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United States Department of the Interior

FISH AND WILDLIFE SERVICE
 Oregon Fish and Wildlife Office
 2600 SE 98th Avenue, Suite 100
 Portland, Oregon 97266

Phone: (503) 231-6179 FAX: (503) 231-6195



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Magalie R. Salas, Secretary
 Federal Energy Regulatory Commission
 888 First Street, N.E., Room 1A
 Washington, D.C. 20426

Subject: Review of Second Draft of Resource Reports for the Construction, Operation, and Maintenance of Ruby Pipeline Project (FERC Docket No. PF08-9-000)

Dear Ms. Salas:

Thank you for the opportunity to review the proposed Ruby Pipeline Project (Project) (FERC Docket No. PF08-9-000) November 18, 2008, resource reports. The Fish and Wildlife Service (Service) reserves the right to comment further on issues raised herein, or on additional issues associated with the proposed Project as information becomes available in the future. We look forward to working with the Project's applicant (El Paso Corp.) and Federal Energy Regulatory Commission (FERC) to discuss and resolve these critical resource issues, and ensure the Project results in a net benefit for our nation's environmental and energy resource needs.

Our review of the November 18 Project resource reports indicates most of the comments provided by the Service to FERC and the Project on October 30, 2008, have not been incorporated into the current version of the Project resource reports. Additionally, the Service has not received any documentation or summarization on how our October 30 comments and the following comments will be addressed in future versions of the resource reports, specific Project plans that are yet to be developed (i.e., a migratory bird conservation plan, a sage-steppe habitat conservation plan, a compensatory mitigation plan for Project impacts to aquatic and terrestrial habitats throughout the Project's alignment, and a plan to conserve Endangered Species Act [ESA] listed species and critical habitats in the Project area), or in the Biological Assessment (BA) and National Environmental Policy Act (NEPA) documents. The following letter provides brief summaries of the Service's October 30 comments on the Project's initial set of draft resource reports, additional comments on the updated November 18 Project resource reports, and

specifically requests several face-to-face meetings with the Project applicant and FERC. The Service recommends face-to-face meetings occur before the Project's application filing date, as these concerns influence several important aspects of the Project. Additionally, it has been the Service's recent experience that formal discussions are much more productive, and can more easily include FERC representatives, during the pre-filing process than after an application has been filed. Please refer to the Service's October 30 letter for additional details, comments, and concerns.

Summary of the Service's October 30 Comments

Sheldon Alternative Alignment (Nevada and Oregon) and Other Potential Routes:

Based on numerous Service comments, including concerns with Project impacts to Wilderness Study Areas and challenges the Project would have in achieving compliance with National Wildlife Refuge Administration Act criteria of compatibility determination, appropriate uses, and biological integrity, diversity and environmental health, the Sheldon alternative alignment should be removed from further analysis and consideration. Removal of the Sheldon alternative alignment from further analysis and consideration would have the additional conservation benefit of eliminating approximately 20 miles of constructed pipeline through Oregon's remaining high quality sage-steppe habitat.

The Service recommends continued analysis and consideration of other alternative routes in the western portion of the Project that would avoid high quality sage-steppe habitat, and minimize impacts to other trust resources and protected lands. The Project has already undergone multiple major and minor route alternatives and variations throughout the pipeline's proposed 600+ mile route, which have added significant miles and costs to the overall Project alignment. The Jungo-Tuscarora alternative is a good example of another relatively-minor route alternative that minimizes impacts to competing resources. Compared to the challenging and complex proposed route, the Jungo-Tuscarora alternative may actually provide some construction cost savings due to the minimized environmental concerns, the significant extent of pre-existing energy corridors that this route would follow, as well as easier and less expensive constructability than the proposed route or other route alternatives. The Jungo-Tuscarora alternative represents an approximately 10% increase in overall Project miles. While the Jungo-Tuscarora alternative would be *potentially* more expensive to construct than the proposed route, the November 18 resource report does not provide enough detail to indicate the actual increased costs of the Jungo-Tuscarora route to evaluate various ecological, biological, constructability, cost and other trade-offs. Ultimately, adding the Jungo-Tuscarora alternative to all the other route alternatives and variations that has made the overall Project longer and more expensive, may be part of the Project's responsible balancing of competing resources. The Jungo-Tuscarora alternative should be fully evaluated in the next set of Project resource reports.

