caves and underground mines called hibernacula. There are no known hibernacula in North Dakota, according to the federal register final rule listing. During the summer, northern long-eared bats roost singly or in colonies underneath bark, in cavities, or crevices of both live and dead trees.

Permit BNCR-1101 contains a limited amount of woodland acreage which consists of primarily isolated patches of tall shrub species such as buffalo berry and chokecherry. The permit does contain farmstead shelterbelts with trees that could potentially provide suitable habitat for the northern long-eared bat. There are very few trees along Hagel Creek and trees in the permit associated with Square Butte Creek are limited to wooded draws in the upper reaches of secondary drainages. A mine road crosses Hagel Creek south of the BNI shop office complex; otherwise, no mining related disturbance is planned in the permit on areas depicted as northern long-eared bat suitable habitat (range) along Hagel Creek or Square Butte Creek. BNI has language in the 2022-2023 wildlife monitoring report stating that they will limit their impact to trees during the northern long-eared bat maternity period from June 1 through July 31.

The northern long-eared bat is rare in North Dakota according to Dr. Erin Gillam, Professor of Biological Science, NDSU. In December 2021, Ms. Gillam prepared a report entitled *Distribution and Roosting Ecology of the Federally Threatened Northern Long-Eared Bat, Myotis septentrionalis, and the Little Brown Bat, Myotis lucifugus, in North Dakota*. The report concludes that the northern long-eared bat is not common in North Dakota and recommended that the range of the species be modified to only include badlands habitats of extreme western North Dakota. Therefore, it is highly unlikely that mining will have

any effect on the northern long-eared bat and the Commission finds that the proposed mining and reclamation activities will have “no effect” on the continued existence of the northern long-eared bat.

### **Piping Plover – Threatened**

There is no suitable habitat for the piping plover within or adjacent to the permit, which is generally characterized as sparsely vegetated shorelines usually associated with alkaline wetlands and sandbars and shorelines associated with major river systems. The Missouri River and Lake Sakakawea, designated piping plover critical habitat, are located at least 16 miles from the permit. The balance of the designated critical habitat is located north and east of the Missouri River. Mining activities may create sparsely vegetated habitat, but such habitats have only been used when the species’ natural shoreline habitat is adversely affected by high water. There is limited wetland acreage with sparsely vegetated shorelines in or adjacent to the permit revision addition area and the Commission finds that the proposed mining and reclamation activities will have “no effect” to the continued existence of the piping plover.

### **Rufa Red Knot - Threatened**

Rufa red knot is a robin-sized shorebird that migrates from south to north every spring and repeats the trip in reverse every fall from far-flung sites throughout the Western Hemisphere. This species is one of the longest-distance migrants in the animal kingdom. Rufa red knots begin their life cycle in the Arctic tundra and undertake their first migration on their own. Migration and wintering habitats include both high-energy ocean or bay front areas as well as tidal flats in more sheltered bays and lagoons. Available information suggests that rufa red knots use inland saline lakes as stopover habitat in the Northern Great Plains. The species range map includes portions of central North Dakota. In July of 2021, the USFWS proposed to designate critical habitat for the rufa red knot in areas outside of North Dakota. The permit area does not contain habitat for the rufa red knot and the Commission finds that the proposed mining and reclamation activities will have “no effect” on the continued existence of rufa red knot species.

### **Dakota Skipper – Threatened**

The Dakota skipper is a small butterfly that requires high-quality mixed or tallgrass prairie. Two habitat types have been identified as suitable for this species. Suitable habitat consists of a moist lowland bluestem prairie habitat type with wood lily, harebell, and smooth camas and a relatively dry upland prairie habitat type found on ridges and hillsides dominated with bluestem grasses, needlegrasses, and desirable native forbs such as purple coneflower. Oliver County was added to the list of counties in North Dakota where this species is believed to exist.

The permit does not contain any moist lowland bluestem prairie habitat and the dry upland sites are generally in reduced ecological condition according to native grassland sampling data in the permit. In 2019, BNI hired KDK Consulting to evaluate, document, and determine if any potential suitable Dakota skipper habitat was present in the Revision 8 addition area and other areas at the BNI mine. The report provided an assessment of the forb component in areas of potentially suitable habitat according to the USFWS 2018 Dakota Skipper North Dakota Survey Protocol. The report determined that the native grassland at the mine and Revision 8 addition area provided no suitable habitat for the Dakota skipper. The 2018 Dakota Skipper North Dakota Survey Protocol has been updated and replaced with the 2022 Dakota Skipper Survey Protocol. The 2022 Dakota Skipper Survey Protocol provides information to decide how, where, and when surveys may be warranted and clarifies that Type B habitat in North Dakota typically contains an association of little bluestem, big bluestem, needlegrasses, and western wheatgrass that is often invaded by Kentucky bluegrass. The updated survey protocol includes a species range map for North Dakota and a determination flow chart, Appendix C.

In March of 2019, the Bureau of Land Management finalized an Environmental Assessment for a federal coal lease by application (NDM-105513) that included lands Permit BNCR-1101. The Environmental Assessment made a finding of no significant impact, Center Mine DOI-BLM-MT-C030-2017-0088-EA.

The EA states that the USFWS was consulted during the EA process and that no threatened, endangered, or candidate plant species or critical habitats were identified, and that the proposed action was not expected to have any significant effects on fish or wildlife resources. The Reclamation Division has determined that previous native grassland species composition changes are not likely to have changed since previous vegetation assessments were completed and the Commission finds that the proposed mining and reclamation activities will have “no effect” on the continued existence of the Dakota skipper provided that BNI Coal continues to have qualified third-party consultants conduct surveys ahead of mining disturbance.

#### **Monarch Butterfly – Candidate Species**

On December 15, 2020, the US Fish and Wildlife Service found that adding the monarch butterfly to the list of threatened and endangered species is warranted but precluded by work on higher-priority listing actions. This decision made the monarch butterfly a candidate for listing under the Endangered Species Act (ESA). The monarch butterfly is not listed or proposed for listing, so it is currently not provided protection by the ESA.

#### **Other North Dakota Listed Species**

Other species listed as threatened, endangered, or proposed in North Dakota include the Gray Wolf, Tricolored Bat, Pallid Sturgeon, and Western Prairie Fringed Orchid. None of these species or their designated critical habitat are potentially affected by mining activities in or immediately adjacent to Permit BNCR-1101. The Reclamation Division finds the mining and reclamation activities proposed with Revision No. 11 and Renewal No. 2 will have “no effect” on these species’ continued existence or on their designated critical habitat.