



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

October 6, 2023

Lindsey Lewis
USFWS Arkansas Ecological Services Field Office
110 South Amity Road, Suite 300
Conway, Arkansas 72032
Lindsey_lewis@fws.gov

Re: Docket No. FD 36500, Canadian Pacific Railway Limited, et al.—Control
of—Kansas City Southern Railway, et al.; **USFWS Informal Section 7**
Consultation Re-initiation – Gentry Capital Improvement Project

Dear Ms. Lewis:

The Surface Transportation Board's (Board) Office of Environmental Analysis (OEA) is re-initiating consultation for the above referenced project to address the reclassification of the northern long-eared bat (*Myotis septentrionalis*) as endangered. On March 15, 2023, the Board authorized Canadian Pacific Railway Limited's acquisition of control of Kansas City Southern Railway, subject to conditions, resulting in the merged railroad Canadian Pacific Kansas City (CPKC). As explained during OEA's previous informal consultation with the Arkansas Ecological Services Field Office in 2022, the Board's authorization of CPKC is projected to cause an increase in rail traffic along existing rail lines and result in planned capital improvements along sections of the existing rail lines, including in Arkansas. This informal consultation concluded with a concurring letter from your office on June 7, 2022 (Attachment A).

Background

As a result of the acquisition, the average rail traffic is expected to increase on certain rail lines within the combined CPKC network because freight would be diverted from rail lines owned by other railroad companies and from truck transportation to rail transportation. To accommodate the projected increase in rail traffic, CPKC has begun to make certain capital improvements within the existing rail right-of-way (ROW).

In Arkansas, the planned capital improvements include adding a new passing siding and extending an existing siding. Construction activities associated with those capital improvements have the potential to affect federally listed threatened or endangered species, if any are present within the existing rail ROW. The planned capital improvements could also involve replacing or extending existing railroad bridges and culverts to accommodate the new or extended siding.

During OEA’s informal consultation with the U.S. Fish and Wildlife Service (USFWS) in 2022, OEA explained that field work was conducted in January 2022 to characterize the existing habitat at each planned capital improvement location. Prior to conducting field work, OEA used the USFWS Information for Planning and Consultation (IPaC) tool and correspondence from the Arkansas Natural Heritage Commission to determine the species of concern for each planned capital improvement location. Based on habitat-level field work, OEA identified suitable bat habitat within the existing ROW for the northern long-eared bat and Indiana bat (*Myotis sodalis*) at the planned Gentry capital improvement project in Arkansas. In its March 2023 decision, the Board imposed multiple mitigation measures recommended by OEA to protect the northern long-eared and Indiana bat during the construction of the planned capital improvement, as detailed in Attachment B to this letter. These measures include requirements to conduct tree clearing and work on structures that provide suitable roosting habitat outside of the active season (April 1 to October 31), as well as measures related to installing lighting. Based on the mitigation developed as part of the NEPA process, OEA had determined that the Proposed Acquisition **may affect, but is not likely to adversely affect** the northern long-eared bat and Indiana bat. As noted above, the Arkansas Field Office concurred with OEA’s determination on June 7, 2022.

Gentry Capital Improvement

CPKC plans to obtain a Clean Water Act (CWA) Section 404 Nationwide Permit from the U.S. Army Corp of Engineers (USACE) to construct the proposed Gentry capital improvement project in Benton County, Arkansas. This capital improvement area contains habitat for the northern long-eared bat. Per the USFWS final rule published on March 31, 2023, the northern long-eared bat has been reclassified as endangered under the Endangered Species Act. Therefore, OEA (as the lead Federal Agency for the Environmental Impact Statement) is re-submitting consultation with USFWS for all currently listed species in the project area in anticipation of CPKC’s application for a Section 404 permit. OEA generated new species lists in USFWS’ IPaC website and confirmed the same species (including bat species) consulted on in the 2022 consultation are potentially present in the project area (Attachment C). In addition, a new bat species was Proposed – tricolored bat – since the last consultation and IPaC indicates it could occur or potentially occur at the Gentry capital improvement location. The tricolored bat is generally found in the same habitats as the northern long-eared bat. Further, a new reptile was Proposed – alligator snapping turtle – since the last consultation and IPaC indicates it could occur or potentially occur at the Gentry project location. While this species can be found in a variety of habitats, it is generally found in deeper waters of large rivers and their major tributaries;¹ this habitat is not found in or around the Gentry capital improvement project location. OEA does not anticipate the Gentry capital improvement project would be likely to jeopardize the continued existence of the tricolored bat or alligator snapping turtle and is not requesting a conference with USFWS.²

Table 1 summarizes the habitat for planned Gentry capital improvement in Arkansas for the northern long-eared bat. The attached maps show suitable forested bat habitat within the ROW of the planned capital improvement location (Attachment D). With implementation of the

¹ 86 FR 62434

² Per ESA Section 7(a)(4), a conference is required only when the Federal agency’s proposed action is likely to jeopardize the continued existence of a proposed species or destroy or adversely modify proposed critical habitat.

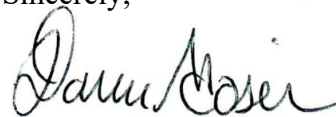
measures in Attachment B, OEA concludes that the Gentry capital improvement project would still result in a **may affect, not likely to adversely affect** determination for the northern long-eared bat under the endangered status. OEA requests the USFWS' concurrence on this determination.

Table 1. Planned capital improvement location in Arkansas with suitable northern long-eared bat habitats.

