

STEPTOE & JOHNSON ^{LLP}
ATTORNEYS AT LAW

EI-17953

KB

David H. Coburn
202.429.8063
dcoburn@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
steptoe.com

November 23, 2009

FD 30186-3

VIA FEDERAL EXPRESS

Chairman Shane D. Colton
Department of Fish, Wildlife and Parks Commission
c/o Edmiston & Colton
310 Grand Avenue
Billings, MT 59101

Re: Tongue River Railroad Company, Inc.

Dear Chairman Colton:

In the interest of advancing the Commission's consideration of the Tongue River Railroad Company, Inc. easement, we have attached a revised version of the easement agreement allowing the Tongue River Railroad Company, Inc. rail line to cross approximately 25 acres of Miles City Fish Hatchery property. This revised agreement: (1) incorporates all of the changes previously discussed with the Commission and Department's staff (based on our discussion of former Chairman Doherty's comments); (2) provides in a revised section A.1 that evidence of the appraisal for the Hatchery property will not be used as precedent in any land acquisition negotiation or eminent domain proceeding associated with the acquisition of property for the TRRC line and (3) includes a new section B.1 that addresses concerns about when the easement will become effective.

On this last point, as you will see section B.1 provides that the easement will not become effective until TRRC has presented the Department with evidence that it has entered into a construction contract or contracts providing for the construction of the rail line between Miles City and Ashland. The other provisions of the agreement that limit when construction could commence and that allow the Department to review construction plans and schedules remain in place. See section B.2.

We have attached both a clean version of the agreement and a version showing the changes made to the last draft of the agreement seen by the Commission. The exhibits to the easement agreement are also attached. We have also attached the September 10, 2009 letter from the U.S. Fish and Wildlife Service addressed to

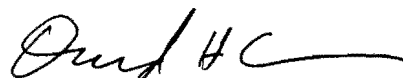
Department counsel confirming that an easement agreement will not violate any terms under which U.S.F.W.S. transferred the Hatchery to state control or the terms of the Biological Opinion issued by USFWS finding that the construction and operation of the TRRC line is not likely to adversely affect the pallid sturgeon. The USFWS letter thus addresses, and resolves, another issue raised by the Commission in prior discussions.

The only other outstanding issue was the insurance question. We have retained in the agreement the insurance escalator provision previously discussed, which provides for an escalation of the initial \$25 million in coverage every five years based on the consumer price index. As we have previously explained, we have once again confirmed upon discussions with experts in the area, a bond is not available and thus not a credible alternative. Further, any such bond, even if it were available, would not offer any greater protection than the Department already has under the robust indemnification and insurance provisions of the agreement, as we have previously explained. In other words, the Department would have to make a claim under a bond just as it would under an insurance policy. Nonetheless, as you know, in addition to the indemnification and insurance obligations undertaken by TRRC in the agreement, TRRC also has agreed in the easement that it will promptly clean up and remediate any spill caused by a collision or derailment.

With the above-described changes we have made to the agreement, and all of the other changes we have made to accommodate Commission concerns, coupled with the USFWS letter, we believe that the agreement is ready to be presented for final approval to the Commission at its January meeting. (We understand that the December agenda is already quite full, and otherwise would request that it be placed on the agenda for that meeting.) We thus ask that the easement agreement be placed on the agenda of the January meeting and look forward to your confirmation that this will happen. Further, we understand that the Department staff may be moving forward to complete the environmental review process by preparing the necessary final documentation and trust that that process will be completed in the near future.

We look forward to hearing from you on these matters at your earliest convenience. I am sure you would agree that this matter has remained unaddressed for too long and that it is time now to move forward toward a final affirmative decision.

Sincerely,



David H. Coburn

Attorney for Tongue River Railroad
Company, Inc.

Chairman Shane D. Colton
November 23, 2009
Page 3

cc: Commissioner Doll
Commissioner Moody
Commissioner Ream
Commissioner Vermillion
Joseph Maurier
Becky Dockter, Esq.
Victoria Rutson, STB
John Crist, Esq.
Tom Ebzery, Esq.
Mike Gustafson, TRRC

After recording return to:
Montana Fish, Wildlife & Parks
P O Box 200701
Helena, Montana 59620-0701
Attention: _____

DRAFT 11/23/09

GRANT OF EASEMENT FOR A RIGHT OF WAY

This Grant of Easement for a Right of Way (this "Grant") is made and entered into this _____ day of _____, 2010, by and between the Montana Department of Fish, Wildlife, and Parks, an agency of the State of Montana, of 1420 East Sixth Avenue, Helena, Montana 59620-0701 (hereafter "Grantor") and the Tongue River Railroad Company, Inc., a Delaware corporation, whose address is 2280 Grant Road, Suite B, P. O. Box 80902, Billings, Montana 59108-0902 (hereafter "Grantee");

RECITALS

1. Grantor is the owner of the Miles City Fish Hatchery located in Custer County, Montana.
2. Grantee desires an easement for a right of way as described below for the sole purpose of constructing and operating a single track railroad line, together with bridges, culverts, crossings, rails, ties, ballasts, signals, wires, switches, and other materials incidental thereto in, on, over, and across that certain real property owned by the Grantor.
3. Grantor is willing to grant an easement for a right of way upon the terms and conditions described herein and Grantee is willing to accept an easement for a right of way upon the terms and conditions described herein.
4. The grant of the right of way for an easement is subject to the discretionary approval of the Montana Fish, Wildlife and Parks Commission ("Commission") as required by MCA 87-1-301(e), provided however that no action or inaction of the Commission shall supersede the prior approval of the construction and operation of the rail line by the Surface Transportation Board ("STB") nor interfere with the right of the Grantee to construct and operate the rail line as provided in the decisions of the STB or its predecessor Interstate Commerce Commission ("ICC").

5. Grantor's property improvements were acquired from and developed with the assistance of funds provided by the United States Fish and Wildlife Service for the purpose of developing and operating a fish hatchery. The United States Bureau of Land Management granted the land to the Grantor for public purposes. Grantee recognizes and acknowledges the Grantor's fiduciary responsibilities to the Hatchery and federal government that require that the Grantor's property must continue to serve fish hatchery purposes, and that the federal land and prior and continued federal funding are provided for these objectives.

6. Various decisions on the applications of the Grantee or its predecessor issued in Finance Docket Nos. 30186 and 30186 (Sub 3), the ICC and STB, respectively, addressed potential impacts to the Miles City Fish Hatchery ("Hatchery") and prescribed certain mitigation measures that the Grantee must take relative to the Hatchery to address or mitigate any adverse impacts of the railroad on the Hatchery. Among other mitigation measures, to be followed by the Grantee, and set forth in the October 9, 2007 final STB decision in Finance Docket No. 30186 (Sub No. 3), are measures addressing protection of Hatchery water supplies, weed control procedures, a process for continued consultation between Grantor and Grantee to resolve outstanding issues subject to STB oversight.

7. The terms of this Grant address and resolve the remaining concerns of the Grantor with respect to additional mitigation relating to construction and operation of the Tongue River Railroad line across Hatchery property. Accordingly, the Grant, which will become effective upon execution, satisfies the directive of the STB that the Grantor and Grantee consult in an effort to reach consensus on the remaining issues.

