BEAR DEN PHASE 2 PROJECT

Migratory Bird Impact Assessment, Mitigation, and Voluntary Conservation Plan

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May 2014

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TABLE OF CONTENTS

1.0 INTRODUCTION 1
2.0 REGULATORY AUTHORITY AND GUIDANCE 1
3.0 LIST OF SPECIES OF CONCERN 3
4.0 IMPACT ANALYSIS 6
4.1 Landscape-scale Habitat Impact Analysis 6
4.1.1 Bird Conservation Region 17 6
4.1.2 Ecoregions 7
4.1.3 Habitat Types 7
5.0 HABITAT AVOIDANCE AND MINIMIZATION MEASURES 8
5.1 Routing 9
5.2 Horizontal Directional Drill 10
5.3 Right-of-Way Configuration and Optimization 10
5.4 Restoration 12
6.0 SEASONAL TIMING RESTRICTIONS 12
7.0 CONSTRUCTION MITIGATION AND AVOIDANCE MEASURES 12
7.1 Pre-construction Migratory Bird and Raptor Nest Surveys, and Sharp-tailed Grouse Lek Surveys 12
7.1.1 Migratory Bird and Raptor Nest Field Survey Protocol 12
7.1.2 Migratory Bird Nest Surveys 13
7.1.3 Sharp-Tailed Grouse Lek Surveys 14
7.2 Actions for Active Nests/Leks 14
7.2.1 Protection Buffers for Active Migratory Bird Nests 14
7.2.2 Protection Buffers for Active Raptor Nests 15
7.2.3 Protection Buffers for Sharp-tailed Grouse 15
7.2.4 Active Nest Monitoring 15
8.0 RESPONSIBILITIES 16
8.1 Enable Bakken Crude Services, LLC. 16
8.2 U.S. Fish and Wildlife Service 16
9.0 GENERAL PROVISIONS OF THIS PLAN 16
9.1 Limitations on Authorities 16
9.2 Third-Party Challenges or Appeals 17
9.3 No Restriction of Similar Voluntary Conservation Plan 17
10.0 CONTACTS 17
10.1 Enable Bakken Crude Services, LLC 17
10.2 U.S. Fish and Wildlife Service 17
11.0 SIGNATORY 17

LIST OF TABLES

Table 3-1 Migratory Bird Species of Concern Potentially Encountered by the Project 4
Table 4.1.3-1 Migratory Bird Species of Concern and Associated Habitat Types 8
Table 5.2-1-1 Horizontal Directional Drill Impact Reduction 10
Table 5.3-1 Proposed Construction Right-of-Way and Permanent Right-of-Way by Landowner or Habitat Type Where There is a Single or Double Pipeline 11
Table 7.2.2-1 Minimum Distance and Timing Limitations of Disturbance of Active Raptor Nests from Oil and Gas Structural Developments 15

ATTACHMENTS

Attachment 1 Construction, Reclamation, and Mitigation Plan
Attachment 2 Weed Management Plan
Attachment 3 Draft Bear Den Phase 2 Construction Schedule

1.0 INTRODUCTION

Enable Bakken Crude Services, LLC (EBCS) retained Natural Resource Group, LLC (NRG) to coordinate and manage the biological and cultural surveys required to support federal and state environmental permitting of the Bear Den Phase 2 Project (Bear Den Phase 2 Project or Project). The Bear Den Phase 2 Project is an extension of the Bear Den Project that is currently being constructed in Dunn and McKenzie Counties, North Dakota. NRG has developed this Migratory Bird Impact Assessment, Mitigation, and Voluntary Conservation Plan (Plan) to assess the potential for impacts to migratory birds, describe mitigation measures that will benefit migratory birds, and document efforts to avoid, minimize, and reduce possible impacts on migratory birds during construction. Part of this plan requires surveys for nesting migratory birds prior to commencement of construction activities along the Project's proposed pipeline route in North Dakota.

2.0 REGULATORY AUTHORITY AND GUIDANCE

Migratory birds include species that nest in the United States and Canada during the summer and migrate south to warmer regions of the United States, Mexico, Central and South America, and the Caribbean for the winter. The Migratory Bird Treaty Act (MBTA) protects migratory birds and most resident birds within the United States. With a few exceptions, all bird species that are native to the United States are protected by the MBTA. Under the MBTA, it is illegal to pursue; hunt; take; capture; kill; attempt to take, capture, or kill; possess; offer for sale; and export, import, or transport birds, their parts (e.g., feathers), and active nests (and the eggs or young within). Unlike the federal Endangered Species Act (ESA), the MBTA does not include harassment or destruction of habitat in its list of prohibitions or within its definition of take. Also, unlike the Bald and Golden Eagle Protection Act (BGEPA), the MBTA does not include disturbance within its definition of take. Using this definition, the MBTA prohibition that is germane to pipeline construction, operation, and maintenance is the killing of an individual or egg (through destruction of an active nest). Federal guidance regarding the MBTA includes Executive Order (EO) 13186, December 2008 Memorandum of Understanding (MOU) between the U.S. Fish and Wildlife Service (FWS) and U.S. Forest Service (USFS), April 2010 MOU between the FWS and the Bureau of Land Management (BLM), BLM and USFS guidance on National Environmental Policy Act (NEPA) conformance, and FWS guidance on MBTA conformance related to communication tower siting and operation. The above mentioned MOU's were created to further address EO 13186 (January 2001) in order to assess impacts of said agency activities on migratory bird populations and their habitats. EBCS focuses on these documents in its approach to address migratory bird concerns and potential project impacts on migratory bird species of concern and their nesting habitats.

EO 13186 (January 2001) was established to ensure that the environmental impacts of a federal action are properly evaluated for migratory birds and states that particular importance should be given to species of concern, priority habitat, and key risk factors. In particular, EO 13186 states that federal agencies should establish a memorandum of understanding with the FWS that addresses the following, as practicable, when authorizing projects under federal jurisdiction:

- avoid and minimize adverse impacts on migratory birds;
- restore and enhance habitats;

- ensure that effects of federally approved actions on migratory bird populations are analyzed and that these analyses should focus on migratory bird species of concern;

- implement conservation measures to reduce the amount of unintentional take during project activities; and

- regularly monitor the above measures.

In December 2008, a MOU between the FWS and USFS was finalized per EO 13186 (USFS and FWS, 2008). In the MOU, the USFS commits to assessing impacts of agency activities on migratory birds by giving priority to species of concern, key risk factors, and priority habitats. To the extent practicable, consideration should be given to identify and minimize incidental take. The USFS should also coordinate with the FWS when planning actions that may have negative impacts on migratory bird populations and should develop measures to minimize negative impacts and maximize beneficial impacts.