Common and Scientific Name	Capital Improvement Location	Federal Status	Suitable Habitat	Effects Determination
Northern long-eared bat (<i>Myotis septentrionalis</i>)	Gentry, Benton County, siding extension	Endangered	Potentially suitable summer roosting habitat within forested areas in the railroad ROW. No roosting structures/trees in the railroad ROW. <u>Habitat impacts:</u> MP 71 (4.1 acres).	May affect, not likely to adversely affect

We appreciate your review and assistance in the consultation process and look forward to hearing from you. For further information or questions, please contact Elizabeth Webster at Elizabeth.Webster@stb.gov or 202-360-0742. For further information about the merger, you may also visit the Board-sponsored project website at www.CP-KCSMergerEIS.com.

Sincerely,



Danielle Gosselin
Director
Office of Environmental Analysis

ATTACHMENT A: 2022 CONSULTATION CORRESPONDENCE



IN REPLY REFER TO:

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Arkansas Ecological Service Field Office
110 South Amity Road, Suite 300
Conway, Arkansas 72032



June 7, 2022

Danielle Gosselin, Director
Office of Environmental Analysis
Surface Transportation Board
c/o Sydney Feldt
Vanasse Hangen Brustlin, Inc.
1355 Peachtree St, NE, Suite 100
Atlanta, Georgia 30309-3269

Re: Docket No. FD 36500, Canadian Pacific Railway Limited, et al. - Control of Kansas City Southern Railway, et al.; USFWS Informal Section 7 Consultation

Dear Ms. Gosselin:

The U.S. Fish and Wildlife Service (Service) has reviewed your assessment, determinations, and your written request for concurrence of OEA's determination of effects for the Proposed Acquisition on federally listed species, in accordance with Section 7(a)(2) of the Endangered Species Act (ESA) of 1973. We received your request on June 6, 2022.

Your letter stated the following (abbreviated):

Based on habitat-level field work, Office of Environmental Analysis (OEA) identified suitable roosting and foraging habitat within the existing ROW for the Northern Long-eared Bat (*Myotis septentrionalis*) and Indiana Bat (*Myotis sodalis*) at both planned capital improvements in Arkansas. The Applicants have proposed multiple measures to protect the Northern Long-eared and Indiana Bat during the construction of the planned capital improvements, as detailed in Attachment A to this letter. These measures include commitments to conduct tree clearing and work on structures that provide suitable roosting habitat outside of the active season (April 1 to October 31), as well as measures related to installing lighting. Based on the Applicants' voluntary commitments, OEA has determined that the Proposed Acquisition **may affect, but is not likely to adversely affect** the Northern Long-eared Bat and Indiana Bat.

The following species do not have suitable habitat within the rail ROW at any of the planned capital improvement locations: Arkansas Fatmucket (*Lampsilis powelli*), Eastern Black Rail (*Laterallus jamaicensis*), Gray Bat (*Myotis grisescens*), Missouri Bladderpod (*Physaria filiformis*), Monarch Butterfly (*Danaus plexippus*), Ozark Big-eared Bat (*Corynorhinus townsendii ingens*), Ozark Cavefish, (*Amblyopsis rosae*), Piping Plover (*Charadrius melodus*),

Rabbitsfoot (*Quadrula cylindrica cylindrica*), Red Knot (*Calidris canutus*), and Red-cockaded Woodpecker (*Leuconotopicus borealis*). Therefore, OEA has determined that the Proposed Acquisition would have **no effect** on these species. There is no critical habitat within any of the planned capital improvement locations in Arkansas. If you agree with these recommended determinations, please send your written concurrence.

The Service concurs with the "no effect" determinations for the listed species identified. No further consultation for this project is required for these species. Furthermore, due to the location of the area being affected occurring immediately adjacent to the existing railway, limited and poor habitat located immediately adjacent to the action area, ongoing constant noise and disturbance, inactive season only clearing restrictions for suitable habitat and bridges, commitment to perform bridge inspections prior to construction, the distance to known species locations, and the implementation of voluntary mitigation measures, the Service concurs with your determination of "may affect, but is not likely to adversely affect" the Indiana Bat and Northern Long-eared Bat. This concurrence concludes your ESA Section 7 responsibilities for this action.

The Service recommends that your agency contact the Arkansas Ecological Services Field Office or re-evaluate this key in IPaC if: 1) the scope, timing, duration, or location of the proposed project changes, 2) new information reveals the action may affect listed species or designated critical habitat; and 3) a new species is listed or critical habitat designated. If any of the above conditions occurs, additional consultation with the Arkansas Ecological Services Field Office should take place before project changes are final or resources committed.

For further assistance or if you have any questions, please contact Lindsey Lewis at (501) 513-4489 or lindsey_lewis@fws.gov.

Sincerely,



Melvin L. Tobin
Field Supervisor

cc: Project File
Read File

Filename: [C:\Users\lilewis\Documents\PROJECTS\FY2022\ARDOT\CPKCS Merger, STB Docket No. FD 36500\20220607_Ltr_CPKCS_USFWS Informal Consultation_Concurrence Letter.docx](#)

ATTACHMENT B: NORTHERN LONG-EARED BAT AND INDIANA BAT MITIGATION MEASURES IMPOSED BY THE BOARD

The Board's decision on March 15, 2023, required CPKC to adhere to environmental conditions, including the following measures:

