

D-9. Wildlife

Matthew Call of Wyo-Ben, Inc. evaluated the areas associated with this proposal for potential significant or critical/important wildlife habitat during site visits at various times of the year 2008. Habitat and noted species information gathered during wildlife field visits were sent to the Wyoming Game and Fish Department (WG&F) and U.S. Fish and Wildlife Service (FWS) for their review. The FWS response indicated possible concern for mountain plovers, nesting raptor species, black-footed ferrets, migratory birds, and greater sage grouse (Exhibit D-9.1). The WG&F response indicated concern for mule deer and antelope, sage grouse, and the protection of Owl Creek from sediment loads due to off site sedimentation (Exhibit D-9.2).

Based on past Wyo-Ben practices, and information from both the FWS and WG&F contained in their response letters concerning this bentonite mine proposal, Wyo-Ben is proposing the following operator committed practices intended to reduce impacts to wildlife and its habitat.

The FWS encouraged the protection of all prairie dog towns for their value to the prairie ecosystem and their value to future black footed ferret reintroductions. Wyo-Ben does not anticipate the disturbance of any prairie dog towns during mining of the proposed areas of this Amendment/Plan of Operations.

Wyo-Ben personnel have observed sage grouse in the area near proposed pit 98T (T43N R93W Section 17) during site visits. The Wyoming Game and Fish Department identified areas around proposed pits 73T, 75T, 98T, and 104T (Red Hole Pits, T43N R93W Sections 17,18) as winter sage grouse habitat. They also identified proposed pit 108T (T43N R96 Sections 24 and 25) to lie within one of the Governor of Wyoming's designated core sage grouse areas; and the following stipulations were recommended to protect those birds within core areas: 1) No surface occupancy within 0.6 miles of the perimeter of occupied sage grouse leks; 2) Surface disturbance limited to < 5% of sagebrush habitat per 640 acres; 3) Locate main haul roads > 1.9 miles from the perimeter of occupied sage grouse leks. Finally, the FWS recommended that no surface disturbing activities occur between the dates November 15 through June 30 annually in mating, nesting, brood rearing, or winter habitats.

Wyo-Ben will mitigate potential impacts to sage grouse in these proposed mining areas by the following voluntary mining restrictions: Mitigation to protect those sage grouse and reported lek near proposed pit 108T will occur in the following manner: First, the closest mining that would occur in proximity to the reported lek near proposed pit 108T is roughly 1.9 miles. This fact addresses core area recommendations 1 and 3 above. Second, based on estimated calculated disturbance in the vegetation map units of proposed pit 108T, approximately 59.4 acres of Sagebrush/ Grasslands out of a total 106.2 acres will be disturbed by mining. This equates to approximately 9% of disturbed sagebrush habitat in 640 acres (Not all the 640 acres surrounding Pit 108T is sagebrush habitat). Although this exceeds the recommended level of disturbed sagebrush habitat, it is not well above that recommendation. Furthermore, disturbance to that sagebrush habitat will occur over an approximately 10-15 year period, with reclamation targeted to restoring previous sagebrush habitat on a yearly basis. After researching the Governor's Executive Order, and related stipulations, it was learned that those stipulations contained in WG&F's habitat review letter to Wyo-Ben for this Amendment/Plan of Operation were taken from Oil and Gas recommendations. The fact that mining typically involves a

greater number of acres of disturbance than oil and gas exploration, with reclamation occurring in a more timely manner should dictate more liberal disturbance acreages within core sage grouse areas for mining operations. It is anticipated that Wyo-Ben will achieve high quality concurrent reclamation on most lands in the Thermopolis area due to greater annual precipitation and deeper soils relative to Big Horn County. Wyo-Ben typically targets wetter areas for sagebrush seeding during reclamation efforts in our pits in Big Horn County; but in the Thermopolis area, Wyo-Ben will seed sagebrush in all lands that supported big sagebrush premine due to the environmental advantages in this area.