In April 2010, a MOU between the FWS and the BLM was finalized per EO 13186 (FWS, 2010) that had similar concepts to the USFS-FWS MOU. In the MOU, the BLM committed to assessing the impacts of projects on migratory birds in the course of NEPA implementation, describe where take may have a measurable negative impact on populations of migratory birds, and give priority to species of concern, key risk factors, and priority habitats. In cases where take is expected, avoidance and minimization measures should be implemented, and if avoidance is not possible, the BLM will coordinate with the FWS and comply with permitting requirements.

The BLM has additional guidance for project planning and NEPA conformance with the MBTA (BLM, 2008; BLM, 2009). The guidance recommends analyzing a project's long-term impacts on populations and habitats following a four-step analysis when determining MBTA conformance. These include:

1) determine which species of conservation concern may occur in the project area;

2) determine the extent of the impacts on the overall habitat type;

3) determine the proportion of the affected habitat types in relation to the total amount of that habitat type available; and

4) consider seasonal restrictions for the project if significant proportions of a habitat type are affected, if the habitat is limited, or if the project will not provide a long-term benefit to bird species of conservation concern.

The FWS provides MBTA guidance on siting, construction, operation, and decommissioning of communication towers (FWS, 2000). In this guidance, FWS states that although individuals and companies cannot be absolved of MBTA offenses, the Office of Law Enforcement (OLE) typically reserves their prosecutorial discretion for individuals and companies that do not make good faith efforts to avoid and minimize projects impacts on migratory birds. The FWS also realizes there may be impacts to some birds even if all reasonable and effective measures are taken to avoid such impacts (FWS, 2012). In these cases, the FWS exercises enforcement discretion to focus on those individuals, companies or agencies that take migratory birds without implementing appropriate measures recommended by the guidelines (FWS, 2012).

In addition to the MBTA, the BGEPA is also applicable to the Bear Den Phase 2 Project. This law prohibits intentional take of an eagle, egg, or nest, including inactive and alternate nests (FWS, 2007b). The BGEPA definition of take includes disturbance of eagles, whereas the MBTA definition of take does not include disturbance. BGEPA disturbance is defined as that which results in a biologically significant impact; it may include interference with breeding, feeding, sheltering behavior (roosting), or nest abandonment, which can contribute to or cause the agitation of a golden eagle to the degree that it causes injury or death (FWS, 2007a).

The above has been key guidance for the development of this *Migratory Bird Impact Assessment, Mitigation, and Compliance Plan* for the Bear Den Project.

In addition to this general guidance, EBCS met with the FWS North Dakota Ecological Services Field Office in February 2014 to receive project-specific input. The amalgamation of these efforts solidifies EBCS' approach and good faith efforts for the conservation of migratory birds and their habitats.

3.0 LIST OF SPECIES OF CONCERN

The first step in the assessment for the Bear Den Phase 2 Project was to identify migratory bird species of concern that could occur in the project area. To do this, EBCS reviewed migratory bird species lists for the Central Flyway. EBCS conducted comprehensive reviews of species' range information and habitat requirements in order to determine which species may be affected by the project. Table 3-1 reflects the final list of Migratory Bird Species of Concern potentially encountered by the Project.

EBCS conducted individual impact analyses and effects determination of Sprague's Pipit and Whooping Crane through the Section 7 consultation process of the ESA. Impact analyses were considered for Piping Plover and Least Tern; however, these species are not likely to occur in the Project area and were given a no effect determination through the Section 7 consultation process of the ESA. These species are included in EBCS' Draft Applicant-prepared Biological Assessment to be filed with the FWS in 2014. If documented within the project area, EBCS will establish buffer zones for these species and construction will be allowed to commence only when the chicks are fully fledged and able to fly. No active Sprague's Pipit nests will be removed during the construction of the proposed project. The above ESA-level protections and analysis are as stringent for individuals and nests as protections and analyses under the MBTA or EO 13186. Thus, no further analyses have been conducted. Per the Draft Applicant-prepared Biological Assessment, any anticipated impacts on individuals and habitat have been mitigated.

EBCS conducted individual impact analyses and effects determination of Bald Eagle, Burrowing Owl, Baird's Sparrow, Loggerhead Shrike, and Long-billed Curlew as part of the USFS Sensitive Species consultation for the NEPA process. These species are included in EBCS' Draft Applicant-prepared Biological Evaluation to be filed with the BLM in 2014. If documented within the project area, EBCS will establish buffer zones for these species and construction will be allowed to commence only when the chicks are fully fledged and able to fly. No active nests will be removed during the construction of the proposed project.

TABLE 3-1

Bear Den Phase 2 Project
Migratory Bird Species of Concern [a] Potentially Encountered by the Project