WITNESSETH

For and in consideration of the sum of \$10 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor does hereby grant and convey unto Grantee, its successors, permitted assignees, lessees and permittees, if any, an easement for a right of way for railroad purposes in, on, over, and across that certain real property situated in Sections 4, 5 and 9, Township 7 North, Range 47 East, Custer County, Montana, containing an area of approximately 24.85 acres, as described and depicted on the Exhibit A, attached hereto and incorporated herein, which easement for a right of way shall run with the land. This Grant shall be perpetual, except to the extent terminated as provided in Section C.7. of this Grant.

This Grant includes the right to enter the easement, subject to the provisions specified in this Grant, to design, survey, install, repair, maintain, alter, erect, and operate a single-track railroad line together with all bridges, culverts, crossings, rails, ties, ballasts, signals, wires, switches and other materials incidental thereto. The easement also includes the right to trim, cut, fell and remove trees, underbrush and other vegetation or other obstruction in the easement, provided that Grantee adheres to all applicable STB mitigation conditions concerning such rights.

Grantor shall not grant further easements, expanded use, or rights of way to third parties across the easement granted herein without the express written consent of the Grantee, which consent could only be denied if such proposed use would interfere with railroad operations or safety.

Grantee and Grantor further agree to the following conditions and stipulations regarding Facilities Construction and Maintenance:

A. GENERAL PROVISIONS

1. Just Compensation for Right-of-Way Grant. Prior to construction, Grantee will pay the Grantor the amount of just compensation for land, damages, and depreciation determined through the appraisal process required under the Uniform Appraisal Standards for Federal Land Acquisition and any additional compensation negotiated and approved by Grantor and Grantee. The cost of appraisal and any review of the appraisal undertaken by Grantee will be the responsibility of the Grantee. The Grantee and Grantor shall mutually select a qualified appraiser. Grantee agrees not to use the appraisal of Hatchery property as evidence in any eminent domain proceeding or land acquisition negotiation with respect to any other property that it may acquire in connection with the construction of its rail line.

2. Payment of all improvements. All railroad structures must be constructed and maintained at the sole expense of the Grantee. Grantee shall at its expense ensure that the condition of the railroad and its appurtenant structures shall not be designed to create a hazard and shall be operated consistent with federal rail safety regulations so as not to create an unreasonable hazard to Grantor's property, personnel, and the visiting public or to the operation of such property as a hatchery and residence.

3. Access. Grantor does also hereby grant unto Grantee a one year temporary construction permit to access 1.24 acres on roads specified in this Grant for the sole purpose of allowing the Grantee, its employees or contractors, to relocate and replace the Grantor's water supply and discharge pipelines, in accordance with approval and timing schedule below, in Section 4, Township 7 North, Range 47 East as shown on Exhibit A. This temporary permit will commence on the first day of railroad construction on land subject to this Grant and terminate one year thereafter.

The easements provided for above may be assigned by Grantee only to (a) an assignee of Grantee that acquires all or part of the railroad line described in the recitals hereto, (b) Grantee's lender(s) pursuant to a collateral assignment, or (c) another assignee approved by Grantor in writing, such approval not to be unreasonably withheld.

4. Roads. Grantor does also hereby grant unto Grantee, its successors, lessees, contractors, agents and permittees, access to roads on the Hatchery as follows: (1) for access to the easement on the road beginning at the southeast corner of the Hatchery property in Section 9 which is shown on the map at Exhibit A for railway_pre-construction surveying, construction, repair, and maintenance purposes; (2) on other

roads on the Hatchery property as agreed by the Grantor and Grantee to allow Grantee access for relocation and reconstruction of the water supply and discharge pipelines and the forage fish pond as described in Section B of this Grant and (3) as otherwise agreed between the parties and, where practicable, as reflected in a written document. For emergency purposes such as spills, derailments, or collisions, Grantor shall provide to Grantee, its successors, lessees, contractors, agents and permittees, reasonable access on roads within the Hatchery property after notice is given to Hatchery personnel, where practicable. Grantee agrees to restore all damage it causes to Hatchery roads to functionality at least equal to that which exists on the date of this Grant to the extent any such damage is caused by Grantee, provided that to the extent that any Hatchery roads are improved by Grantor subsequent to the date of this Grant, Grantee shall restore any damage it causes to such roads to the improved condition. Furthermore, Grantee will provide two at-grade vehicular crossings for use by the Grantor: one at the Tongue River water pipeline crossing, and one at the Yellowstone River water pipeline crossing to Grantor's severed, remaining land.

5. Compliance with applicable laws. For the anticipated construction activities and maintenance operations including those applicable to relocation of Grantor's supply and discharge water and sewer pipelines, private and public utilities, and labor laws, Grantee shall comply with all laws, regulations, and ordinances and obtain all approvals, permits or consents necessary or required from any applicable governmental body that are now required or may be required in connection therewith. Grantee will be responsible for ensuring a safe construction work environment.

B. CONSTRUCTION OF THE RAILROAD AND GRANTOR'S INFRASTRUCTURE

1. Effectiveness of Easement. This Easement Agreement will become effective to allow construction of the Grantee's rail line on Hatchery property only at such time as Grantee has presented in writing to Grantor evidence that Grantee has entered a binding contract or contracts with a construction firm or firms to construct the Grantee's rail line between Miles City and Ashland. Notwithstanding the preceding sentence, Grantee or its contractors may enter the Hatchery property in advance of any such contract or contracts for purposes of surveying or other pre-construction planning work.

2. Construction Plans/Schedule

(A) Timing of Construction. It is the intent of the Grantor and Grantee that the construction of the line across the Easement shall be generally proximate in time to the construction of other portions of the Grantee line from Miles City to the coal resources in the Ashland, Northern Cheyenne Reservation, and Otter Creek areas. Grantee shall not commence construction on Grantor's property until such time as the Grantee has (1) provided the Grantor with Grantee's comprehensive engineering and design plans for construction of the Grantee line between Miles City and the Ashland area and consulted with respect to the portion of the plans that relate to the hatchery property as provided in

Section B.1.(B) of this Grant; (2) provided the Grantor with a timeline for the construction of the Grantee line between Miles City and the Ashland area and consulted with respect to such plans as provided in Section B.1 (C) of this Grant, and (3) entered into a construction contract to construct the entire Grantee line from Miles City to the coal resources in the Ashland, Northern Cheyenne Reservation, and Otter Creek areas.

(B) Consultation on Engineering and Design Plans. In further consideration of the existing use of Grantor's property as a fish hatchery, prior to commencement of construction activities, Grantee shall provide to Grantor a copy of all of Grantee's engineering and design plans for construction that will affect the hatchery infrastructure such as relocation and construction of waterlines, utilities, sewer facilities, manholes, roadways, use of Grantor's internal roads, fences, fishponds, and surface drainage provisions. Grantee and the Grantor shall consult with respect to such plans. Grantee must materially adhere to construction designs provided to Grantor, subject to any adjustment of those designs to accommodate the Grantor's reasonable concerns. If Grantee thereafter desires to materially change such designs, Grantee must first consult with Grantor and accommodate Grantor's reasonable concerns with respect to such changes. Grantor shall set forth its concerns in writing and Grantee shall respond to those concerns in writing.