- The Applicants will not conduct construction-related tree removal for the Capital Improvement Projects during the active season for the Indiana bat and the northern long-eared bat (April 1 to October 31).
- During the construction of the Capital Improvement Projects, the Applicants will take steps to reduce the unnecessary removal of bat habitat outside of active bat season by limiting tree removal to only the areas necessary to safely construct and operate the new siding or second track, marking the limits of tree clearing through the use of flagging or fencing, and ensuring that construction contractors understand clearing limits and how they are marked in the field.
- Where practicable, the Applicants will conduct any culvert or bridge removal as part of the Capital Improvement Projects outside of the roosting period of bat species, specific to each planned capital improvement location. Where practicable, if bridge or culvert removal is required during the bat roosting period where the individual planned capital improvement is located, the Applicants will consult with OEA and the local office of the U.S. Fish and Wildlife Service (USFWS) on appropriate methods to determine if bats are using the bridge or culvert as a roost.
- If construction of the Capital Improvement Projects would require removal or alteration of bridges, culverts, or other structures that provide suitable habitat for the northern long-eared bat or the Indiana bat during the active season for those species (April 1 to October 31), the Applicants will first conduct an inspection for the presence of or evidence of use by bats. The inspection will be completed by a qualified biologist. If the inspection finds bats or evidence of bats, then the Applicants will not commence work on the structure until coordinating with OEA and USFWS to determine appropriate follow-up or mitigative actions. The inspection must be completed during the same year that the work takes place.
- During construction of the Capital Improvement Projects, the Applicants will direct any temporary lighting away from suitable habitat for the northern long-eared bat or the Indiana bat during the active season for those species (April 1 to October 31). The Applicants will use downward-facing, full cut-off lens lights for any temporary lighting used during the construction of the planned capital improvements.
- If the Capital Improvement Projects would involve installing any new, or replacing any existing, permanent lights, the Applicants will use downward-facing, full cut-off lens lights (with the same intensity or less for replacement lighting).

**ATTACHMENT C: 2023 USFWS SPECIES LISTS FOR GENTRY CAPITAL
IMPROVEMENT PROJECT**



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Arkansas Ecological Services Field Office
110 South Amity Suite 300
Conway, AR 72032-8975
Phone: (501) 513-4470 Fax: (501) 513-4480



In Reply Refer To:

September 12, 2023

Project Code: 2023-0127926

Project Name: Canadian Pacific Acquisition of Kansas City Southern

Subject: List of threatened and endangered species that may occur in your proposed project location or may be affected by your proposed project

To Whom It May Concern:

The enclosed species list identifies threatened, endangered, proposed and candidate species, as well as proposed and final designated critical habitat, that may occur within the boundary of your proposed project and/or may be affected by your proposed project. The species list fulfills the requirements of the U.S. Fish and Wildlife Service (Service) under section 7(c) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*).

New information based on updated surveys, changes in the abundance and distribution of species, changed habitat conditions, or other factors could change this list. Please feel free to contact us if you need more current information or assistance regarding the potential impacts to federally proposed, listed, and candidate species and federally designated and proposed critical habitat. Please note that under 50 CFR 402.12(e) of the regulations implementing section 7 of the Act, the accuracy of this species list should be verified after 90 days. This verification can be completed formally or informally as desired. The Service recommends that verification be completed by visiting the IPaC website at regular intervals during project planning and implementation for updates to species lists and information. An updated list may be requested through the IPaC system by completing the same process used to receive the enclosed list.

The purpose of the Act is to provide a means whereby threatened and endangered species and the ecosystems upon which they depend may be conserved. Under sections 7(a)(1) and 7(a)(2) of the Act and its implementing regulations (50 CFR 402 *et seq.*), Federal agencies are required to utilize their authorities to carry out programs for the conservation of threatened and endangered species and to determine whether projects may affect threatened and endangered species and/or designated critical habitat.

A Biological Assessment is required for construction projects (or other undertakings having similar physical impacts) that are major Federal actions significantly affecting the quality of the human environment as defined in the National Environmental Policy Act (42 U.S.C. 4332(2)(c)). For projects other than major construction activities, the Service suggests that a biological

evaluation similar to a Biological Assessment be prepared to determine whether the project may affect listed or proposed species and/or designated or proposed critical habitat. Recommended contents of a Biological Assessment are described at 50 CFR 402.12.

If a Federal agency determines, based on the Biological Assessment or biological evaluation, that listed species and/or designated critical habitat may be affected by the proposed project, the agency is required to consult with the Service pursuant to 50 CFR 402. In addition, the Service recommends that candidate species, proposed species and proposed critical habitat be addressed within the consultation. More information on the regulations and procedures for section 7 consultation, including the role of permit or license applicants, can be found in the "Endangered Species Consultation Handbook" at:

<https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf>

Migratory Birds: In addition to responsibilities to protect threatened and endangered species under the Endangered Species Act (ESA), there are additional responsibilities under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA) to protect native birds from project-related impacts. Any activity, intentional or unintentional, resulting in take of migratory birds, including eagles, is prohibited unless otherwise permitted by the U.S. Fish and Wildlife Service (50 C.F.R. Sec. 10.12 and 16 U.S.C. Sec. 668(a)). For more information regarding these Acts see <https://www.fws.gov/program/migratory-bird-permit/what-we-do>.

The MBTA has no provision for allowing take of migratory birds that may be unintentionally killed or injured by otherwise lawful activities. It is the responsibility of the project proponent to comply with these Acts by identifying potential impacts to migratory birds and eagles within applicable NEPA documents (when there is a federal nexus) or a Bird/Eagle Conservation Plan (when there is no federal nexus). Proponents should implement conservation measures to avoid or minimize the production of project-related stressors or minimize the exposure of birds and their resources to the project-related stressors. For more information on avian stressors and recommended conservation measures see <https://www.fws.gov/library/collections/threats-birds>.

In addition to MBTA and BGEPA, Executive Order 13186: *Responsibilities of Federal Agencies to Protect Migratory Birds*, obligates all Federal agencies that engage in or authorize activities that might affect migratory birds, to minimize those effects and encourage conservation measures that will improve bird populations. Executive Order 13186 provides for the protection of both migratory birds and migratory bird habitat. For information regarding the implementation of Executive Order 13186, please visit <https://www.fws.gov/partner/council-conservation-migratory-birds>.