Species	Ecoregion	Potential Habitat
American Bittern *Botaurus lentiginosus*	Little Missouri Badlands Missouri Plateau	Fringes and shorelines of wetlands dominated by tall, emergent vegetation. Nests located in dense emergent vegetation over water 5-20 cm in depth and less often on dry ground in fields
Baird's Sparrow *Ammodramus bairdii*	Little Missouri Badlands Missouri Plateau	Mixed-grass and fescue prairie with scattered low shrubs and residual vegetation from previous year's growing season. Nests located in on ground in depression excavated by adult and also may place nest in natural depression or hoof print.
Bald Eagle *Haliaeetus leucocephalus*	Little Missouri Badlands Missouri Plateau	Forested areas adjacent to large waterbodies. Nests located in trees often within mature and old-growth forest with suitable waterbodies nearby for foraging.
Black-billed Cuckoo *Coccyzus erythropthalmus*	Little Missouri Badlands Missouri Plateau	Shortgrass vegetation characteristic of dry, open, plains often associated with burrowing mammals. Nests located close to roads that are surrounded by bare ground or short grass with high perches nearby and grazed, level pastures with high density of burrows.
Burrowing Owl *Athene cunicularia*	Little Missouri Badlands Missouri Plateau	Well-drained, level to gently sloping areas characterized by sparse vegetation and bare ground within shortgrass or grazed mixed-grass prairie. They require underground burrows dug by mammals.
Chestnut-collared Longspur *Calcarius ornatus*	Little Missouri Badlands Missouri Plateau	Arid, short- to mixed-grass prairie that has been recently grazed or mowed with vegetation height <20– 30 cm. Nests are placed on the ground in a depression excavated by the female often beside cattle dung and usually under a clump of grass.
Dickcissel *Spiza americana*	Little Missouri Badlands Missouri Plateau	Grassland, savanna, and cropland. Nests placed near ground level, but not on the ground, in areas containing dense grasses and forbs or 3-4 meters above the ground on woody plants.
Ferruginous Hawk *Buteo regalis*	Little Missouri Badlands Missouri Plateau	Flat and rolling terrain in grassland or shrub steppe regions. Nests either placed on the ground or in topographically elevated nest sites such as boulders, creek banks, knolls, or low cliffs.
Golden Eagle *Aquila chrysaetos*	Little Missouri Badlands Missouri Plateau	Desert, grassland, and steppe in canyons or mountainous areas with rimrock terrain. Nests located on cliffs, trees, ground, river banks, or humanmade structures. Nests often have a view of the entire area surrounding the nest location.
Grasshopper Sparrow *Ammodramus savannarum ammolegus*	Little Missouri Badlands Missouri Plateau	Moderately open grassland and prairie with patchy bare ground. Distinctive ground nest is very difficult to locate and usually domed with overhanging grasses.
Horned Grebe *Podiceps auritus*	Little Missouri Badlands Missouri Plateau	Inland bodies of water such as rivers and small lakes and coastal areas. Nests located in fairly shallow, moderately sized freshwater ponds and marshes with beds of emergent vegetation.
Least Tern *Sternula antillarum*	Little Missouri Badlands Missouri Plateau	Segments of the Missouri River system with sparse vegetation along sand and gravel bars within wide river channels, salt flats along lake shorelines, dike fields, and several artificial habitats (i.e. sand and gravel pits)
Lewis's Woodpecker *Melanerpes lewis*	Little Missouri Badlands Missouri Plateau	Open woodlands with a brushy understory offering ground cover, dead or downed woody material, available perches, and abundant insects. Nest cavities excavated in trunk or large branches of large trees that are burned or dead and decaying.
Loggerhead Shrike *Lanius ludovicianus*	Little Missouri Badlands Missouri Plateau	Pastures with fence rows, old orchards, mowed roadsides, cemeteries, golf courses, agricultural fields, riparian areas, and open woodlands. Nests located in trees with thorns that likely provide increased protection from predators.

TABLE 3-1 (cont'd)

Bear Den Project
Migratory Bird Species of Concern [a] Potentially Encountered by the Project

Species	Ecoregion	Potential Habitat
Long-billed Curlew *Numenius americanus*	Little Missouri Badlands Missouri Plateau	Open, sparse grassland. Ground nests are located in shortgrass or mixed-grass prairie with flat to rolling topography on relatively dry, exposed sites.
Marbled Godwit *Limosa fedoa*	Little Missouri Badlands Missouri Plateau	Northern prairies of Canada and U.S. Nests built in short, grassy cover in sparsely vegetated landscapes, grasslands, or wetlands in Northern prairies of Canada and U.S.
McCown's Longspur *Calcarius mcownii*	Little Missouri Badlands Missouri Plateau	Restricted to open habitat and sparse vegetation provided by the semi-arid shortgrass steppe. Nests are constructed in shallow depressions on the ground.
Mountain Plover *Charadrius montanus*	Little Missouri Badlands Missouri Plateau	Generally a bird of open, flat, dry tablelands with low, sparse vegetation. Nests on bare ground in shortgrass prairie of the Great Plains region.
Peregrine Falcon *Falco peregrinus*	Little Missouri Badlands Missouri Plateau	A wide variety of habitat is used from urban areas to lake edges to mountain ranges. Nests located on cliffs or other high platform structures.
Pinyon Jay *Gymnorhinus cyanocephalus*	Little Missouri Badlands Missouri Plateau	Dry environments with cliffs or bluffs and shrub-steppe deserts. Nests are located in cavities, ledges, crevices, bluffs, isolated rock outcrops, on cliffs, trees, and human-made structures.
Piping Plover *Charadrius melodus*	Little Missouri Badlands Missouri Plateau	Prairie alkali lakes and free flowing portions of the Missouri River and the Yellowstone River with barren river sandbars.
Prairie Falcon *Falco mexicanus*	Little Missouri Badlands Missouri Plateau	Native prairie and cropland that includes badlands, isolated buttes, and cliffs with ledges, small holes, caves or crevices to nest. Most nesting pairs (in ND) are cencentrated along the Little Missouri River Valley and adjoining prairie.
Red-headed Woodpecker *Melanerpes erythrocephalus*	Little Missouri Badlands Missouri Plateau	Found in deciduous woodlands, especially with beech or oak, lowland and upland habitats, river bottoms, and open wood, groves of dead and dying trees. Nests are made in dead trees or in dead portions of live trees.
Sage Sparrow *Amphispiza belli*	Little Missouri Badlands Missouri Plateau	Prefers semi-open habitats with evenly spaced shrubs 1–2 m high. Nests mainly in shrubs but also in bunchgrass and occasionally on ground under shrubs.
Sage Thrasher *Oreoscoptes montanus*	Little Missouri Badlands Missouri Plateau	Shrub-steppe dominated by big sagebrush. Nests most commonly in big sagebrush and three-tip sagebrush, and occasionally uses other species such as low sagebrush.
Sharp-tailed Grouse *Tympanuchus phasianellus*	Little Missouri Badlands Missouri Plateau	Tracks of relatively undisturbed mixed-grass prairie with scattered patches of small trees and shrubs or near the margins of woodlands. Occasionally uses agricultural cropland.
Short-eared Owl *Asio flammeus*	Little Missouri Badlands Missouri Plateau	Typically large expanses of prairie and coastal grasslands, heathlands, shrub-steppe, and tundra. Ground nests are typically located in large expanses of prairie and coastal grasslands, heathlands, shrub-steppe, and tundra.
Sprague's Pipit *Anthus spragueii*	Little Missouri Badlands Missouri Plateau	Frequently disturbed grasslands of intermediate height greater than 145 ha in size, and stubble and fallow fields (alfalfa, soybean, wheat) in fall. Prefer well-drained areas in open grassland for nesting.
Upland Sandpiper *Bartramia longicauda*	Little Missouri Badlands Missouri Plateau	Uses dry grasslands with low to moderate forb cover, low woody cover, moderate grass cover, moderate to high litter cover, and little bare ground. Nests found in native grassland, seeded grassland, grazed pastures, un-grazed grasslands, hayfields, and crop fields.