(C) Consultation on Timing of Construction. In a cooperative effort to avoid, minimize, or eliminate impacts and disruptions to Hatchery operations or facilities that are necessary to Hatchery facilities and fish production, Grantee will consult with Grantor regarding the timing and duration of activities related to construction of the railroad. For Grantee's construction or reconstruction activities specifically related to the Hatchery, construction activities may commence within the permanent or temporary easement areas only after a written plan has been provided by Grantee to Grantor on the timing of construction activities and Grantor has had a reasonable opportunity to consult and comment on such plan. Grantee shall adjust the plans as necessary to accommodate any reasonable concerns of the Grantor, provided that no such adjustment shall be required that would result in a delay of Grantee's proposed construction schedule of more than forty-five (45) days absent agreement of Grantor and Grantee to a longer delay. This construction timing plan must include the timing and duration of construction of hatchery water facilities and appurtenances, utilities, roads, fences, sewage facilities, forage fish pond relocation, surface water drainage adjustments, and any other components of the facility requiring construction or reconstruction. Grantee must use commercially reasonable efforts to adhere to the timelines for construction provided in the plans it submits, subject to any adjustment of those plans to accommodate the Grantor's reasonable concerns and to address unforeseen weather, topographical or other conditions.

3. Protection of Grantor's Water, Sewer, and Utility Facilities. Grantee agrees to locate, identify, and save from harm during and after construction, and during operation, the Grantor's supply and discharge water pipelines, valves, pumps, sewer lines, and related infrastructure and utilities located under the easement or that would be

impacted by construction and maintenance of the railway or any other action by the Grantee that results in damage or impacts to any aspect of the Grantor's property. Grantee agrees to relocate Grantor's Yellowstone River intake water supply pipeline from within the easement area to the Grantor's remaining land within the temporary construction permit area included in this Grant. Grantee agrees to provide intake water supply lines that will lie under the railway easement area and protect those water supply lines with encasements for both the Yellowstone waterline and the Tongue River waterline; and will provide manholes on either side of the easement to gain underground access to both waterlines. Both manholes and pipe encasements will be of sufficient size to allow easy access for inspection and maintenance by a typical worker and be of sufficient strength to protect the waterlines and workers. Manholes and encasements must meet or exceed the American Railway Engineering and Maintenance of Way Association's standard specifications for installation of utilities underneath railway embankments.

4. Disturbance of Sewage Lagoons Prohibited or Restoration or Movement to Avoid Disturbance. Grantee agrees to refrain from disturbing operations of the existing sewage lagoons located adjacent to the easement area. If due to railroad construction and operation, sewage lagoons and appurtenant pipelines must be restored or moved, Grantee must pay to have them moved or restored to standards required by state and local authorities (i.e., Department of Health, Environmental Quality, Custer County Sanitarian).

5. Hold Harmless. Grantee agrees to locate, identify, and save from harm from railroad construction and operation during and after construction, the Grantor's supply and discharge water pipelines. If any outgoing waterlines, drainage or sewer lines are affected by the railroad construction or operation, Grantee will adequately protect them in place or reconstruct them to existing functionality at no greater operational and maintenance costs to Grantor than exists on the date that such lines are affected.

6. Drainage. In order to prevent flooding and inadequate drainage on Grantor's property resulting from railroad construction, Grantee agrees to provide adequate culverts designed to flow east under the right of way easement and prevent water accumulation on Grantor's property. Grantee agrees to indemnify and hold harmless Grantor from any claims of damage from any party due to flooding caused by the presence of the railroad within the easement for a right of way.

7. Relocation of Grantor's Forage Fish Pond. Grantee agrees, at its cost, to relocate or reconfigure to the Grantor's reasonable satisfaction the forage fishpond located under the proposed "South Wye" easement area to another area on the Grantor's remaining land reasonably identified by Grantor at the time that final engineering plans are presented under section B.1. Construction of the relocated forage fish pond will occur during the construction of the railroad on the easement. Grantee recognizes and agrees this existing fishpond's water supply is by gravity fed pipeline and that if the pond is relocated to another part of Grantor's property, long term operation and maintenance costs to pump water into and out of the relocated pond will be incurred and all such costs

are compensable to Grantor by Grantee during the period the Hatchery remains in operation. A functional replacement pond at least equal to the existing fishpond must be in place prior to any changes to the existing pond to assure there is no loss of forage fish production.

8. Fencing. Grantee agrees that in order to maintain security of the Grantor's property, prior to construction of the railroad, Grantee will fence the right of way easement from the remaining property owned by the Grantor using fencing equivalent to or better than the existing chain link fence and maintain the fence along the easement right of way at its sole expense thereafter. For safety and liability reasons, Grantee shall provide security fence gates at all crossings.

9. Restoration. After construction, Grantee will promptly reestablish all natural features including vegetation, soil and natural land contours to pre-existing states to the satisfaction of the Grantor, apart from the changes allowed by the easement for the use of the railway easement for railroad transportation purposes.

10. Obligations. Grantee agrees to (a) implement an Emergency Response Plan and a Spill Prevention Plan in cooperation with appropriate federal, state and local agencies; (b) comply with the Hazardous Materials Transportation Act and its governing regulations in the event hazardous materials are transported over the easement and right of way; (c) comply with Federal Railroad Administration hazardous materials regulations and general rail safety regulations in connection with the exercise of Grantee's rights and obligations under this Grant; and (d) comply with all applicable health and safety regulations in connection with Grantee's rights under this Grant.

11. Miscellaneous. If any hatchery improvements or structures or operations are materially adversely impacted by the construction, repair, maintenance or operation of the railroad, they will be replaced or restored in a manner that is equal to or greater in functionality and efficiency than existed at the time of the adverse impact and, subject to adjustment for inflation, at no greater cost to Grantor than exists on the date of this Grant.

C. MAINTENANCE OF THE EASEMENT

1. Weed Management. Grantee will control weeds within the right of way easement areas consistent with the requirements imposed by the STB's mitigation measure concerning weed control during construction and operation for so long as the easement described in this Grant is held by the Grantee or its assigns. Unless otherwise approved in writing by the Grantor, weed control must be by mechanical means (rather than aerial or broadcast methods) due to potential impacts to water quality and fish production by the application of herbicides or other chemicals. If Grantee determines that it is necessary to use herbicides to control weeds, it shall so advise Grantor and Grantor must approve in writing the type of herbicide, application rate, and means and timing of application prior to weed control activities being undertaken by or on behalf of the Grantee within the right of way easement area. Grantee acknowledges that it will complete an approved weed management plan with Custer County separately.

2. Materials or Equipment Storage Restricted. Grantee will not store materials or equipment of any kind or nature, including, but not limited to railroad cars, other than materials for the maintenance and repair of its rail line within the easement and right of way, on the right of way easement area, except during times of construction and then only those materials directly related to construction within the easement area.