Addressing Unsurveyed Properties in the NEPA and ESA Processes

The November 18 resource reports do not address how important species and habitats will be addressed on the large components of the proposed Project's alignment that have been denied access by landowners. Multiple special status and ESA-listed species and their habitats could occur on these unsurveyed properties. The Service recommends development of a standard approach to addressing all species and habitats in the future on unsurveyed lands. The final BA

and NEPA documents should include commitments from the Project to complete listed species surveys. Specific steps should be identified to avoid or minimize effects, via pipeline rerouting or other conservation measures associated with alignment, construction, and future operations, for any newly discovered species or habitat. Standard commitments for compensatory mitigation should also be identified for any species (ESA-listed or not) or habitat discovered on currently unsurveyed lands. The applicant and FERC should incorporate the above steps into a plan for addressing unsurveyed properties, and include the plan as a commitment in the final FERC BA and NEPA documents. The plan should estimate species and habitat occurrences and associated Project effects on unsurveyed lands, provide a description of how unsurveyed lands will be surveyed in the future, actions that the Project will take to avoid and minimize impacts to key species and habitats that are discovered on these unsurveyed properties, and compensatory mitigation commitments for impacts to these species and habitats.

Habitat Characterization for the Entire Project Alignment

The applicant should characterize and map habitat types and their relative quality for the entire route, including affected areas outside of the right-of-way (ROW). The final habitat maps should be used to discuss "micro-alignment" adjustments in the pipeline route, especially to avoid high quality habitats. These maps should also serve as the foundation for future discussions of compensatory mitigation for impacts to habitats throughout the 600+ mile Project.

The Service and other resource agencies received a commitment from the Project's applicant to develop a habitat classification model for sagebrush steppe habitats, ensure the Project was able to "microsite" the construction activities away from high value sage-steppe habitats, and provide a tool for development of a compensatory mitigation and conservation plan for sage-steppe habitats. However, since late summer 2008 discussions, the Service is unaware of additional progress towards review and implementation of this sage-steppe habitat model. The Project applicant should rapidly complete the habitat classification model, ground truth the modeling results, engage stakeholders in a discussion of pipeline alignment and construction methods that seeks to avoid these important sage-steppe habitats. Following the modeling effort, the applicant should develop a conservation/compensatory mitigation plan for impacted sage-steppe habitats.

Project Construction Concerns:

The Service's October 30 letter provided numerous concerns associated with Project construction methods. These concerns were not adequately addressed in the November 18 resource reports. The Service requests careful review and attention toward our previous Project construction-related comments. The Service highlights and expands upon the following significant concern regarding where the Project will obtain water for hydrostatic testing in the dry, high desert environment:

Extraction of already-limited water for hydrostatic testing could have significant adverse effects to native aquatic species, regardless of whether the Project utilizes existing water rights or new water rights. Additionally, the location and timing of any water extractions will also have significant ramifications to aquatic systems. The Project should create a water extraction and management plan for hydrostatic testing, that seeks to avoid impacting key species, sensitive waters, and already over-allocated water supplies.

Compensatory mitigation should be provided for any adverse impacts to resources where hydrostatic waters are withdrawn.

Waterbody and Wetland Crossings Concerns:

There are no specific Project wetland and waterbody construction and mitigation procedures (Procedures) or upland erosion control and revegetation plans (Plans) provided in the November 18 resource reports. The Service's October 30 letter provided many concerns with the FERC standard Procedures and Plans documents, and provided specific information on types of data that should be collected at each waterbody crossing to ensure proper construction design, restoration, monitoring, and remediation. These October 30 concerns and recommendations should be addressed in final FERC BA and NEPA documents. In the future, the Service will be providing these same waterbody and wetland comments to Federal and state agencies with specific authorities over Project waterbody and wetland construction-related activities.