TABLE 3-1 (cont'd)

Bear Den Project
Migratory Bird Species of Concern [a] Potentially Encountered by the Project

Species	Ecoregion	Potential Habitat
Yellow Rail *Coturnicops noveboracensis*	Little Missouri Badlands Missouri Plateau	Wet sedge meadows. Nests located in wet sedge meadows dominated by *Carex lasiocarpa* with moist substrate to standing water.
Whooping Crane *Grus americana*	Little Missouri Badlands Missouri Plateau	Roosting and feeding along migration in a variety of habitats including submerged sandbars in wide, unobstructed river channels isolated from human disturbance, freshwater wetlands with shallow areas, and croplands.

Sources: Birds of North America (BNA), 2011; Deschant et al., 2003; Gomes, No Date; USFWS, 1990; USFWS, 2008; USFWS, 2011.

[a] List is from Birds of Conservation Concern, USFWS, 2008 and/or Birds of Management Concern and Focal Species, USFWS, November 2011.

4.0 IMPACT ANALYSIS

4.1 Landscape-scale Habitat Impact Analysis

Consistent with current BLM guidance, EBCS conducted a broad level habitat assessment for the areas crossed by the proposed pipeline. Migratory bird impacts can be measured at three separate scales: Partners in Flight (PIF) Bird Conservation Regions (BCRs), U.S. Geological Survey (USGS) Class III ecoregions, and North Dakota GAP Analysis habitat types. BCRs are distinct ecological regions in North America with similar bird communities, habitats, and resource management issues (NABCI, 2007). One BCR is crossed by the proposed Bear Den Phase 2 Project (BCR 17, Badlands and Prairies). These BCRs can be further subdivided into smaller ecological units such as ecoregions. The Class III Ecoregions of North Dakota were used to estimate habitat impacts at a finer regionally specific scale than the BCRs. Two ecoregions are crossed by the Bear Den Phase 2 Project. These include the Missouri Plateau and the Little Missouri Badlands. In addition, habitat impacts were assessed using the habitat types defined by the North Dakota GAP Analysis, which are crossed by the Project. Eleven habitat types are crossed by the Bear Den Phase 2 Project, and are discussed in Section 4.1.3 below.

4.1.1 Bird Conservation Region 17

BCR 17, also known as the Badlands and Prairies, extends west and south of the glaciated Prairie Pothole region, east of the Rocky Mountains, and north of the true shortgrass prairie. BCR 17 occurs in portions of five states: North Dakota, South Dakota, Montana, Nebraska, and Wyoming. Its climate is often characterized as having low annual precipitation and extreme winter low temperatures. This BCR is characterized as semi-arid grasslands dominated by mixed grass prairies. It encompasses approximately 91,084,753 acres in the Midwest. The Bear Den Phase 2 Project disturbs approximately 172.1 acres of BCR 17 for a total of 0.001 percent of the available geographic area impacted. Given the prevalence of migratory bird habitat within the region/BCR 17, impacts associated with construction and operation of the proposed Project would be less than significant.

4.1.2 Ecoregions

The Missouri Plateau Ecoregion is semi-arid mixed grass prairie with a mosaic of spring wheat, alfalfa, and pastureland in North Dakota. Generally, the climate is arid with cold winters and hot summers. Most of the ecoregion receives between 15-17 inches of precipitation a year (USGS, 2006). In North Dakota, the Missouri Plateau Ecoregion encompasses 12,800,000 acres. The Bear Den Phase 2 Project disturbs approximately 172.1 acres of this ecoregion for less than 0.01 percent of the available geographic area impacted. Given the prevalence of migratory bird habitat within the Missouri Plateau Ecoregion, the overall effect of the project on migratory bird habitat in this ecoregion is considered less than significant.

The Little Missouri Badlands Ecoregion is a highly dissected erosional landscape of conical hills. It has an annual rainfall ranging from 14 to 16 inches per year (USGS, 2006). Habitats in this ecoregion include shortgrass prairie with juniper in the draws and along north slopes. In North Dakota, the Little Missouri Badlands Ecoregion encompasses 1,633,280 acres. The Bear Den Phase 2 Project disturbs approximately 172.1 acres of this ecoregion for a total of 0.04 percent of the available geographic area impacted. Given the prevalence of migratory bird habitat within the Little Missouri Badlands Ecoregion, the overall effect of the project on migratory bird habitat in this ecoregion is considered less than significant.

4.1.3 Habitat Types

Habitats crossed by the Bear Den Phase 2 Project vary considerably. Table 4.1.3-1 provides a brief description of each habitat type, migratory birds species of concern associated with each habitat type, the total acreage of each habitat type in the ecoregions crossed, the acres impacted by the project, and the percent of each habitat impacted by the project. The project disturbs approximately 0.01 percent of the available habitats in the ecoregions crossed. Given the prevalence of migratory bird habitat within these habitat types, the overall effect of the project on migratory bird habitat in these habitat types is considered less than significant.

Physical disturbance, displacement, and clearing of herbaceous upland and wetland habitats could affect migratory birds at or near the time of construction, but such effects would be temporary and many habitats would generally recover quickly following construction. Upland and wetland forested habitats would be affected most substantially, with a long-term conversion of wooded areas to successional stages in the construction right-of-way and a permanent conversion to scrub-shrub or herbaceous levels within the permanent pipeline right-of-way. The permanent pipeline right-of-way width is variable along the Project and ranges from 33-foot-wide on all state lands to 50-feet-wide along a majority of the Project.. There will be no permanent conversion of wetland forested habitats to scrub-shrub and/or herbaceous habitats along the permanent right-of-way.

TABLE 4.1.3-1

Bear Den Phase 2 Project
Migratory Bird Species of Concern and Associated Habitat Types