3. Insurance Requirements; Grantor as Additional Insured.

(A) Grantee shall maintain general liability insurance in an amount no less than \$25 million per occurrence and in the aggregate to cover claims for damage to the Hatchery, resident fish populations or any persons arising out of an accident or incident resulting from the construction or operation of Grantee's railroad, including a derailment, collision, spill or other event that results from Grantee's activity in constructing or operating a railroad on property subject to this Grant. Grantee shall provide to Grantor, prior to the date that construction of the rail line commences on the property covered by this Grant, proof that such insurance has been procured and, upon request, a copy of said insurance policy. Said insurance policy shall name Grantor as an additional insured and shall be maintained with an insurer in good standing in the State of Montana. Grantee or any assignee will maintain insurance in place as required by this paragraph during the period that it is constructing, operating or owning the rail line on Grantor's property. In the event that Grantee enters an agreement to provide trackage rights to any other railroad during the term of this Grant allowing such other railroad to operate over the easement granted herein, Grantee shall, through any such trackage rights agreement, require the railroad exercising such trackage rights to provide Grantor proof that the railroad granted such trackage rights maintains insurance that is in every material respect consistent with the requirements of this paragraph and that the Grantor has been named as an additional insured.

(B) At the fifth year anniversary of the execution of this Agreement, and every fifth year thereafter, the minimum level of insurance specified in this Section shall be increased by an amount determined by the percent change (expressed as a decimal), if any, in the CPI-U since the date of the commencement of rail operations, or since the last adjustment made under this paragraph, as applicable. For purposes of this section, CPI-U shall mean the Consumer Price Index for all Urban Consumers (1982-84=100). The provisions of this paragraph shall apply to any assignee of Grantee to no less extent than they apply to Grantee. Nothing in this paragraph shall be construed to require Grantee to procure insurance prior to the date that construction commences in the right of way provided by this Grant.

4. Immediate Remediation of Spills. In the event of a spill, including spills resulting from derailment or collision, Grantee agrees to clean up the spill and remediate the effects of the spill as soon as possible. Grantee acknowledges that time is of the essence in these circumstances. If the spill is caused in whole or in part by the Grantor, the Grantor and Grantee agree to apportion the costs of the remediation thereafter. If the parties are unable to agree on the appropriate level of apportionment, the parties shall

resolve the dispute pursuant to the Dispute Procedure set forth below. Nothing in this paragraph shall be read to constitute an admission by Grantee of liability for the spill, derailment or collision.

5. Liability and Indemnification. Grantee agrees to and shall indemnify and save harmless the Grantor, its administrators, managers, agents, employees, resident employee family members and Hatchery visitors, from and against any and all actions, lawsuits, claims, demands, damages, judgments, losses, fines, and expenses (including attorney fees and court costs incurred enforcing this obligation or a third party claim) or liability (Losses), brought or asserted for injuries to or death of any person or persons, damage to property, loss to resident fish populations, breach of this Grant, or violation of any federal, state or local statute, rule, regulation or ordinance arising out of, resulting from, or occurring in connection with, in whole or in part, the Grantee's exercise of the rights and privileges herein granted, or the exercise of Grantee's rights by any of Grantee's contractors, employees, assignees, or successors in interest, including but not limited to, collisions, derailments, hazardous materials spills, or other major events, provided, however, that such indemnification and hold harmless obligation shall not apply to the extent any damage, injury or death results from the acts or omissions of Grantor, its administrators, managers, agents, employees, resident employee family members and Hatchery visitors. Grantee and Grantor shall each bear responsibility for the Losses in proportion to their respective partial liability. Grantee will be responsible for the activities and use of the rail line and easement area by all third party lessees and permittees of the Grantee. This indemnification and hold harmless obligation survives abandonment of the easement, if any.

6. Liens, Mortgages, and Other Encumbrances. Grantee shall keep the Grantor's land interest free from liens, mortgages or other financial encumbrances arising from the activities of the Grantee or its employees, agents, or contractors. Nothing in the foregoing shall restrict any collateral assignment of this Grant to Grantee's lender(s).

7. Reversion of Easement Interest, Breach, and Termination. In the event that the rail line shall be unused for a period of at least 24 successive months, Grantor may request that Grantee initiate proceedings at the STB or any successor agency to seek the abandonment of the portion of the rail line traversing the Hatchery. As soon as practicable following such a request, Grantee shall initiate such proceedings in the event that it does not have any intention of restoring service on the portion of the line traversing the Hatchery. Nothing herein shall be interpreted so as to restrict in any way Grantor's rights to initiate proceedings at the STB or any successor agency to seek abandonment of the portion of the rail line traversing the Hatchery in the event that the line has not been used for at least 24 successive months. Grantee agrees that upon the effective date of any abandonment of Grantee's rail line authorized by the STB (or any successor agency) pursuant to the formal railroad abandonment procedures of the STB (or any successor agency), the easement and right of way provided for in this Grant, and all of Grantee's obligations under this Grant, shall automatically terminate and be of no further force or effect, except that the following obligations shall survive any abandonment hereunder: (a) Grantee's indemnification obligation as set forth in Section C.5 of this Grant with

respect to matters as to which that obligation applies that arose prior to the effective date of the abandonment and (b) Grantee's obligation to remediate to the extent reasonably practicable concealed or unknown problems caused by Grantee in the right of way covered by this Grant that existed prior to the effective date of the abandonment. Grantee, at its expense, shall remove any track or other structures and return the easement area to conditions that existed prior to construction of the railroad upon the effectiveness of such an authorized abandonment in accordance with STB-imposed remediation conditions.

8. Breach of Obligations. In the event that Grantee is in material breach of any obligations undertaken by Grantee under this Grant, Grantor may submit a notice of breach to Grantee identifying Grantee's actions or omissions claimed to constitute a breach. Grantee shall thereupon have a period of thirty (30) days, or such longer period as may be reasonably necessary to effectuate the cure of such breach, provided that Grantee has taken steps to initiate cure of the breach within the 30 days, to consult with Grantor in an effort to resolve the issue or otherwise cure the issue that is identified in the notice of breach. If the issue has not been cured to the reasonable satisfaction of Grantor within the cure period described in this paragraph or within such longer period as the parties may agree, Grantor shall be entitled to exercise its rights at law or equity, subject to Grantee's right to continue to construct or operate its railroad line absent any final abandonment order issued by the STB or a successor agency.

9. Dispute Resolution Procedure. The parties agree to work in good faith to resolve through negotiations any dispute that may arise under this Grant, including, but not limited to, any dispute relating to compensation due for any damage. In the event that they are unable to resolve any such dispute, either party may seek mediation of such dispute by a mediator jointly appointed by the parties, with the costs of mediation to be shared equally between the parties. In the event that mediation does not result in an agreement to resolve the dispute, either party may seek judicial remedies, or remedies from the STB or its successor, or State Court, as appropriate. The venue for such action shall be in Montana State Court in and for Lewis and Clark County, Montana.