Monitoring/Adaptive Management Concerns:

The November 18 resource reports provide limited discussion, and even less specificity, of the applicant's commitment to long term monitoring and rapid remediation of any post-construction Project impacts to natural resources. The applicant should develop a post-construction monitoring and adaptive management plan that is highly responsive to potential catastrophic failures in the Project's standard efforts to address project impacts and restoration activities. Examples of potential Project impacts that should have a specific post-construction monitoring and remediation plan include: failure of erosion control, mass slope failure, and lateral and vertical stream channel scouring. The post-project monitoring should target specific hydrologic events (i.e., first large precipitation event, any rain-on-snow events; large precipitation event on highly saturated soils). The post-construction monitoring plan should have site-specific focus on stream crossings that are higher risk of ecological impacts if unanticipated failures occurred (e.g. spawning and rearing habitats; steep and erosive upslope areas; Rosgen channel types that are already vulnerable to additional lateral and vertical scour). The monitoring plan should also detail how the applicant will address these unanticipated slope failures, scour, bank failure, or other mass erosive events, regardless of the time of year a catastrophic event occurs. The monitoring plan should be clearly defined in the final FERC BA and NEPA documents.

Compensatory Mitigation Concerns:

The November 18 resource reports provide limited information on the applicant's commitment and plan for compensatory mitigation for unavoidable impacts to resources. The applicant should compensate for impacts to all aquatic and terrestrial habitat types that will not rapidly and/or fully recover their original physical form, function, and species composition (even after Project restoration efforts). For some habitat types, compensation for Project impacts should therefore be identified for the entire Project footprint, not just the center portion of ROW where limited restoration occurs. The applicant should develop a compensatory mitigation plan to address unavoidable impacts to any and all natural resources (listed, sensitive, and non-listed species, and all habitats) impacted by Project activities. Adequate information and specificity should be included in the compensatory mitigation plan, including effects being compensated, agreed-upon mitigation ratios for each resource impacted (mitigation ratios should be developed via a Habitat Equivalency Analysis model or other habitat equivalency calculation that is collaboratively

developed with stakeholders such as the Service), specific habitat functions being returned via mitigation activities, locations and specific descriptions of compensatory mitigation, funding mechanisms to accomplish all mitigation activities (including long-term monitoring, remediation, maintenance, and management), commitments as to timing of projects/purchases, and agreements from federal or private project managers to site these projects and/or undertake these actions in at specific locations and under specific timeframes. The compensatory mitigation plan should be clearly defined in the final FERC BA and NEPA documents. The Service's Mitigation Policy (Federal Register 46 (15):7644 – 7663) is a good resource for mitigation needs planning.

ESA-specific Concerns:

The Service provided numerous ESA-specific comments in our October 30 letter. The Project's November 18 resource reports do not appear to address any of these critical ESA concerns. The Service has had no recent meetings with FERC, FERC's third party consultant, the applicant, the applicant's consultant, or other Federal agencies who will require ESA consultation, to discuss contents of the Project's draft BA and early ESA consultation strategy, yet the November 18 resource reports (Resource Report 3, page 3-49) indicate that a Project draft BA has been developed. The Service requests an immediate meeting between FERC, the applicant, and the various Service offices involved with this Project, to discuss and resolve the Service's ESA-related issues. These Service issues, as identified in our October 30 letter, are repeated below:

It is our understanding that the FERC will be using the information contained in the resource reports to assist with development of the BA for consultation with the Service under the ESA. The current resource reports do not contain the specific information needed by the Service to analyze potential effects to ESA-listed species or critical habitat under our jurisdiction. Please provide more detailed information on the Project (timing, location, sequence, protections, monitoring, mitigation, etc), and analysis on how the Project will impact threatened and endangered species and their critical habitat.

FERC will be the federal agency who will conduct formal ESA consultation with the Service for the Project. However, there are multiple federal agencies (e.g., Forest Service, Bureau of Land Management, and Corps of Engineers) that will rely on the Service's Biological Opinion (BO) and Incidental Take Statement (ITS) for their associated Project activities and/or associated authorizations. In addition, if and when the Project actually begins to transport natural gas, another federal agency (Department of Transportation) will exert authority over significant Project components and operations. To ensure the Service can conduct a complete consultation, and provide Terms and Conditions to relevant federal agencies, FERC should identify the following ESA relationships and responsibilities over the life of the Project:

- Define each federal agency that will receive ESA formal consultation for their associated authorities;
- Describe the components of the overall Project action that each federal agency will be responsible for;
- Define the extent of discretion each of these federal agencies will retain for the life of the Project;
- Define, for Project features and operations that will be transferred to another federal agency's jurisdiction after Project construction, how associated mitigation, restoration, monitoring, and adaptive management will also be transferred to that agency;

Also, please define how FERC will serve as lead federal agency over the life of Project, including how FERC will ensure all federal agencies and the applicant strictly and fully comply with FERC's final proposed action and the Service's Biological Opinion and Incidental Take Statement.