Habitat Type	Migratory Bird Species of Concern Associated with the Habitat Type	General Habitat Description	Acres Impacted
Cultivated Cropland	Dickcissel	Lands tilled and planted to annual herbaceous small grain and row crops	19.6
Introduced Upland Vegetation - Perennial Grassland and Forbland	Grasshopper Sparrow, Dickcissel	Significantly altered landscape with no natural vegetation. All non-native perenials and forbs.	0.04
Northwestern Great Plains Mixedgrass Prairie	Grasshopper Sparrow, Dickcissel	Typically dominated by cool season grasses with scattered forbs and shrubs, including green needlegrass, needle and thread grass, Western wheatgrass, blue grama prairie sagewort, and prairie coneflower.	135.4
Northwestern Great Plains Shrubland	Sage Sparrow, McCown's Longspur	Occurs near slopes or on upper terraces of rivers and streams and has fine to sandy loam soils and has a shrub den	3.0
Southwestern Great Plains Canyon	Pinyon Jay	A complex mosaic of grasslands, shrublands, and woodlands within the canyon system.	0.4
Western Great Plains Badland	Sage Sparrow, McCown's Longspur	Rugged, eroded lands that lie well above or below local base level and are relatively free of vegetative cover.	0.5
Western Great Plains Depressional Wetland Systems	Long-billed Curlew	Occur in lowland depressions with a permanent water source through most of the year and have high species diversity.	3.5
Western Great Plains Dry Bur Oak Forest and Woodland	Pinyon Jay	This ecosystem includes the bur oakdominated upland woods of bluffs and ravines, primarily in the mixed-grass prairie environment	0.3
Western Great Plains Floodplain Systems	Whooping Crane, Yellow Rail	Alluvial soils with periodic flooding dominated by floodplain forests, wet meadows, and gravel flats with grass cover under trees.	0.6
Western Great Plains Sand Prairie	Sage Sparrow, McCown's Longspur, Sprague' Pipit, Sharp-tailed Grouse	Contain elements of tallgrass and shortgrass priaries that are very susceptible to wind erosion because of the soil composition and vegetative cover.	2.5
Western Great Plains Wooded Draw and Ravine	Pinyon Jay	Occur on steep northern slopes or canyon bottoms with higher moisture levels than what is common for the area. Aspen, paper birch, and boxelder maples are common.	6.2
Total			**172.1**

5.0 HABITAT AVOIDANCE AND MINIMIZATION MEASURES

In an effort to be consistent with the MBTA, EO 13186, and the BLM guidance, EBCS has reduced migratory bird impacts in several ways. EBCS has avoided sensitive and rare habitats such as mineral deposits, talus slopes, and native prairie through careful routing. In addition, EBCS has made right-of-way width reductions and right-of-way construction configuration changes to reduce and avoid impacts on other priority habitats such as forested areas and riparian wetlands. Agency input has also been considered during routing and during development of

avoidance and minimization measures for listed species that directly benefit migratory birds as well. EBCS has committed to restoration efforts to ensure that environmental impacts have been reduced or minimized after construction. EBCS' habitat avoidance and impact minimization measures as they relate to EO 13186 and BLM guidance are discussed below.

5.1 Routing

EO 13186 instructs agency project proponents to avoid and minimize impacts on migratory birds. Linear rights-of-way are able to use routing as a tool to help avoid impacts on discrete habitats and features, thereby avoiding impacts on the birds that use these habitats and features to nest. During development of the proposed route, EBCS has evaluated multiple alternatives to optimally design and locate the proposed facilities in a manner that minimizes its environmental footprint while meeting the purpose and need of the project. Although this effort was not conducted specifically for migratory birds, a route with the least environmental impacts will, in turn, have the least impact on migratory birds. The criteria implemented by EBCS during evaluation and selection or rejection of alternate route configurations included review of technical and economic feasibility and constructability; quantitative evaluation of environmental constraints comprised of sensitive areas; and coordination with key stakeholders such as federal land management agencies, state and federal resource agencies, local planning departments, Tribal entities, and landowners. Existing data and available information from the BLM, USFS, FWS, North Dakota Game and Fish (NDGF) were obtained and reviewed to identify locations where sensitive species and habitats potentially occur along the proposed pipeline corridor. These data were mapped and incorporated into the various routing scenarios and quantitative route selection process. In addition, results of the general biological and wetland surveys conducted in 2013 as well as the species-specific special status plant surveys were used to further inform and refine the routing process. As new survey results became available, further adjustments to the route were made if necessary. This process identified the shortest route possible with modifications for constructability and considerations to avoid and minimize impacts to sensitive areas.

Beginning in early 2014, EBCS evaluated potential routing constraints in consultation with the state and federal land management agencies including the North Dakota State Land Department (NDSLD), USFS, and the BLM. EBCS has engaged the USFS in an effort to develop and refine a pipeline route that avoids or minimizes disruption to sensitive areas located within the Little Missouri National Grassland (LMNG) while considering existing energy and/or transportation corridors, constructability and slope stability, and ecological resources. These sensitive areas include wetlands, native prairie, and cap rock slopes. Early in the project planning efforts for the Bear Den (Phase 1) Project, the USFS resource specialists advised EBCS of several resources of significant concern within the LMNG that the agency recommended for impact avoidance including native prairie, USFS Sensitive plants, geologic hazards (i.e., debris slides/flows, slumps, earthflow, channel crossings), wetlands, meadows, and bighorn sheep lambing areas.

After considering agency input and prior to completing its sensitive species surveys, EBCS implemented conservation measures in the form of route modifications to avoid or minimize impacts on many species, particularly special status plants. While route modifications were not directly considered for migratory birds, benefits to birds from these route adjustments include the avoidance of the higher quality habitats along the pipeline right-of-way.

5.2 Horizontal Directional Drill

The Horizontal Directional Drill (HDD) method is another process that allows for trenchless construction across an area. With this method, a borehole is drilled under the area and a prefabricated segment of pipe is installed through the borehole, thereby avoiding disturbance to the surface of the right-of-way and to the area. HDDs are most commonly used to cross underneath sensitive or difficult to construct areas such as areas with slope stability issues, roads, wetlands, and waterbodies. HDDs provide a number of advantages over typical pipeline construction and installation methods, such as avoidance of surface disturbance, riparian tree clearing, and in-stream construction. If an HDD crossing is successful, there are little to no negative impacts on the sensitive area crossed. EBCS plans to use the HDD crossing method in locations (see Table 5.2-1), which will reduce overall project impact to potential migratory bird habitats by a total of acres.

TABLE 5.2-1

Bear Den Phase 2 Project
Horizontal Directional Drill Impact Reduction

Line	Feature Crossed	Enter Milepost	Exit Milepost	Length (feet)	Access Required Across HDD Location (feet)	Acres Potentially Impacted if HDD Crossing Method Is not Used [a]	Impact (acres)
AR-18	Constructability	0.7	0.8	744	0	1.7	0.3
AR-25	Foreign Pipeline	0.1	0.1	240	15	0.6	0.1
AR-25	Foreign Pipeline	0.1	0.1	240	15	0.6	0.1
AR-25	Foreign Pipeline	1.2	1.3	150	15	0.3	0.1
AR-25	Steep Slope	1.6	1.7	500	15	1.1	0.2
AR-25	Foreign Pipeline	2.1	2.2	200	15	0.5	0.1
AR-25	Waterbody	4.4	4.4	261	15	0.6	0.1
AR-25	Steep Slope	4.7	4.8	499	0	1.1	0.2
AR-48	Steep Slope	0	0.1	269	15	0.6	0.1
AR-48	Foreign Pipeline	0.2	0.2	402	15	0.9	0.1
AR-48	Sensitive Resource Buffer	2.4	2.4	200	0	0.5	0.1
AR-48	Foreign Pipeline	3.5	3.5	80	15	0.2	0.0
AR-48	Wildlife Habitat	3.7	3.8	452	15	1.0	0.2
AR-51	Steep Slope	0	0	150	15	0.3	0.1
AR-51	Foreign Pipeline Wetland	0.6	0.7	347	15	0.8	0.1

5.3 Right-of-Way Configuration and Optimization

In addition to routing, EBCS will use various right-of-way configurations and optimizations to avoid and reduce impacts on migratory birds. In particular, many of these measures may benefit and at a minimum reduce or avoid impacts on migratory bird species of concern, consistent with EO 13186. For example, on federal lands the nominal construction right-of-way will be reduced from 125 feet to 80 feet (see Table 5.3-1). This measure will reduce overall ground disturbance for the project reducing potential impacts to migratory birds.