We appreciate your concern for threatened and endangered species. The Service encourages Federal agencies to include conservation of threatened and endangered species into their project planning to further the purposes of the Act. Please include the Consultation Code in the header of this letter with any request for consultation or correspondence about your project that you submit to our office.

Attachment(s):

- Official Species List

OFFICIAL SPECIES LIST

This list is provided pursuant to Section 7 of the Endangered Species Act, and fulfills the requirement for Federal agencies to "request of the Secretary of the Interior information whether any species which is listed or proposed to be listed may be present in the area of a proposed action".

This species list is provided by:

Arkansas Ecological Services Field Office

110 South Amity Suite 300

Conway, AR 72032-8975

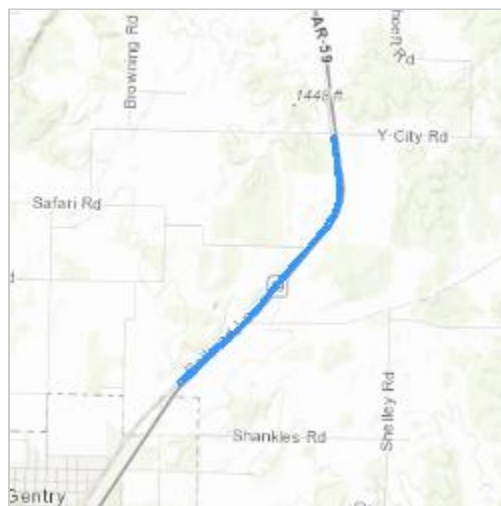
(501) 513-4470

PROJECT SUMMARY

Project Code: 2023-0127926
Project Name: Canadian Pacific Acquisition of Kansas City Southern
Project Type: Railroad - New Construction
Project Description: Canadian Pacific Railway Limited, et al. (CP) and Kansas City Southern et al. (KCS) (collectively Applicants) applied for authority from the Surface Transportation Board (STB) for CP to acquire KCS. To support the expected increase in rail traffic on the existing rail line due to the acquisition, the Applicants plan to make capital improvements within the existing rail right-of-way, which would include adding/constructing new passing sidings, extending existing sidings, adding a section of double track, and adding facility working track at certain locations along the existing rail line. One of these capital improvements occurs in Benton County, Arkansas. The work includes ground clearing activities and tree clearing. The STB's Office of Environmental Analysis (OEA) prepared a Final Environmental Impact Statement that analyzed the environmental impacts of the proposed acquisition and the STB authorized the acquisition on March 15, 2023. OEA previously consulted with the Arkansas USFWS Field Office as part of the NEPA process and completed the ESA Section 7 process in 2022. OEA is requesting a new species list due to the status change of the northern long-eared bat and may need to re-open consultation for the species.

Project Location:

The approximate location of the project can be viewed in Google Maps: <https://www.google.com/maps/@36.29138575,-94.45463826982348,14z>



Counties: Benton County, Arkansas

ENDANGERED SPECIES ACT SPECIES

There is a total of 13 threatened, endangered, or candidate species on this species list.

Species on this list should be considered in an effects analysis for your project and could include species that exist in another geographic area. For example, certain fish may appear on the species list because a project could affect downstream species.

IPaC does not display listed species or critical habitats under the sole jurisdiction of NOAA Fisheries¹, as USFWS does not have the authority to speak on behalf of NOAA and the Department of Commerce.

See the "Critical habitats" section below for those critical habitats that lie wholly or partially within your project area under this office's jurisdiction. Please contact the designated FWS office if you have questions.

-
1. [NOAA Fisheries](#), also known as the National Marine Fisheries Service (NMFS), is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce.

MAMMALS

NAME	STATUS
Gray Bat <i>Myotis grisescens</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/6329	Endangered
Indiana Bat <i>Myotis sodalis</i> There is final critical habitat for this species. Your location does not overlap the critical habitat. Species profile: https://ecos.fws.gov/ecp/species/5949	Endangered
Northern Long-eared Bat <i>Myotis septentrionalis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/9045	Endangered
Ozark Big-eared Bat <i>Corynorhinus (=Plecotus) townsendii ingens</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/7245	Endangered
Tricolored Bat <i>Perimyotis subflavus</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/10515	Proposed Endangered

BIRDS

NAME	STATUS
Eastern Black Rail <i>Laterallus jamaicensis ssp. jamaicensis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/10477	Threatened
Piping Plover <i>Charadrius melodus</i> Population: [Atlantic Coast and Northern Great Plains populations] - Wherever found, except those areas where listed as endangered. There is final critical habitat for this species. Your location does not overlap the critical habitat. Species profile: https://ecos.fws.gov/ecp/species/6039	Threatened
Red Knot <i>Calidris canutus rufa</i> There is proposed critical habitat for this species. Species profile: https://ecos.fws.gov/ecp/species/1864	Threatened

REPTILES

NAME	STATUS
Alligator Snapping Turtle <i>Macrochelys temminckii</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/4658	Proposed Threatened

FISHES

NAME	STATUS
Ozark Cavefish <i>Amblyopsis rosae</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/6490	Threatened

INSECTS

NAME	STATUS
Monarch Butterfly <i>Danaus plexippus</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/9743	Candidate

CRUSTACEANS

NAME	STATUS
Benton County Cave Crayfish <i>Cambarus aculabrum</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/5011	Endangered

FLOWERING PLANTS

NAME	STATUS
Missouri Bladderpod <i>Physaria filiformis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/5361	Threatened

CRITICAL HABITATS

THERE ARE NO CRITICAL HABITATS WITHIN YOUR PROJECT AREA UNDER THIS OFFICE'S JURISDICTION.

