



United States Department of the Interior



FISH AND WILDLIFE SERVICE
North Dakota Ecological Services Field Office
3425 Miriam Avenue
Bismarck, North Dakota 58501

May 13, 2025

IN REPLY REFER TO:
Technical Review Renewal No 45,
Revision No.5 to BNCR-9702
BNI Coal Ltd.

Mr. Jonathan Emmer
Director, Reclamation Division
North Dakota Public Service Commission
600 East Boulevard, Department 408
Bismarck, North Dakota 58505-0480

Dear Mr. Emmer:

Thank you for the letter dated May 7, 2025, requesting comments on permit BNCR-9401, Revision No. 45, Renewal No. 5 for the Center Mine permit held by BNI Coal, Ltd. in Oliver County, North Dakota. The Office of Surface Mining Reclamation and Enforcement's (OSMRE), under the authority of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), has authorized the North Dakota Public Service Commission (NDPSC) to act as their non-federal designated agent for consultation purposes.

In accordance with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (Act), you requested US Fish & Wildlife Service (Service) concurrence of your "May effect, not likely to adversely affect" determinations for the endangered whooping crane (*Grus Americana*), threatened piping plover (*Charadrius melodus*), and Dakota skipper (*Hesperia dacotae*). In accordance with section 7 of the Act, the Service concurs with the "may affect, but not likely to adversely affect" determination for the above-described species.

There is no requirement under the implementing regulations of the Act (50 CFR Part 402) for action agencies to receive the Service's concurrence with "no effect" determinations, therefore the responsibility for the "no effect" determination remains with NDPSC for the rufa red knot (*Calidris canutus rufa*). We recommend the action agency document the "no effect" determination and retain the documentation in the decisional record for this federal action.

The NDPSC has requested informal conferencing for a "not likely to jeopardize" determination as a result of this proposed Project for three proposed species: western regal fritillary (*Argynnis idalia occidentalis*), monarch butterfly (*Danaus plexippus*) and Suckley's cuckoo bumble bee (*Bombus suckleyi*). There is no requirement under implementing regulations of the Act for action agencies to receive concurrence on "not likely to jeopardize" determinations for proposed species and proposed critical habitat, but action agencies may complete informal conferencing on a voluntary basis. Based on the current understanding of the needs of these species, it is the

determination of the Service that the proposed project is “not likely to jeopardize” the western regal fritillary, monarch butterfly, or Suckley’s cuckoo bumble bee. Informal conferences are non-binding and would have to be adopted as a consultation if the action is ongoing after listing as per 50 CFR 402.10(d). If these species are listed following the rulemaking period, please reinitiate consultation within 30 days to finalize informal consultation for these species.

Pursuant to the implementing regulations of the Act (50 CFR 402.13), this letter concludes informal consultation. This consultation should be re-initiated if:

- (1) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not considered in this consultation.
- (2) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this consultation; or
- (3) a new species is listed, or critical habitat is designated that may be affected by this action.

We appreciate your efforts to ensure the conservation of listed and proposed species as part of our joint responsibilities under the Act. If you have any questions on these comments, please contact Jerry Reinisch at (701) 425-2133 or me at (720) 793-6797.

Sincerely,

Luke Toso, Acting Field Supervisor