TABLE 5.3-1

Bear Den Phase 2 Project
Proposed Construction Right-of-Way and Permanent Right-of-Way by Landowner or Habitat Type
Where There is a Single or Double Pipeline

	Landowner/Habitat Type			
Pipeline/Right-of-Way	Federal (feet wide)	North Dakota Department Trust Lands (feet wide)	Privately Owned (feet wide)	Wetlands and Waterbodies (feet wide)
Construction Right-of-Way	80	100	100	75
Permanent Right-of-Way	50	33	50	50

One specific measure that will reduce impacts on migratory birds will be collocation with other rights-of-way. In total, about 7.6 miles (52.4%) of the Project will be collocated with existing utility (e.g., other pipelines, power lines, etc.), railroad, or road rights-of-way. EBCS considers its proposed pipeline to be "collocated" with existing rights-of-way where its proposed construction and/or operational right-of-way abuts an existing pipeline, utility, or road right-of-way; or its proposed pipeline route is located generally parallel to a pipeline, utility, or road right-of-way and does not stray from this general alignment for a distance greater than 300 feet. For example, minor route variations from the adjacent pipeline, utility, or road rights-of-way that EBCS has adopted at feature crossings (e.g., waterbody, utility) for engineering purposes are still considered collocated. This also includes areas where EBCS' proposed pipeline route leaves an existing right-of-way and immediately realigns with another right-of-way.

In segments where EBCS was unable to collocate, EBCS will minimize impacts in sensitive environmental areas and high priority habitats to migratory birds such as wetlands and riparian zones by reducing the construction right-of-way width to 75 and 60 feet for pipeline installations and placing additional temporary workspaces (ATWS) at least 50-feet outside of these areas as practicable. However, EBCS will use HDD methods to cross the one wetland within the construction right-of-way and to cross Cherry Creek. Using HDD crossing methods will reduce and potentially eliminate surface disturbances within these wetland and riparian areas. These sensitive environmental areas were identified through agency review, general biological surveys, and existing data. Wetlands and riparian areas often have high species diversity and may be critical for some wildlife. These habitats have declined throughout the project area where vegetation has been converted by development, road building, agriculture, and pasture conversion. Riparian corridors can be extremely productive and diverse areas often supporting high species diversity of migratory birds, which may rely on intact riparian systems for foraging, hunting, refugia, or movement. Census results of nest site locations indicate that floodplain woodlands can support greater densities of birds than either herbaceous or upland habitats (Stauffer, 1980). Where practicable, EBCS will use HDDs to minimize and avoid surface impacts to riparian areas. Additionally, Best Management Practices will be implemented where appropriate when accessing those locations (e.g., cutting veg at ground level, removing only those stumps necessary for safe travel, installing sedimentation barriers, etc.). Where clearing of riparian areas cannot be avoided, EBCS will spread annual wheatgrass to provide temporary cover while allowing native herbaceous and woody vegetation to become re-established without excessive competition. Consistent with EO 13186, these measures will reduce the impacts on migratory birds nesting in riparian areas.

5.4 Restoration

Consistent EO 13186 guidance, EBCS has developed restoration and enhancement measures that will reduce impacts on or benefit migratory bird species of concern. Following construction of the pipeline, restoration and reclamation of the disturbed work areas will occur following methods outlined in EBCS' *Construction, Reclamation, and Monitoring Plan* (see Attachment 1). During Project construction EBCS proposes to remove and store topsoil for reuse during reclamation. Topsoil segregation benefits revegetation success as most plant-essential nutrients are found at or near the surface. Disturbed areas will be de-compacted as needed and would be subject to final grading.

6.0 SEASONAL TIMING RESTRICTIONS

The FWS suggested that EBCS also consider avoiding disturbance and incidental take through the adoption of seasonal avoidance measures. EBCS' construction schedule was designed with consideration to an array of environmental and contractual constraints. To meet these objectives, it will be necessary to construct during parts of the migratory bird nesting season. Project construction is currently anticipated to begin in July 2014 and be substantively complete and in-service by October 2014, subject to receipt of all applicable federal, state, and local permits and approvals. Attachment 3 includes EBCS' draft construction schedule. The construction schedule will be finalized when the project is approved and permits are issued. Actions that may impact nesting migratory birds during construction primarily include clearing and grading of the construction right-of-way, as it is anticipated that migratory birds would generally avoid the construction right-of-way following those actions.

7.0 CONSTRUCTION MITIGATION AND AVOIDANCE MEASURES

7.1 Pre-construction Migratory Bird and Raptor Nest Surveys, and Sharp-tailed Grouse Lek Surveys

EBCS is committed to implementing the above-described conservation measures related to avoidance, minimization, and mitigation to reduce impacts on migratory birds during pipeline construction. In addition, EBCS has committed to pre-construction surveys, and active migratory bird and raptor nest avoidance and monitoring, during construction. EBCS has developed the following Migratory Bird and Raptor Nest Field Survey Protocol to define and communicate project-specific survey methods, team member roles and responsibilities, and coordination and reporting guidelines. Although sharp-tailed grouse are not migratory birds there are guidelines and standards associated with the protection of their active leks on USFS lands within the Project (LRMP, 2001). EBCS has developed the following Sharp-tailed Grouse active lek and nest survey protocols to protect the species and adhere to the 2001 LRMP standards and guidelines for prairie grouse.