There is no clear indication from either version of the Project resource reports of how the Project would contribute to the recovery of listed species. The Service recommends that the Project result in a clearly beneficial action for listed species and their habitats. Section 7(a)(1) of the ESA creates an affirmative obligation, directing Federal agencies to utilize their authorities to further the purposes of the ESA by carrying out conservation programs for listed species. Additionally, recent case law indicates that projects should allow for the opportunity for both recovery and survival of the species.¹ These recent judicial opinions underscore the importance of demonstrating that the Project's proposed action will not appreciably decrease the likelihood of survival and recovery (jeopardy analysis), or not appreciably diminish the value of critical habitat for either survival or recovery of listed species. The Service is willing to discuss potential conservation actions that would be clearly beneficial to listed species and their habitats, and assist with recovery of these species. The Project should provide an ESA conservation plan, and include the plan in the BA and NEPA documents, to assist with conservation of listed species and their habitats in the Project area.

Migratory Bird Treaty Act Concerns:

The Service provided several key comments in our October 30 letter on the Migratory Bird Treaty Act (MBTA), and Executive Order 13186, which affirms the responsibilities of Federal agencies to comply with the MBTA, and specifies the need to avoid or minimize impacts on migratory bird resources when conducting agency actions, as well as the need to restore and enhance the habitat of migratory birds. Unfortunately, limited and incomplete information about the applicant's plan to address migratory bird impacts is provided in the November 18 resource reports. These previous Service comments should be fully addressed by the applicant and FERC. One example of how another natural gas pipeline project applicant successfully addressed MBTA concerns was the Rockies Express - East Project. Please see attached document for a potential model to apply to the Project's and FERC's MBTA responsibilities. The Service requests a meeting with the Applicant and FERC to discuss migratory bird issues, as soon as possible.

¹ *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1063 (9th Cir. 2004) (the Ninth Circuit held that the ESA requires the U.S. Fish and Wildlife Service to address the twin goals of recovery and survival in the context of a section 7 consultation on a proposed action that may affect designated critical habitat); *see also National Wildlife Federation v. National Marine Fisheries Service*, Case No. 05-35736 (9th Cir. 2006) Judge Redden extended the reasoning in *Gifford Pinchot Task Force* from consultations involving critical habitat to consultations on effects to species under a section 7 jeopardy analysis under the ESA).

Additional Service Comments on the November 18 Resource Reports

Resource Report 2

Page 2-20: The Applicant should not use open cut waterbody crossing methods where there are fish present. At a minimum, a dry ditch construction method should be used for fish bearing streams, and Horizontal Directional Drilling (HDD) should be employed where practicable for all fish bearing streams. The HDD method should be the primary method of waterbody crossing construction for any ESA-listed fish and/or critical habitat stream.

Page 2-20 (and also page 2-25): The Applicant should provide information on where, when, and how hydrostatic testing water will be acquired. As noted in Service comments, above, the Project should develop a water extraction and management plan for hydrostatic testing, that seeks to avoid impacting key species, sensitive waters, and already over-allocated water supplies. Compensatory mitigation should be provided for any adverse impacts to resources where hydrostatic waters are withdrawn.

Page 2-21: The Service strongly disagrees with the conclusions that waterbody crossings will result in minor, short term impacts. To the contrary, the potential for adverse affects on aquatic species from waterbody crossings is currently unknown but, based on past pipeline crossing projects, could be substantial. Current FERC guidance (the "Procedures") for minimization of impacts to both aquatic and terrestrial species does not provide sufficiently detailed and specific information to protect streams within the complex geographic and ecologic settings of the Project's multiple ecoregions, and the Project's November 18 resource reports do not provide any additional details to the FERC Procedures. The Service suggests numerous site specific data collection, analysis, design, monitoring, and remediation measures that should be incorporated into the Project's "Procedures" to ensure waterbody crossings will truly result mostly minor, short term impacts. Compensatory mitigation will probably still be required, even with the best designed and implemented waterbody crossing.