10. Entire Document. This document represents the entire agreement between Grantor and Grantee with respect to the subject matter addressed herein, and any statements, promises, or inducements made by either party, which are not contained in this document, are not valid. No modification, enlargement, or alteration of this Grant is valid except upon written amendment signed by the parties to this Grant.

11. Interest in Property. Grantee by this Grant will not acquire any interest in the Grantor's property save and except the easement provided in this Grant and the right to build, maintain, and use the land as railroad pursuant to the terms contained herein.

12. Authority to Grant an Easement for a Right-Of-Way. Grantor does hereby covenant with Grantee that it is lawfully seized and possessed of said easement area and that it has the good and lawful right to convey said easement and right of way or any part or parts thereof subject to the statutory authority of the Montana Department of Fish,

Wildlife and Parks Commission, provided, however that no action or inaction of the Commission shall supersede the prior approval of the construction and operation of the rail line by the STB and that Grantor has not granted to any third party any rights to all or any portion of the property that is subject to the easement and right of way to which this Grant would be subordinate.

13. Disposition of Payments. Payment for use of MCFH property pursuant to Section A.1 of this Grant is not intended as compensation for surplus property or excess property that would require funds received to go into the Property Trust Fund. Therefore, FWP will deposit funds and all interest accrued from these funds received pursuant to this Grant into the Fisheries Mitigation Trust Fund – Private – 08041 created pursuant to Montana Code Annotated §87-1-611. Funds and all interest accrued will be used for fisheries projects as identified or related to the following programs;

- a. Fish Hatcheries – Operations, maintenance, enhancement, construction, equipment, wild brood fish collection, enhanced spawning operations for hatchery or wild brood sources, and hatchery staffing;
- b. Fish Health – Protection for hatchery fish including fish health detection equipment, costs associated with staffing for fish health inspections and sampling, and related fish health, disease and aquatic nuisance species disease detection or prevention in hatcheries or in wild populations (including genetic testing);
- c. Fisheries Monitoring Projects – Fish tags and tagging, fish marking, creel census, radio telemetry equipment and monitoring projects, and associated equipment to accomplish fish monitoring objectives;
- d. Water Leases/Instream Flow Enhancement – Projects that result in protecting or enhancing streamflows or water quality for priority fisheries in the Upper Missouri River Basin where these elements are limiting factors; and
- e. Native Fish Programs – Restoration of native fish populations and their habitat, monitoring native fish populations, survey and inventory of native fish populations and habitat.

14. Authorization. Grantee shall furnish to Grantor copies of all documents demonstrating Grantee's authorization to enter into this Grant. Grantee will demonstrate that it is a corporate entity in good standing qualified to do business in Montana.

15. Trackage Rights Notification. Grantee shall notify Grantor in writing prior to the grant of trackage rights to any other railroad.

IN WITNESS WHEREOF, Grantor and Grantee have executed this Grant as of the day and year above written.

Montana Department of Fish, Wildlife, and Parks

By: Director

Tongue River Railroad Company, Inc.

ATTEST: _____

By: _____

Its: _____

GRANTOR ACKNOWLEDGEMENT:

STATE OF MONTANA)

: ss

County of Lewis and Clark)

On this _____ day of _____, 2010, before me, the undersigned Notary Public in and for the State of Montana, personally appeared _____ known to me the person that executed the foregoing instrument on behalf of Montana Fish, Wildlife, and Parks.

Notary Public for the State of Montana

Printed Name: _____

Residing at: _____

My commission expires: _____

GRANTEE ACKNOWLEDGEMENT:

STATE OF _____)

: ss.

County of _____)

On this _____ day of _____, 2010, before me, the undersigned Notary Public in and for the State of _____, personally appeared _____, known to me the persons that executed the foregoing instrument on behalf of Tongue River Railroad Company, Inc.

Notary Public for the State of Montana

Printed Name: _____

Residing at: _____

My commission expires: _____

EXHIBIT A

Map and Legal Description of Easement Area (to be provided by TRRC)

RAILROAD EASEMENT DESCRIPTION

Described Property:

SOUTH "WYE" TRACT 2

Refer to the attached Exhibit "A" for the following legal description. Being a portion of Sections 4 & 5, Township 7 North, Range 47 East, Principal Montana Meridian, Custer County, Montana. COMMENCING at the South 1/4 corner of said Section 5, thence proceeding North 41d 44' 33" East, 3,022.83 feet, more or less, to the TRUE POINT OF BEGINNING where the South "WYE" of the railroad enters State of Montana property (otherwise known as Tract 2); thence proceeding North 41d 30' 00" East, 509.82 feet, more or less, to a point along the northwest side of Tract 2, thence along a bearing of curve to the right having a radius of 1580.00 feet (the center of which bears South 10d 41' 59" East), through a central angle of 27d 58' 10", an arc distance of 771.29 feet, more or less, to a point on the curve that intersects the southeast line of the Tract 2 (the center of which bears South 17d 16' 11" West along a radius of 1580.00 feet), thence proceeding South 41d 30' 00" West, 279.59 feet, more or less, to a point along the southeast side of Tract 2, thence along a bearing of curve to the left having a radius of 1330.00 feet (the center of which bears South 12d 19' 13" West), through a central angle of 40d 39' 04", an arc distance of 943.63 feet, more or less, to a point on the curve that intersects the northwest line of the Tract 2 (the center of which bears South 28d 19' 51" East along a radius of 1330.00 feet), where the right-of-way boundary ties to THE POINT OF BEGINNING, said point lying North 41d 44' 33" East 3,022.83 feet, more or less, from the POINT OF COMMENCEMENT (South 1/4 corner of said Section 5). The above describe right-of-way description for the "SOUTH WYE" of TRACT 2 contains 4.81 Acres, more or less.

SEE EXHIBIT "A"

NORTH "WYE" TRACT 2

Refer to the attached Exhibit "B" for the following legal description. Being a portion of Sections 4 & 5, Township 7 North, Range 47 East, Principal Montana Meridian, Custer County, Montana. COMMENCING at the South 1/4 corner of said Section 5, thence proceeding North 41d 39' 10" East, 4,795.14 feet, more or less, to the TRUE POINT OF BEGINNING where the North "WYE" of the railroad enters State of Montana property (otherwise known as Tract 2); thence proceeding North 41d 30' 00" East, 322.78 feet, more or less, to the northwest corner of Tract 2, thence proceeding South 48d 30' 00" East, 104.48 feet, more or less, to a point on the northeast side of Tract 2, thence along a bearing of curve to the left having a radius of 1785.00 feet (the center of which bears South 74d 28' 03" East), through a central angle of 25d 36' 40", an arc distance of 797.89 feet, more or less, to a point on the curve that intersects the southeast line of the Tract 2 (the center of which bears North 79d 55' 17" East along a radius of 1785.00 feet), thence proceeding South 41d 30' 00" West, 307.61 feet, more or less, to a point along the southeast side of Tract 2, thence along a bearing of curve to the right having a radius of 2035.00 feet (the center of which bears North 74d 31' 52" East), through a central angle of 24d 06' 08", an arc distance of 856.05 feet, more or less, to a point on the curve that intersects the northwest line of the Tract 2 (the center of which bears South 81d 22' 00" East along a radius of 2035.00 feet), where the right-of-way boundary ties to THE POINT OF BEGINNING, said point lying North 41d 39' 10" East 4,795.14 feet, more or less, from the POINT OF COMMENCEMENT (South 1/4 corner of said Section 5). The above describe right-of-way description for the "NORTH WYE" of TRACT 2 contains 5.13 Acres, more or less.