7.1.1 Migratory Bird and Raptor Nest Field Survey Protocol

EBCS will assign a Migratory Bird Treaty Act Coordinator (MBTA Coordinator) to the Project. The MBTA Coordinator will have overall responsibility for survey coordination, resource allocation, status tracking and reporting, data collation, procedural review, and quality assurance for the Project's migratory bird nest field surveys. EBCS will also identify a MBTA Survey Crew Lead (MBTA Lead) on each spread who will be the primary responsible for the migratory bird nest surveys and protection measures in the field. In addition, a web based information portal will facilitate information sharing throughout the Project.

7.1.2 Migratory Bird Nest Surveys

It is anticipated that a total of two biologists will conduct migratory bird nest surveys ahead of construction clearing and grading crews within the proposed construction right-of-way and in ATWS areas from May through July 15 (one crew of two biologists per spread). MBTA survey crews, consisting of one MBTA Lead and one MBTA Survey Crew Assistant biologist (MBTA Assistant), will remain on the project as long as clearing is being conducted and identified migratory bird and raptor nests are active, but the number of personnel will be reduced as needs decrease (i.e., right-of-way is cleared, bird nesting season progresses). MBTA survey crews will work closely with the Lead EI (LEI) for their respective spreads to determine where surveys will be needed to ensure construction crews have access to the right-of-way on the day they are scheduled. The MBTA Lead will be responsible for confirming that access is approved on all parcels they are going to survey each day. Surveys will be coordinated so completion of survey for a tract is as close to the date construction crews are scheduled to do initial clearing as feasible; these surveys will be valid for 7 days. If construction crews do not start clearing within 7 days of when survey was completed, resurvey will be required prior to construction activities. Once clearing has gone through an area, it will not require additional survey, except for active nests that were found during surveys which require monitoring (see below).

7.1.2.1 Pedestrian Nest Surveys

Pedestrian surveys will be conducted by MBTA survey crews using a combination of methods based on habitat: systematic walking, rope dragging, and behavioral observations. These techniques have been shown to be most effective for identifying nesting grassland/prairie birds and the Bear Den Phase 2 Project crosses mostly grassland and agricultural land (Winter et al. 2003).

7.1.2.2 Systematic Walking

In areas with tall grasses or planted agricultural fields, MBTA survey crews will traverse a survey area at arm's width apart in a grid pattern searching for flushing birds as they walk. A stick or pole can be used to disturb the vegetation in front of the surveyors to aid in flushing birds in thick vegetation (Winter et al. 2003). If a bird is seen flushing from an area, MBTA survey crews will search for a nest near where the bird was seen. More than one pass across the survey area may be needed to identify all nests in that area; this is at the discretion of the MBTA Lead in each crew.

7.1.2.3 Rope Dragging

Rope dragging will be used in areas with short vegetation (i.e., shortgrass prairie, grazed pastures) to flush birds on nests. A rope is pulled across the survey area between two people, and flushes the bird from its nest. MBTA survey crews will watch for birds flushing just in front of, underneath, and behind the rope (Winter et al. 2003). If a bird is seen flushing from an area, surveyors will search for a nest near where the bird was seen. More than one pass across the survey area may be needed to identify all nests in that area; this is at the discretion of the MBTA Lead in each crew.

7.1.2.4 Behavioral Observations

Behavioral observations will be a part of both rope dragging and systematic walking surveys. Nesting birds often display unique behaviors or cues such as: "alarm chipping; flushing within 5 meters and flying only a short distance; nest material in the bill; food in the bill; fecal sac in the bill; members of a pair in close vicinity to one another; distraction displays; repeated flights towards a distinct area; and begging vocalizations by nestlings" (Winter et al. 2003). MBTA survey crews will look for these cues during systematic walking and rope dragging surveys.

7.1.2.5 Raptor Nest Surveys

Raptor nest data has been provided to EBCS by the USFS LMNG McKenzie District Office for species occurring on both federal and private land adjacent to or along the Project at various distances. Raptor nest locations have been identified for Swainson's Hawks, Prairie Falcons, Merlins, Golden Eagles, Ferruginous Hawks, Burrowing and Great Horned Owls. In accordance with recommendations received from the FWS, two aerial surveys for raptor nests were conducted within 1-mile of the construction right-of-way in April and May 2014 to determine if there are active raptor nests in the Project area. The first initial survey were conducted to identify all potential nests with the second survey targeting nest with unknown activity status.

7.1.3 Sharp-Tailed Grouse Lek Surveys

The USFS LMNG McKenzie District Office provided EBCS with Sharp-tailed Grouse lek locations within and adjacent to the Project on state, federal, and private lands. The USFS data shows that there are approximately 8 sharp-tailed grouse leks within 1 mile of the construction right-of-way that were recorded between 1998 and 2007. If construction begins after June 15, the end of lekking season, known sharp-tailed grouse leks on USFS lands within 1 mile of the Project will not be surveyed for activity. If construction is to be implemented during the active lek season and within known lek locations, March 1 to June 15, known Sharp-tailed Grouse leks on USFS lands within 1 mile of the construction right-of-way will be surveyed to determine if they are active.

7.2 Actions for Active Nests/Leks

Active migratory bird nests, active Sharp-tailed Grouse nests, and inactive or active raptor nests found during surveys will be recorded. Each nest will be given a unique identification number to allow tracking of nests for monitoring activities. Nests which will require follow-up monitoring will be marked for ease of re-location in the field. GPS coordinates of the nest will be saved in the GPS unit, and a flag on a post will be placed a known distance and direction away from the nest to mark, but not disturb, the nesting bird. In areas with livestock, nest flagging will not be used so livestock are not attracted to the flag and trample the nest; these nests will be located for monitoring purposes using the recorded GPS coordinates and notes on the exact nest location on the survey form.

7.2.1 Protection Buffers for Active Migratory Bird Nests

Migratory birds that are not Species of Concern (Table 3-1) will receive a sufficient buffer around active nests to avoid disturbing breeding activities (USFWS, 2012); nest buffers will vary depending upon the species and their tolerance to activities near them. Sprague's Pipit nests will receive a 100-foot nest buffer. Migratory birds that are Species of Concern will receive a 30-foot nest buffer. All other migratory bird nests will be protected, but there will not be an established

buffer distance for these species. For nests with buffers that fall within the construction right-of-way or within ATWS, the MBTA biologists will be responsible for installing signage and protective fencing or markers, and alerting the LEI on that spread and MBTA Coordinator to the location and restrictions for the active nests found that may affect construction activities.

7.2.2 Protection Buffers for Active Raptor Nests

Active raptor nests will dictate continued biological monitoring requirements for those active nests within the prescribed activity restriction buffers (Table 7.2.2-1), during construction. Monitoring of raptor activity on identified nests with buffers that impact construction activities will be conducted by the MBTA survey crews (see Active Nest Monitoring Section 7.2.1). Nests will be monitored once per week until the young have fledged (anticipated to be late-July in most instances), at which time the buffer will be lifted.