Wyo-Ben believes the recommendation by FWS of a limited time frame in which to mine in sage grouse habitat annually will, in actuality, result in a greater impact to grouse than if reduced-impact mining occurred through out the year. If Wyo-Ben is forced to obtain its annual tonnage of product in a short window of opportunity, such as would be applied in the four month window suggested by FWS (July 1- November 14), It would be necessary to disturb large acreages of land without the benefit of timely reclamation. On the other hand, spreading the disturbance out over a greater time frame in conjunction with reasonable timing restrictions allow for the use of techniques, such as cast-back mining, which allows for timely reclamation, thus reducing impacts (see cast back mining discussion in the mine plan section).

Wyo-Ben proposes the following voluntary mining practices, which have been applied in our Greybull, Wyoming operations for at least 15 years, and based on yearly monitoring of Leks near those active pits, have been successful at minimizing impacts to grouse. Wyo-Ben will observe the following practices for all pits in which sagebrush habitat and sage grouse are known to exist (Proposed Pits of the Red Hole, and 108T): During the mating season, from March 1 through May 15, no mining or hauling activity will occur within ½ mile of a lek during the consecutive hours between 6:00 pm and 8:00 am to reduce impacts to mating birds due to audio and visual distractions. Furthermore, no initial surface disturbing activities will occur between May 15 (nesting season) and July 15 (brooding season) in areas that are within 0.6 mile of active leks. Areas planned for disturbance that are further than 0.6 mile from active leks will be checked for possible nesting or brooding sage grouse during appropriate times of the year immediately before any activities begin. If nesting or brooding sage grouse hens or chicks are found, mining will be halted until the birds can survive independent of the immediate nest habitat. Other mitigation efforts will include staying current with reclamation, including the separation and saving or direct spreading of top and subsoil in order to increase the chances of quick revegetation success. Additionally , Wyo-Ben will use a seed mix that will establish a diverse population of vegetation. Wyoming big sagebrush seed will be targeted to areas most likely to support sagebrush establishment at a rate of two to four pounds per acre. Fencing of new reclamation will also be considered on a case-by-case basis, mostly based on the expectation of domestic livestock grazing. Finally, Wyo-Ben will consider constructing open water sources when appropriate conditions allow for such structures.

Wyo-Ben, with the aid of BLM/WG&F, will determine the location of leks that occur near our planned mining areas. Those leks will be monitored three times per year on a yearly basis, usually during the month of April, to determine possible impacts due to mining. Results of monitoring will be displayed in our annual report. If it is determined

that our mining is substantially negatively impacting those populations, Wyo-Ben will consult with BLM/LQD/FWS for mitigation recommendations.

The WG&F noted that the location of proposed pit 108T does not occur within designated big game crucial winter range, but mule deer and pronghorn use the habitat year-long. The area of Proposed pit 102T does occur in crucial winter/year-long habitat, and pits of the Red Hole occur within winter/year-long habitat for mule deer and crucial winter/year long habitat for antelope. Wyo-Ben will voluntarily restrict mining operations to ½ hour before sunrise to ½ hour after sunset during the winter months in those areas considered to contain big game crucial winter range. Also, Wyo-Ben commits to stay current with reclamation of mine sites, and use a diverse seed mix composed of grasses, forbs and shrubs in order to reduce potential hardships to these animals. Further, with recommendations from BLM/LQD, monitoring routes will be established in known mule deer/antelope habitat to assess impacts to those species throughout the year. If it is determined that mining is having an impact, the WG&F/BLM/LQD will be consulted for mitigation recommendations.

Raptor nest searches were conducted within a one-mile area from planned mining associated with this proposal in appropriate habitat. Potential raptor nests known by Wyo-Ben personnel to exist include one approximately ¾ mile from proposed pit 108T, and one approximately 1,000 feet from the last planned phase of mining at proposed pit 98T. Those nests did not appear to be bald eagle nests, but could be the nests of other raptors. Those nests, and others that may be made known to Wyo-Ben, that are within 1 mile of planned mining will be monitored in the spring of the year to determine species and activity status. If an active bald eagle, or ferruginous hawk nest is observed, we will contact FWS personnel and avoid activity within a ½ mile (shielded view) or 1 mile (unobstructed sight distance) buffer of the nest. All other active raptor nests will be given a ½ mile buffer from mining activity.

Recently, the mountain plover has been removed as a candidate for FWS threatened or endangered listing. Consequently, Wyo-Ben will regard this species as a migratory bird of special interest and conduct ground searches as we do for other birds in this classification (See paragraph below). If a nest, or nesting plovers are found, Wyo-Ben, Inc. will notify the FWS/BLM/LQD for mitigation recommendations.