SEE EXHIBIT "B"

SOUTH "WYE" TRACT Y

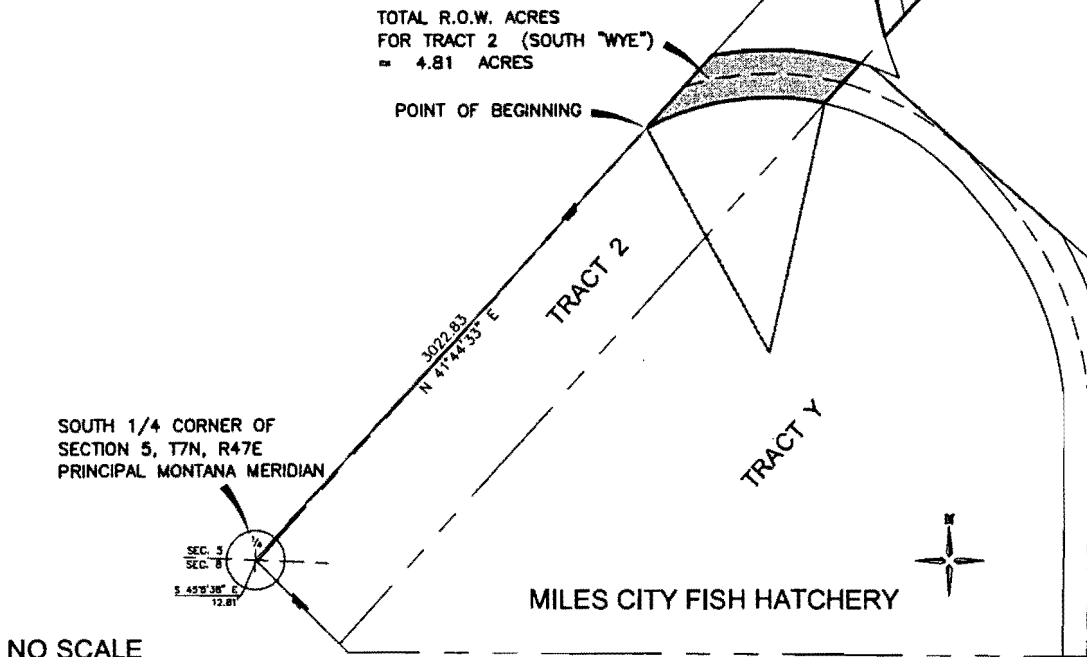
Refer to the attached Exhibit "C" for the following legal description. Being a portion of Sections 4 & 5, Township 7 North, Range 47 East, Principal Montana Meridian, Custer County, Montana.

COMMENCING at the South 1/4 corner of said Section 5, thence proceeding North 50d 50' 27" East, 3,775.50 feet, more or less, to the TRUE POINT OF BEGINNING where the South "WYE" of the railroad enters State of Montana property (otherwise known as Tract Y); thence proceeding North 41d 30' 00" East, 279.59 feet, more or less, to a point along the northwest side of Tract Y, thence along a bearing of curve to the right having a radius of 1580.00 feet (the center of which bears South 17d 16' 11" West), through a central angle of 2d 11' 31", an arc distance of 60.44 feet, more or less, to a point on the curve that intersects the northeast line of the Tract Y (the center of which bears South 19d 27' 41" West along a radius of 1580.00 feet), thence proceeding South 48d 12' 00" East, 1302.35 feet, more or less, to a point along the northeast side of Tract Y, thence along a bearing of curve to the right having a radius of 2035.08 feet (the center of which bears South 59d 52' 19" West), through a central angle of 13d 21' 41", an arc distance of 474.58 feet, more or less, to a point on the curve that intersects the east line of the Tract Y (the center of which bears South 73d 14' 01" West along a radius of 2035.08 feet), thence proceeding South 00d 16' 00" West, 1772.90 feet, more or less, to a point on the southeast corner of Tract Y, thence proceeding North 89d 38' 00" West, 169.55 feet more or less, to a point along the south sided of Tract Y, thence proceeding North 00d 41' 54" East, 1163.06 feet, more or less, thence along a bearing of curve to the left having a radius of 1785.08 feet (the center of which bears North 89d 18' 06" West), through a central angle of 39d 22' 49", an arc distance of 1226.91 feet, more or less, to a point on the curve the center of which bears South 51d 19' 05" West along a radius of 1785.08 feet, thence proceeding North 38d 40' 55" West,

147.80 feet, more or less, thence along a bearing of curve to the left having a radius of 1330.00 feet (the center of which bears South 51d 19' 05" West), through a central angle of 38d 59' 52", an arc distance of 905.25 feet, more or less, to a point on the curve that intersects the northwest line of the Tract Y (the center of which bears South 12d 19' 13" West along a radius of 1330.00 feet), where the right-of-way boundary ties to THE POINT OF BEGINNING, said point lying North 50d 50' 27" East 3,775.50 feet, more or less, from the POINT OF COMMENCEMENT (South 1/4 corner of said Section 5). The above describe right-of-way description for the "SOUTH WYE" of TRACT Y contains 14.91 Acres, more or less.

SEE EXHIBIT "C"

NOTE: THE BEARING AND DISTANCE FROM THE
SOUTH 1/4 CORNER OF SEC. 5
TO THE POINT OF BEGINNING IS:
N 41°44'33" E @ 3022.83 FT