TABLE 7.2.2-1

Bear Den Phase 2 Project
Minimum Distance and Timing Limitations of Disturbance of Active Raptor Nests from Oil and Gas Structural Developments

Species -Nest	Minimum Distance from Oil and Gas Structural Developments (miles)	Minimum Distance and Timing Limitation (miles and dates)
Bald Eagle	1.0	1.0 from 2/1 to 7/31
Golden Eagle	0.5	0.5 from 2/1 to 7/31
Peregrine Falcon	1.0	1.0 from 2/1 to 7/31
Prairie Falcon	0.25	0.25 from 4/1 to 7/31
Merlin	0.5	0.5 from 4/1 to 7/31
Ferruginous Hawk	0.5	0.5 from 3/1 to 7/31
Burrowing Owl	0.25	0.25 from 4/15 to 8/31

Source: Land and Resource Management Plan (LRMP). 2001. Land and Resource Management Plan for the Dakota Prairie Grasslands North Region. U.S Forest Service. Bismarck, North Dakota.

7.2.3 Protection Buffers for Sharp-tailed Grouse

All active leks within 1 mile of the Project will receive a 1.0 mile buffer if construction occurs during the active lek season (March 1 – June 15) and construction activities will be limited within those buffers from March 1 to June 15 (LRMP, 2001). Buffers that impact construction activities will be monitored by the MBTA survey crews.

7.2.4 Active Nest Monitoring

Active nests will be monitored once per week until the young have fledged (anticipated to be mid-July or earlier in most instances) or the nest has failed, at which time the buffer will be lifted. If nests are identified adjacent to the right-of-way after ground clearing activities have commenced in an area, EBCS will attempt to limit extensive disturbance in the area, but will assume that because the birds initiated nesting after construction began in an area that the nesting individuals are acclimated to construction-related noise and disturbance and, therefore, additional protections will not be implemented.

8.0 RESPONSIBILITIES

8.1 Enable Bakken Crude Services, LLC.

EBCS' assessment of habitat impacts at three spatial scales (i.e., BCR, ecoregion, habitat type) shows that the impacts from the Bear Den Phase 2 Project on migratory bird habitat are expected to be less than significant and discountable. EBCS recognizes that the construction of the Bear Den Phase 2 Project may result in impacts on individuals of some migratory bird species. Mitigation actions completed to address impacts on wetlands, when taken into consideration with EBCS' routing, HDDs, right-of-way optimization, restoration, and revegetation efforts, will offset project impacts on migratory bird species of concern and other bird species along the project route. EBCS has also committed to surveying and avoiding any active migratory bird nests. Collectively, these actions demonstrate EBCS' good faith efforts to minimize impacts and provide benefits to migratory birds.

8.2 U.S. Fish and Wildlife Service

The MBTA prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the U. S. Department of the Interior. While the MBTA has no provisions for allowing unauthorized take, the FWS and EBCS recognize that some birds (nests) may be taken during pipeline construction and maintenance activities even if all reasonable and practicable conservation measures to avoid take are implemented. The FWS' OLE has discretionary authority for the investigation and enforcement of the MBTA. In addition, the OLE also carries out its mission to protect migratory birds by fostering relationships with individuals and industries by helping them proactively reduce construction and operational impacts on migratory birds. While it is not possible to absolve individuals, companies, or agencies from liability, the OLE can focus its enforcement on those individuals, companies, or agencies who do not take pro-active measures to avoid and minimize impacts on migratory birds.

The FWS provided technical assistance to EBCS and its representatives throughout the construction process to ensure that EBCS provides for the conservation of migratory birds during Project activities. The FWS would do the following:

- The FWS provided EBCS with assurance that the measures proposed in this plan are reasonable to comply with the MBTA and will avoid or minimize impacts to migratory birds during construction of the proposed project.

- FWS provided guidance to EBCS for post-construction operation and maintenance actions so that such actions are conducted in a way that minimizes impacts to migratory birds.

9.0 GENERAL PROVISIONS OF THIS PLAN

9.1 Limitations on Authorities

Nothing in this Plan shall be construed as affecting the authorities of any party or as binding them beyond their respective authorities or responsibilities. Nothing in this Plan shall be construed as obligating the United States, its officers, agents, or employees, to expend any funds in excess of appropriations authorized by law.

9.2 Third-Party Challenges or Appeals

This Plan does not create any new right or interest in any member of the public or any State as a third-party beneficiary, nor shall it authorize anyone not party to this Plan to maintain a suit for injuries or damages pursuant to the provisions of this Plan. The duties, obligations, and responsibilities of the Parties to this Plan with respect to third-parties, include States, shall remain as imposed under existing law.

9.3 No Restriction of Similar Voluntary Conservation Plan

This Plan in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations, or individuals. It is the express intent of the Parties that the contributed funds be leveraged to the maximum extent practicable by supplemental funding from any legally available source.

10.0 CONTACTS

Notifications required hereunder may be sent via first-class mail, postage pre-paid, or by properly addressed electronic mail to the following principal contacts:

10.1 Enable Bakken Crude Services, LLC

Chad Burrows
Environmental Project Manager
Enable Bakken Crude Services, LLC
P.O. Box 21734
Shreveport, LA 71151

10.2 U.S. Fish and Wildlife Service

Kevin Shelley
U.S. Fish and Wildlife Service
3425 Miriam Ave
Bismarck, ND 58501

11.0 SIGNATORY

IN WITNESS WHEREOF, the Parties have caused this Migratory Bird Impact Assessment, Mitigation, and Voluntary Conservation Plan to be executed by their respective authorized representatives.

Date: _____

By: _____

Enable Bakken Crude Services, LLC.

Date: _____

By: _____

U.S. Fish and Wildlife Service

BEAR DEN PHASE 2 PROJECT

ATTACHMENT 1
Construction, Reclamation, and Monitoring Plan

(SEE APPENDIX E)

BEAR DEN PHASE 2 PROJECT

ATTACHMENT 2
Weed Management Plan

(SEE APPENDIX K)

BEAR DEN PHASE 2 PROJECT

ATTACHMENT 3
Draft Bear Den Phase 2 Construction Schedule

Attachment 3

Bear Den Phase 2 Project
Anticipated Construction Segments and Schedule

Project Section	Pipeline Segments	Anticipated Construction Start Date	Anticipated Construction Completion Date
A		15-Jul-13	15-Sep-13
B		01-Sep-13	01-Nov-13