YOU ARE STILL REQUIRED TO DETERMINE IF YOUR PROJECT(S) MAY HAVE EFFECTS ON ALL ABOVE LISTED SPECIES.

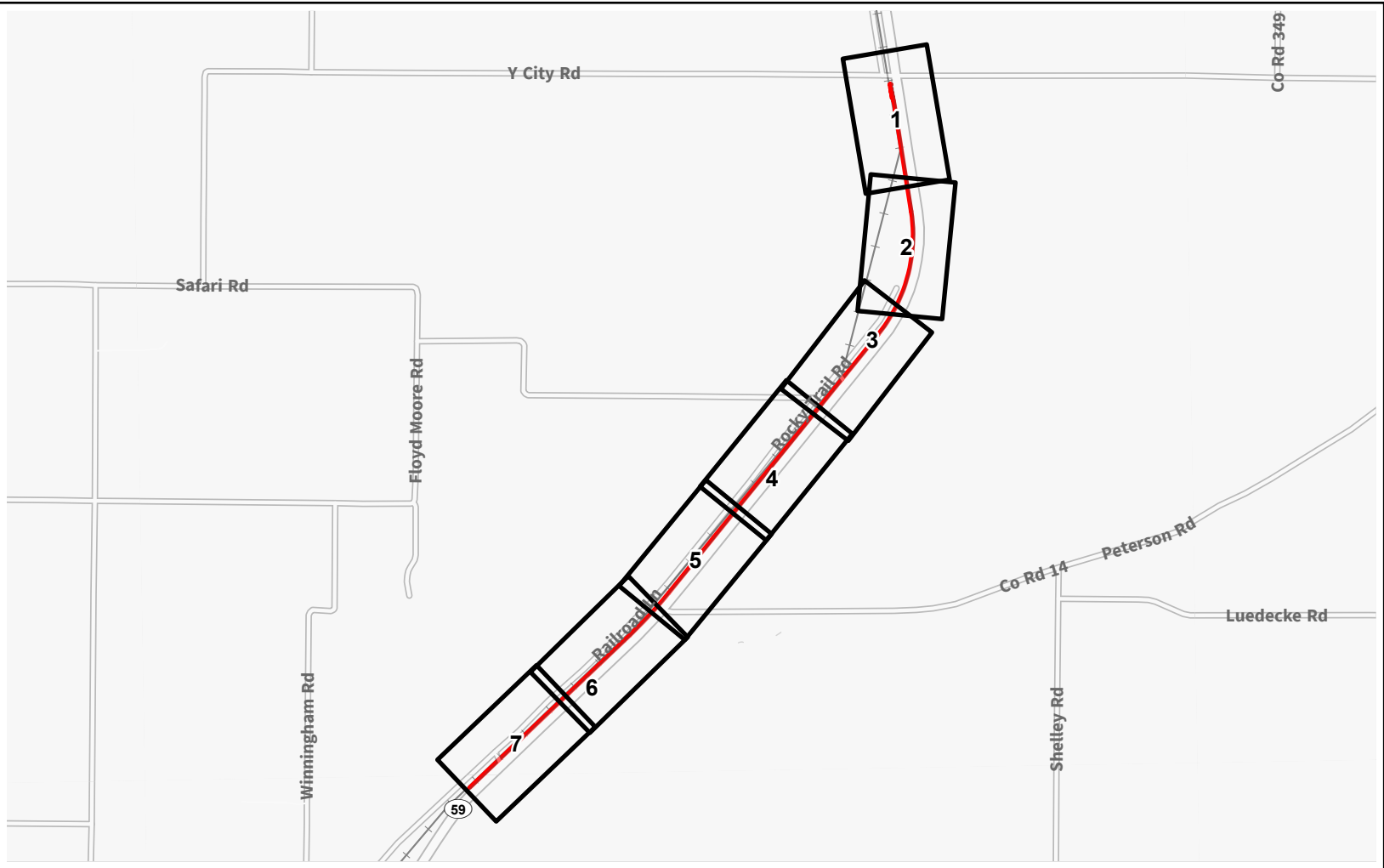
IPAC USER CONTACT INFORMATION

Agency: Private Entity
Name: David Johnson
Address: 1001 G Street NW
Address Line 2: Suite 1125
City: Washington
State: DC
Zip: 20001
Email: dcjohnson@vhb.com
Phone: 2023600742

LEAD AGENCY CONTACT INFORMATION

Lead Agency: Surface Transportation Board
Name: Elizabeth Webster
Email: Elizabeth.Webster@stb.gov