TOTAL R.O.W. ACRES
FOR TRACT 2 (SOUTH "WYE")
= 4.81 ACRES

POINT OF BEGINNING

TRACT 2

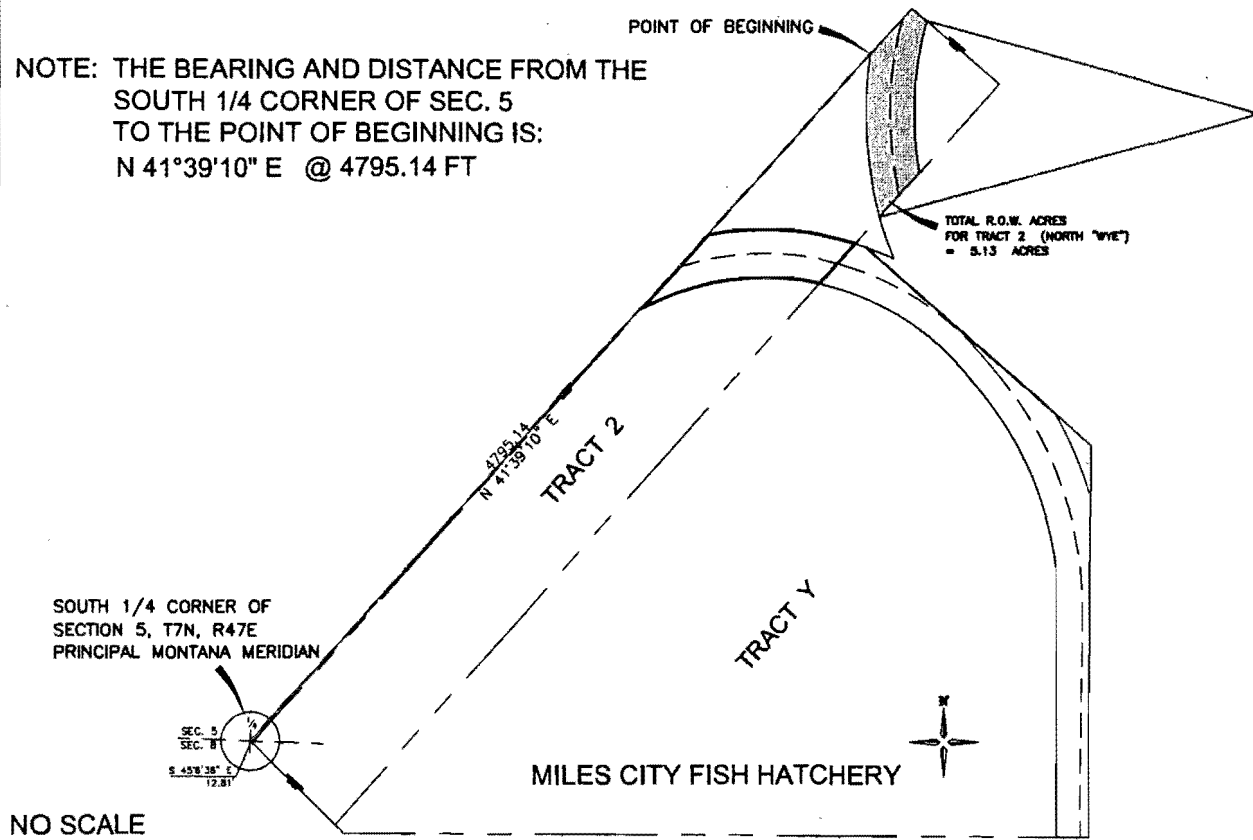
$\Delta = 27^{\circ}58'10''$
D = 3'37'35"
L = 771.29'
T = 393.49'
R = 1580.00'

$\Delta = 40^{\circ}39'04''$
D = 4'18'29"
L = 943.63'
T = 492.66'
R = 1330.00'

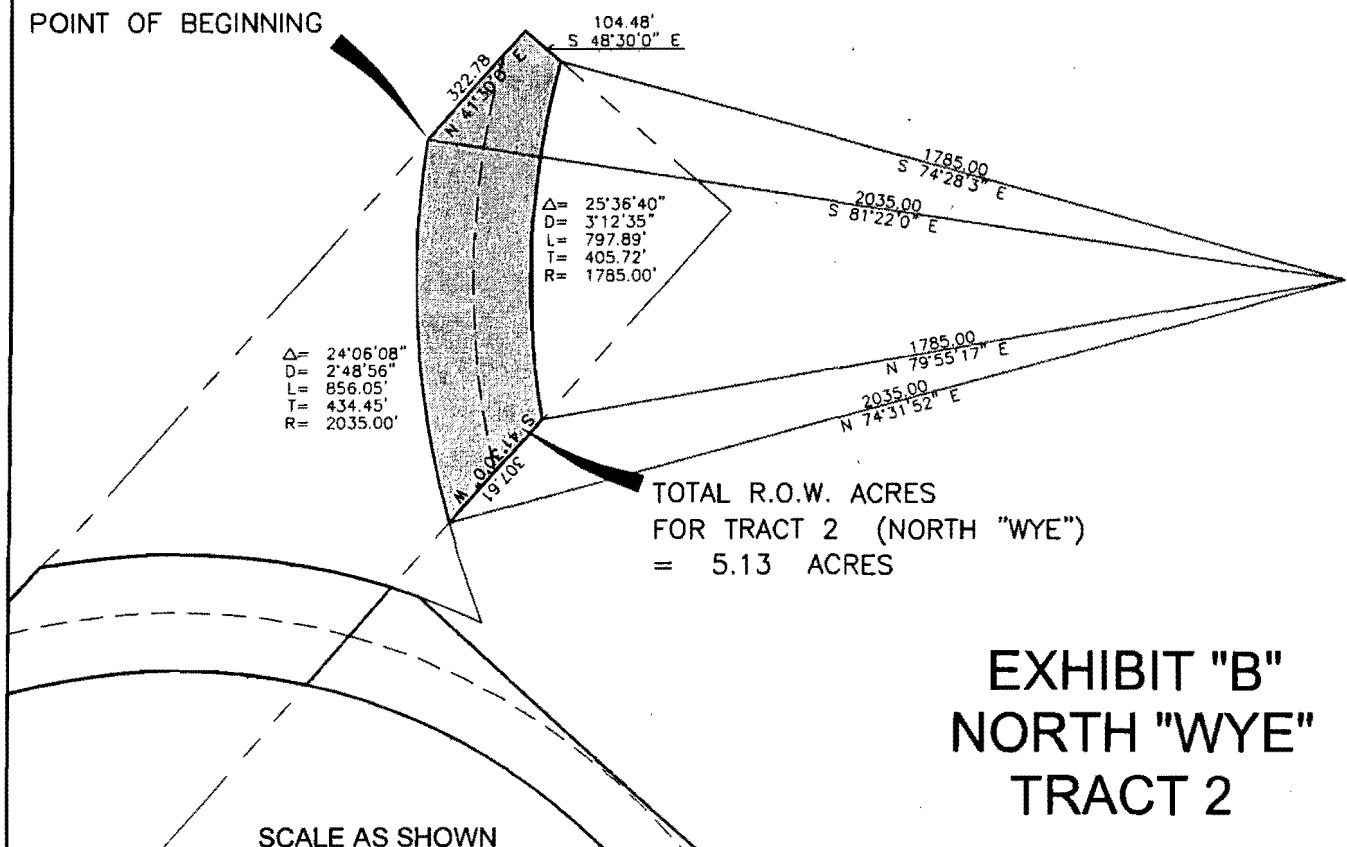
EXHIBIT "A"
SOUTH "WYE"
TRACT 2

SCALE AS SHOWN

NOTE: THE BEARING AND DISTANCE FROM THE
SOUTH 1/4 CORNER OF SEC. 5
TO THE POINT OF BEGINNING IS:
N 41°39'10" E @ 4795.14 FT