The FWS indicated likely habitat exists for certain migratory birds in the project area. Wyo-Ben, Inc. personnel will conduct ocular and birdcall surveys within proposed affected areas during the spring breeding period (April 10 to July 10) to determine presence or absence of migratory bird species. Surveys will be conducted according to methodology provided by the FWS. If nesting activity by these species, or any species listed as a “species of special concern” in the Wyoming Natural Diversity Database (Fertig and Beauvais, 1999) is noted, the BLM/LQD/FWS will be notified for mitigation recommendations.

To protect aquatic species of Owl Creek and ultimately the Big Horn River, Wyo-Ben commits to installing fabric fence or certified weed free straw bale check dams on reclaimed drainages that have the potential to release sedimentation off site.

No power lines or fences will be constructed as part of this proposed activity. Postmine topography will be designed to maximize topographic diversity, enhancing both vegetation diversity and wildlife habitat. Wyo-Ben personnel will observe a recommended haul road speed limit of 45 mph.

If previously unidentified significant habitat or significant wildlife usage are observed during the course of conducting this proposed activity, Wyo-Ben, Inc. will implement mitigation and notify all relevant regulatory authority.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

**Ecological Services
5353 Yellowstone Road, Suite 308A
Cheyenne, Wyoming 82009**

In Reply Refer To:
ES-61411 W.Mines - WY09SL0059

JAN 1 2009

Mr. Matthew Call
Wyo-Ben, Inc.
P.O. Box 1072
Greybull, Wyoming 82426

Dear Mr. Call:

Thank you for your letter, dated December 10, 2008 and received in our office on December 12, regarding Wyo-Ben, Inc.'s interest to mine and process bentonite in six pits (73T, 75T, 98T, 102T, 104T, and 108T) under Permit 321C, Amendment 6 (hereafter referred to as Project). You requested the U.S. Fish and Wildlife Service (Service) evaluate the Project, which is located in portions of T43N/R93W/Sections 16, 17, and 18, T43N/R96W/Sec. 24 and 25, and T44N/R96W/Sec. 28, near Thermopolis, in Hot Springs County, Wyoming.

In response to your request, the Service reviewed the information you provided pursuant to the Endangered Species Act (Act) of 1973 as amended, (16 U.S.C. 1531 *et seq.*), Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703, and the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. 668. Other fish and wildlife resources are considered under the Fish and Wildlife Coordination Act and the Fish and Wildlife Act of 1956, as amended, 70 Stat. 1119, 16 U.S.C. 742a-742j.

Your letter indicated that wildlife surveys were conducted and mitigation measures were proposed in the 1980s for these pits but the Bureau of Land Management (BLM) never reviewed or approved them. Therefore, Wyo-Ben, Inc. must provide supplemental information to the BLM for their analysis of the Project. The Service recommends that Wyo-Ben, Inc. conduct new wildlife surveys throughout the entire project area because the initial surveys are approximately 20 years old.

At this time, we can offer some general recommendations that could be refined with additional information from future survey results. We are not aware of any threatened or endangered species occurrences in proximity to the proposed pit area. However, based on a discussion with BLM Biologist, Tim Stephens, in mid-December, there is at least one golden eagle (*Aquila chrysaetos*) nest and one greater sage-grouse (*Centrocercus urophasianus*) lek in the Project area vicinity. In addition, we would encourage the protection of any prairie dog towns for their value to the prairie ecosystem and the many species that rely on them. We further encourage you to analyze potentially disturbed prairie dog towns for their value to future black-footed ferret reintroduction.

Migratory Birds: The MBTA, enacted in 1918, prohibits the taking of any migratory birds, their parts, nests, or eggs except as permitted by regulations and does not require intent to be proven. Section 703 of the MBTA states, "Unless and except as permitted by regulations ... it shall be unlawful at any time, by any means or in any manner, to ... take, capture, kill, attempt to take, capture, or kill, or possess ... any migratory bird, any part, nest, or eggs of any such bird..." The BGEPA prohibits knowingly taking, or taking with wanton disregard for the consequences of an activity, any bald or golden eagles or their body parts, nests, or eggs, which includes collection, molestation, disturbance, or killing.