ATTACHMENT D: MAPS FOR GENTRY CAPITAL IMPROVEMENT PROJECT



 Capital Improvement Location

 Page Index



Source: FRA, CP, ArcGIS Online

O-255





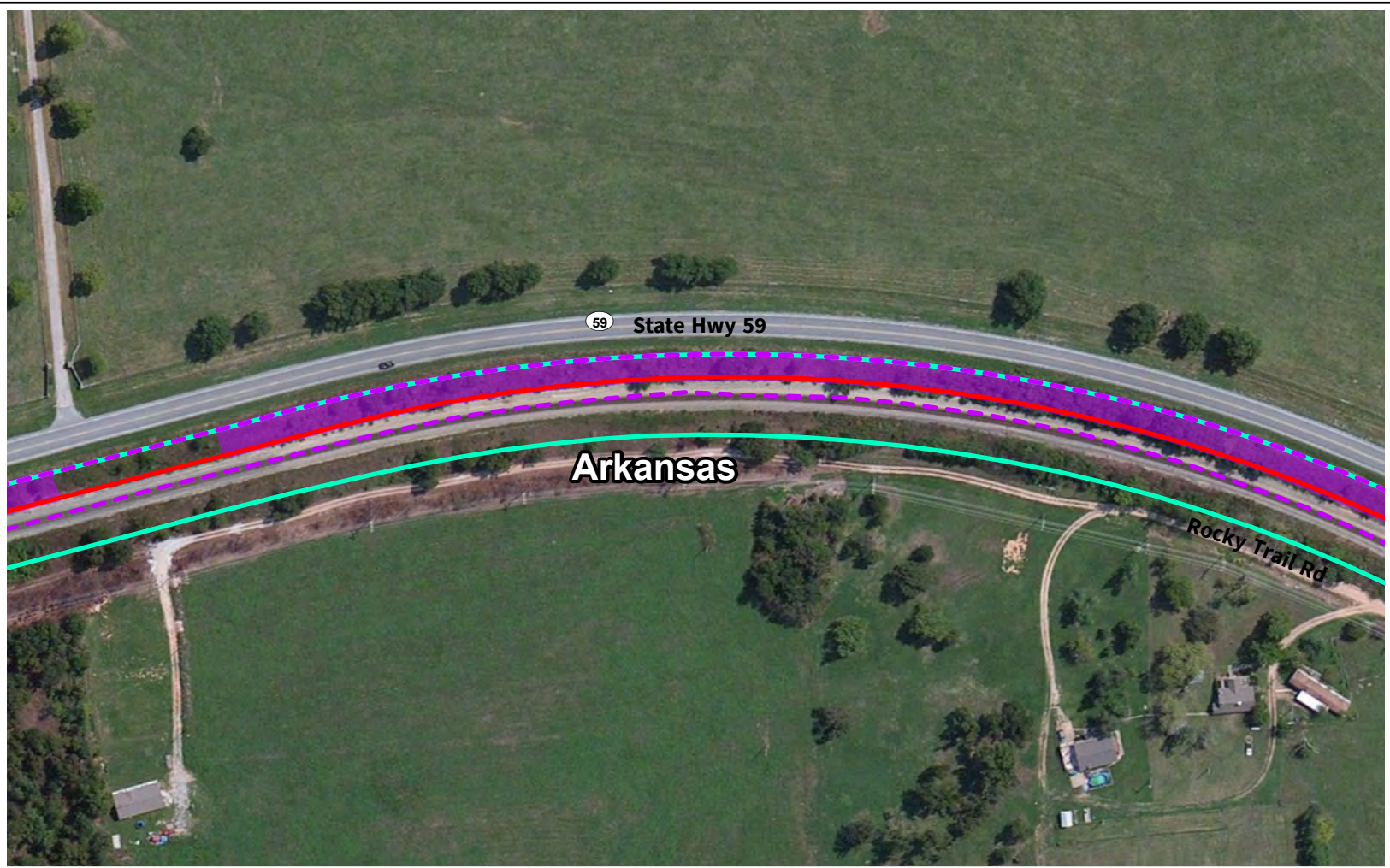
-  Study Area
-  Suitable Forested Bat Habitat
-  Capital Improvement Location
-  Existing Right-of-Way



Source: FRA, CP, ArcGIS Online

O-256





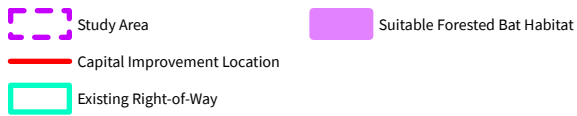
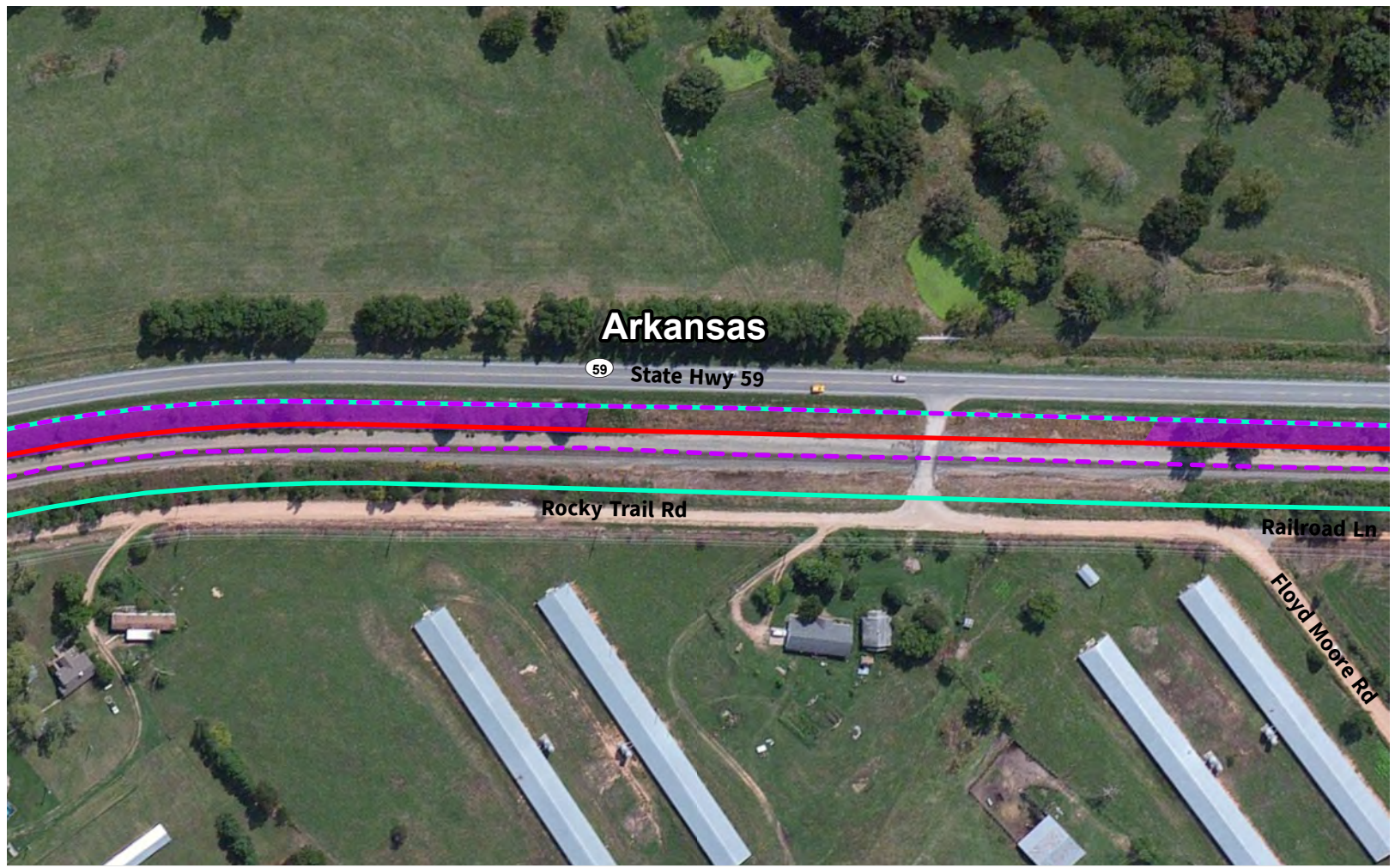
-  Study Area
-  Suitable Forested Bat Habitat
-  Capital Improvement Location
-  Existing Right-of-Way