POINT OF BEGINNING



SOUTH 1/4 CORNER OF
SECTION 5, T7N, R47E
PRINCIPAL MONTANA MERIDIAN

MILES CITY FISH HATCHERY

TOTAL R.O.W. ACRES
FOR TRACT Y (SOUTH "WYE")
= 14.91 ACRES

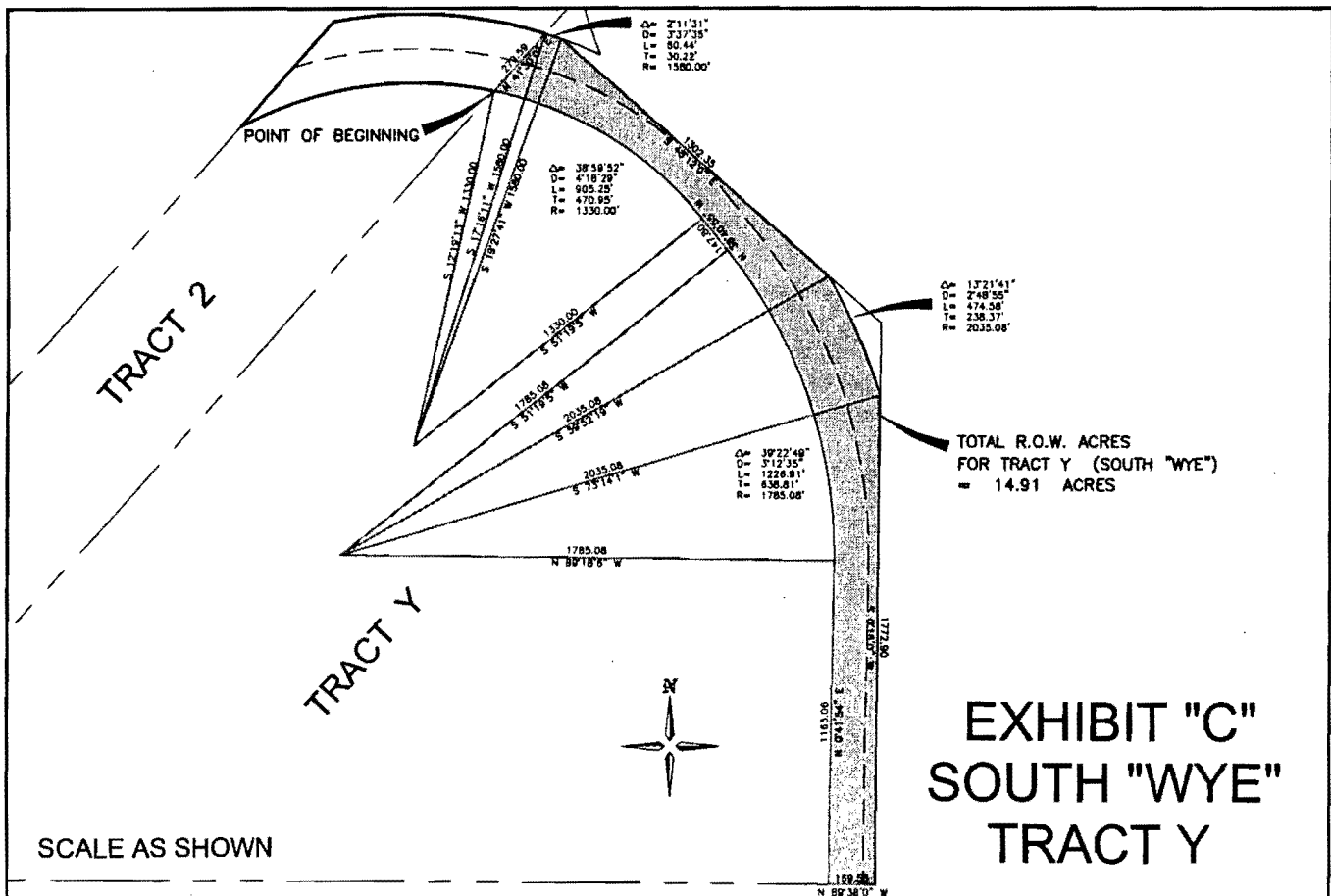


EXHIBIT "C"
SOUTH "WYE"
TRACT Y



United States Department of the Interior

FISH AND WILDLIFE SERVICE Mountain-Prairie Region



IN REPLY REFER TO
FWS/R6

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228-1807

SEP 10 2009

Rebecca Jakes Dockter
Agency Legal Counsel
Montana Fish, Wildlife, and Parks
1420 East Sixth Avenue
P.O. Box 200701
Helena, Montana 59620-0701

Dear Ms. Dockter:

Thank you for your letter, dated August 6, 2009, requesting our views regarding your approval of a Right-of-Way Easement to the Tongue River Railroad Company (TRRC) to allow the construction and operation of a railroad on the northeast corner of the Miles City Fish Hatchery (MCFH).

As you know, the MCFH is located on property that was formerly a U. S. Fish and Wildlife Service (Service) hatchery site deeded to the State in 1987, with the condition that if the hatchery ever ceased to be used as a hatchery, the property would revert back to the Service. Since acquiring the MCFH, Montana Fish, Wildlife, and Parks (MFWP) has used Dingell-Johnson Sport Fish Restoration grant funds for hatchery operation, maintenance, and improvements; and Section 6 Endangered Species Act (ESA) grant funds for continuous holding and captive propagation of the listed endangered pallid sturgeon.

From your letter we understand that, "The portion of the hatchery property over which the railroad has been permitted to construct and operate is the northeast corner not currently occupied by hatchery facilities. A forage fish pond and some sewer lines will be impacted but, as a condition of their permit, TRRC is required to relocate them at their expense."

Further, it is our understanding that MFWP will continue to operate the hatchery at the level and for the purpose for which the acquisition was made, and have determined that the actions proposed by the TRRC will have no effect on the management or operations conducted at the MCFH. As you know, the Surface Transportation Board (STB) requested formal consultation

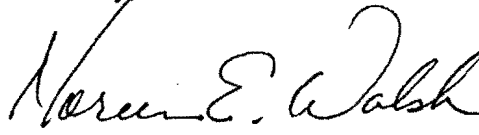
under the ESA regarding the TRCC permit application. Our Montana Ecological Services Field Office issued a Biological Opinion (BO) on July 12, 2006, concurring that the proposed action is not likely to adversely affect the pallid sturgeon. The BO also stated, "In relation to the MCFH and pallid sturgeon, the Board must reinitiate consultation if:

- A. The research study at the Service's Bozeman Fish Technology Center (Webb 2006) indicates that the vibration and noise equivalent to that of the TRRC operations causes a stress response in adult pallid sturgeon, impedes reproduction by reducing gamete and/or progeny quality, and impedes the immunological response of adult pallid sturgeon, or impacts embryo development or larval and juvenile growth;
- B. As outlined in the revised monitoring plan at the MCFH (Womack and Associates 2006), during construction and operation of the railroad, seismographs trigger an alarm when determined action levels are exceeded; and/or
- C. There is significant decrease in fertility, survivorship or health of eggs, larvae, juvenile or adult fish at the MCFH."

We agree with your approval of the easement provided MFWP continues to maintain hatchery operations, the impacted facilities are replaced, and the requirements of the July 12, 2006, BO are met.

Thank you for the opportunity to comment on this issue. If you have any questions or need further information, please contact me or David McGillivray, Chief, Division of Wildlife and Sport Fish Restoration, Region 6, at (303) 236-4411.

Sincerely,


Regional Director

cc: Joe Maurier, Director, Montana Fish, Wildlife, and Parks