Work that could lead to the take of a migratory bird including an eagle, their young, eggs, or nests (for example, if you are going to construct new power lines in the vicinity of a nest), should be coordinated with our office before any actions are taken. Removal or destruction of such nests, or causing abandonment of a nest could constitute violation of one or both of the above statutes. Removal of any active migratory bird nest or nest tree is prohibited. For golden eagles, inactive nest permits are limited to activities involving resource extraction or human health and safety. Mitigation, as determined by the local Service field office, may be required for loss of these nests. No permits will be issued for an active nest of any migratory bird species, unless removal of an active nest is necessary for reasons of human health and safety. Therefore, if nesting migratory birds are present on, or near the project area, timing is a significant consideration and needs to be addressed in project planning.

If nest manipulation is proposed for this project, the project proponent should contact the Service's Migratory Bird Office in Denver at 303-236-8171 to see if a permit can be issued for this project. No nest manipulation is allowed without a permit. If a permit cannot be issued, the project may need to be modified to ensure take of a migratory bird or eagle, their young, eggs or nest will not occur.

Mountain plover: The Service has withdrawn the proposal to list the mountain plover (*Charadrius montanus*). We do, however, encourage Wyo-Ben to continue providing protection for this species as it remains protected under the MBTA. Measures to protect the mountain plover from further decline may include (1) avoidance of suitable habitat during the plover nesting season (April 10 through July 10), (2) prohibition of ground disturbing activities in prairie dog towns, and (3) prohibition of any permanent above ground structures that may provide perches for avian predators or deter plovers from using preferred habitat. Suitable habitat for nesting mountain plovers includes grasslands, mixed grassland areas and short-grass prairie, shrub-steppe, plains, alkali flats, agricultural lands, cultivated lands, sod farms, and prairie dog towns. We strongly encourage the development of protective measures with an assurance of implementation should mountain plovers be found within the project area.

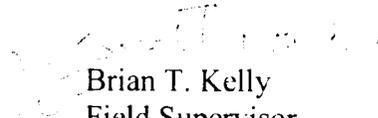
Greater Sage-grouse: The Service is currently conducting a review to determine if the greater sage-grouse warrants listing. Greater sage-grouse are dependent on sagebrush habitats year-round. Habitat loss and degradation, as well as loss of population connectivity have been identified as important factors contributing to the decline of greater sage-grouse populations rangewide (Braun 1998, Wisdom *et al.* 2002). Therefore, any activities that result in loss or degradation of sagebrush habitats that are important to this species should be closely evaluated for their impacts to sage-grouse. If important breeding habitat (leks, nesting, or brood rearing habitat) is present in the project area, the Service recommends no project-related disturbance

March 1 through June 30, annually. Minimization of disturbance during lek activity, nesting, and brood rearing is critical to sage-grouse persistence within these areas. Likewise, if important winter habitats are present (Doherty *et al.* 2008), we recommend no project-related disturbance November 15 through March 14, annually.

We recommend you contact the Wyoming Game and Fish Department to identify important greater sage-grouse habitats within the project area, and appropriate mitigative measures to minimize potential impacts from the proposed project. The Service recommends surveys and mapping of important greater sage-grouse habitats where local information is not available. The results of these surveys should be used in project planning, to minimize potential impacts to this species. No project activities that may exacerbate habitat loss or degradation should be permitted in important habitats. Additionally, unless site-specific information is available, greater sage-grouse habitat should be managed following the guidelines by Connelly *et al.* 2000 (also known as the WAFWA guidelines).

Thank you for your efforts to ensure the conservation of threatened, endangered, and other species and their habitats in Wyoming. If you have further questions regarding this letter, please contact our office at the letterhead address or Ann Belleman at (307) 578-5116.