Source: FRA, CP, ArcGIS Online

O-257

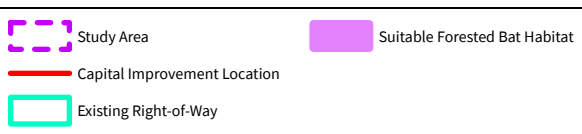




Source: FRA, CP, ArcGIS Online

O-258

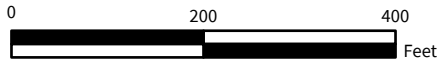
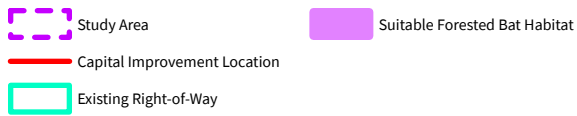




Source: FRA, CP, ArcGIS Online

O-259

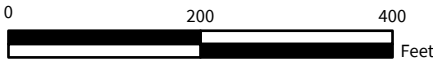
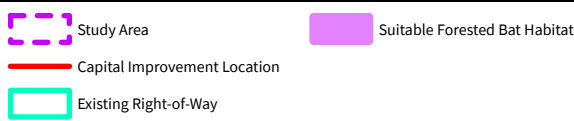
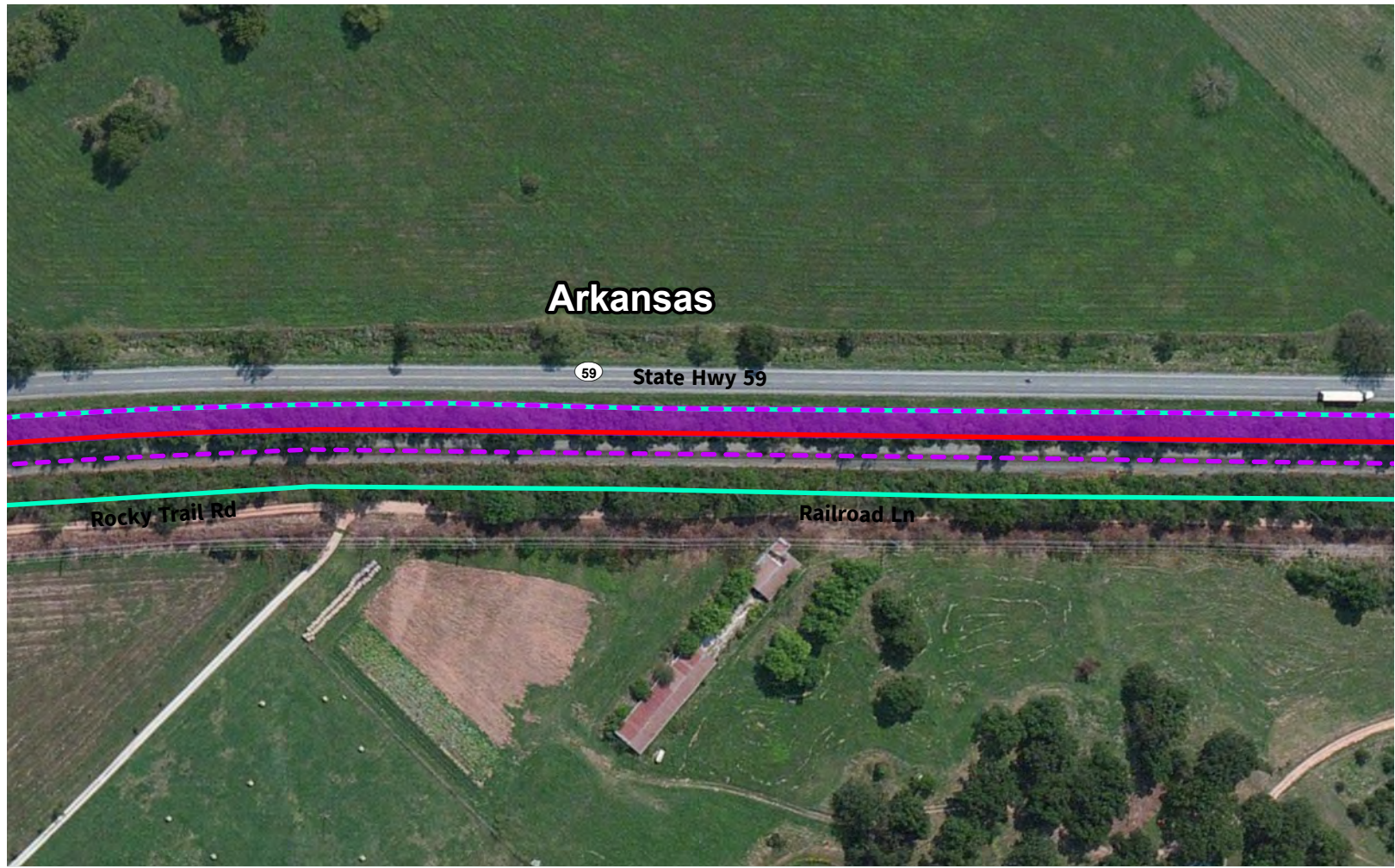




O-260

Source: FRA, CP, ArcGIS Online

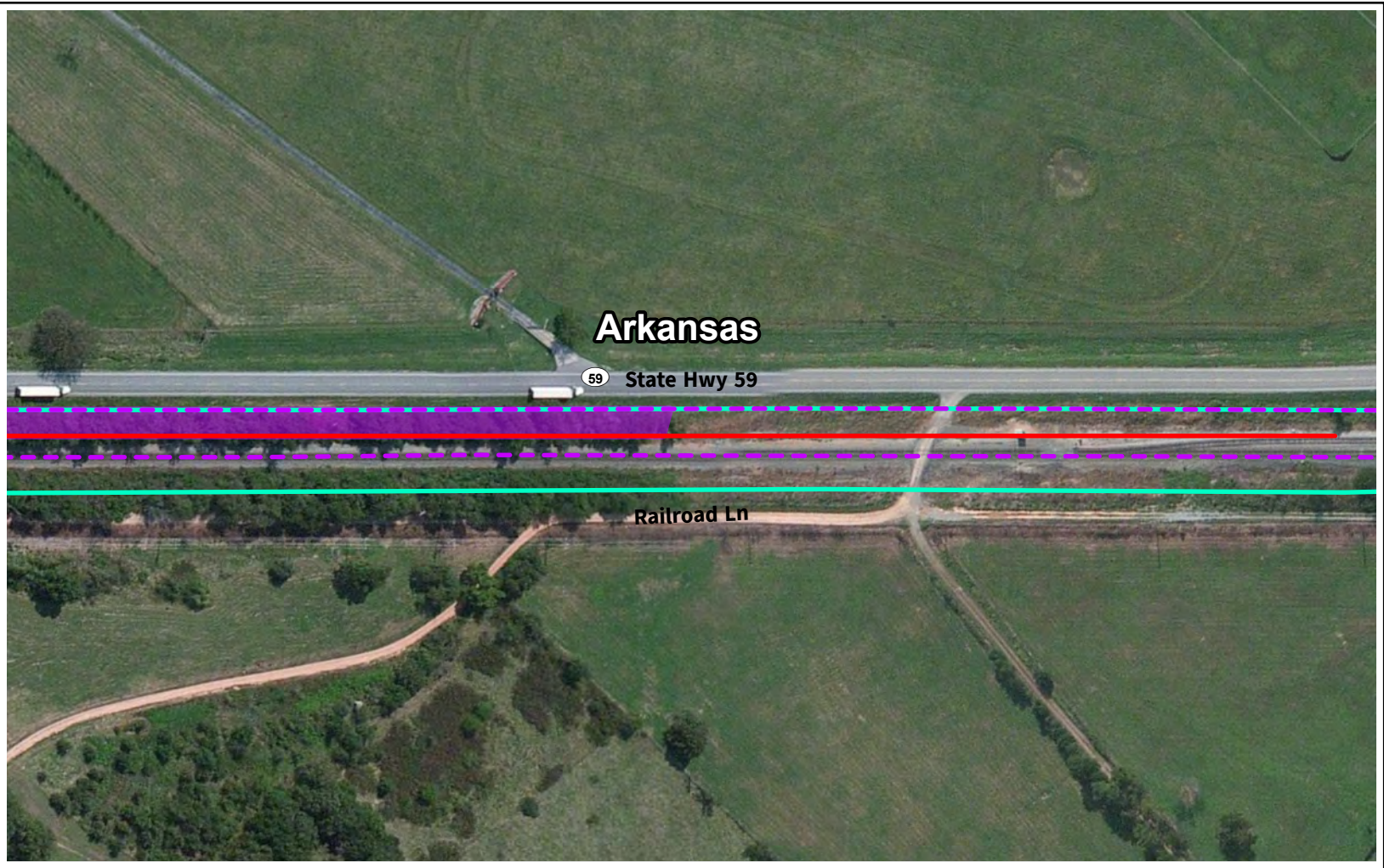




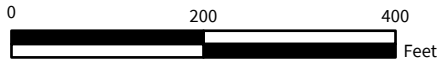
Source: FRA, CP, ArcGIS Online

O-261





-  Study Area
-  Capital Improvement Location
-  Existing Right-of-Way
-  Suitable Forested Bat Habitat



Source: FRA, CP, ArcGIS Online

O-262