Sincerely,



Brian T. Kelly
Field Supervisor
Wyoming Field Office

cc: WGFD, Non-game Coordinator, Lander, WY (B. Oakleaf)
WGFD, Statewide Habitat Protection Coordinator, Cheyenne, WY (M. Flanderka)

Literature Cited:

- Braun, C.E. 1998. Sage grouse declines in western North America: What are the problems? Proceedings of the Western Association of Fish and Wildlife Agencies 78:139-156
- Connelly J.W., M.A. Schroeder, A.R. Sands, and C.E. Braun. 2000. Guidelines to manage sage grouse populations and their habitats. Wildlife Society Bulletin 28(4): 967 - 985.
- Doherty, K.E., D. E. Naugle, B.L. Walker, and J.M. Graham. 2008. Greater sage-grouse winter habitat selection and energy development. J. Wildl. Manage. 72(1): 187-195.
- Wisdom, M.J., B.C. Wales, M.M. Rowland, M.G. Raphael, R.S. Holthausen, T.D. Rich, and V.A. Saab. 2002. Performance of Greater Sage-Grouse models for conservation assessment in the Interior Columbia Basin, U.S.A. Conservation Biology 16: 1232-1242.



WYOMING GAME AND FISH DEPARTMENT

5400 Bishop Blvd. Cheyenne, WY 82006

Phone: (307) 777-4600 Fax: (307) 777-4610

Web site: <http://gf.state.wy.us>

GOVERNOR
DAVE FREUDENTHAL

DIRECTOR
STEVE FERRELL

COMMISSIONERS
JERRY GALLES - President
CLIFFORD KIRK - Vice President
CLARK ALLAN
FRED LINDZEY
RON LOVERCHECK
ED MIGNERY
BILL WILLIAMS, DVM

January 8, 2009

WER 225.16
Wyo-Ben, Inc.
Habitat Review
Wyo-Ben, Inc.'s Proposed Amendment 6
Pits 73T, 75T, 98T, 102T, 104T and 108T
Permit 321C
Hot Springs County

Mathew Call
Environmental Supervisor
Wyo-Ben, Inc.
P.O. Box 1072
Greybull, WY 82426

Dear Mr. Call:

The staff of the Wyoming Game and Fish Department has reviewed the Habitat Review for the Wyo-Ben Inc.'s Proposed Amendment 6 to permit 321C within Hot Springs County. We offer the following comments for your consideration.

Terrestrial Considerations:

The location of pit 108T does not occur within designated big game crucial winter range; however, mule deer and pronghorn utilize the area yearlong. There is one sage grouse lek (Rattlesnake Gulch 3) located in T43, R96 SW, SE Sec. 36 (UTM Z12, E716000 N4835900). This lek is currently active and was last checked in 2005, when 5 males and 1 female were observed. In 2003, the lek supported between 16-19 males and 3-5 females.

Pit 108T does occur within the Thermopolis sage-grouse core area. Therefore, in an effort to reduce or mitigate potential negative impacts to sage grouse and remain compliant with the Governor's Executive Order (2008-2) related to sage grouse protection in core areas, we recommend the following stipulations be applied:

- No surface occupancy within 0.6 mile of the perimeter of occupied sage grouse leks.
- Surface disturbance limited to < 5% of sagebrush habitat per 640 acres.
- Locate main haul roads > 1.9 miles from the perimeter of occupied sage grouse leks.

2046.1

Mr. Mathew Call
January 8, 2009
Page 2 – WER 225.16

Pit 102F is located within crucial winter/yearlong habitat for both the Basin mule deer herd and the 15-Mile pronghorn herd. No known sage grouse leks occur in the area.

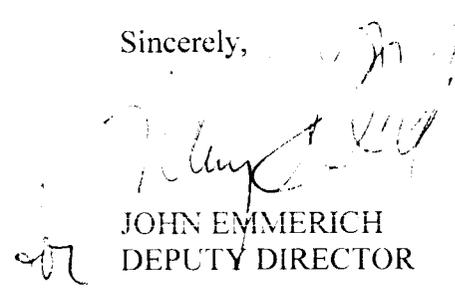
The four pits located in sections 17 and 18 of T43 R93 occur within winter/yearlong habitat of the Southwest Big Horns mule deer herd, as well as crucial winter/yearlong habitat of the Copper Mountain pronghorn herd. Section 17 also contains winter sage grouse habitat. Sage grouse may utilize this area during the winter period.

Aquatic Considerations:

We have no aquatic concerns pertaining to this project. However, we recommend that best management practices be used to control erosion and prevent sediment from reaching Owl Creek.

Thank you for the opportunity comment.

Sincerely,



JOHN EMMERICH
DEPUTY DIRECTOR

JE:MF

cc: USFWS