Page 2-23: The Project still is proposing the option of installing temporary flume pipe crossings. The Service's October 30 letter commented that temporary culverts should not be employed as a construction bridge. To restate the Service's concern, temporary flume pipe crossings should not be employed, as these features may result in significantly greater habitat impacts than a temporary spanning bridge. Impacts from a temporary flume pipe crossing may include additional sediment in the stream, difficulty in removing all materials used to construct these temporary crossing features, and accidental modification of stream banks and channel during construction and upon eventual removal of these features.

Throughout Resource Report 2: There is no discussion of the long term and/or permanent impacts from wetland and waterbody crossings. Concerns as well as examples of common impacts from waterbody and wetland crossings were described herein and in the Service's October 30 letter. Wetland impacts that may be unavoidable include, but are not limited to, modification of site hydrology, alteration of vegetative community, and introduction of noxious weeds and other non-target species. As noted above, the Service recommends that the Project develop a compensatory mitigation plan for unavoidable impacts, including impacts to waterbodies and wetlands.

Resource Report 3

Page 3-11: Please note that, in addition to most streams in Oregon being Habitat Category 2 under the Oregon Department of Fish and Wildlife (ODFW) Habitat Mitigation Policy (Policy), that compensatory mitigation under the Policy for Category 2 habitats indicates “no net loss of habitat quantity or quality and to provide a net benefit of habitat quality or quantity”. As noted above, the Service has provided substantial documentation on the additional data collection, design, construction, restoration, monitoring and remediation needs for waterbody crossings, as well as need to provide compensatory mitigation for the unavoidable impacts – the compensatory mitigation for these Habitat Category 2 waterbodies should provide a net benefit of habitat quality or quantity.

Page 3-14: The Service requests to participate in any Project-ODFW planning meetings to discuss specific waterbody crossings at Twelvemile, Twentymile, Deep, Drews and Thomas creeks, as well as East Branch Lost River and Lost River.

Page 3-25 through 3-29 – Table 3.2-1. The Service’s October 30 letter requested that the Project characterize and map habitat types and relative quality for the entire 600+ mile route, including affected areas outside of the ROW. Table 3.2-1 is empty of information – it provides no acreage or relative quality data for various habitats along the Project’s route. The format of Table 3.2-1 indicates habitats will be quantified by temporary versus permanent impacts. As previously discussed herein and in the Service’s October 30 letter, the Service believes there are many “temporary” impacts that should be compensated for, because they are not truly “temporary”. The Applicant and Service should discuss with other stakeholders and resolve what impacts are permanent and what impacts are truly temporary for each habitat type. Table 3.2-1 should also be expanded to include a quantification of acreage by relative habitat quality for each habitat type. All these data should be stored on a GIS database, so the Applicant and stakeholders can review map products that depict where the highest quality habitat occurs along the pipeline route (including habitats at all associated Project features such as access roads), to determine where to take extra precautions to avoid or minimize impacts to high quality habitats. Table 3.2-1 and its associated GIS database should also provide a mechanism to quantify impacts by habitat type, habitat quality, and location, and thereby inform future compensatory mitigation negotiations for habitat impacts throughout the Project area.

Page 3-43: Table 3C-1 does not provide enough information to satisfy Service needs in evaluating Project impacts to migratory birds. Table 3C-1 should be expanded to include information on migratory bird species from throughout the project, and should provide examples of life history information for representative bird species that nest in different habitat types (e.g., ground, riparian, upland).

Pages 3-52 to 53, Table 3.4-5: The November 18 resource reports do not provide sufficient detail to allow the Service to confirm initial ESA effects determinations for multiple fish species. Due to overall lack of ESA information in these resource reports, and the general Service disagreement with sufficiency of the Project’s “Procedures” and associated Project statements that waterbody crossings will have minor impacts that are temporary in nature, the Service recommends that Table 3.4-5 effect determinations be made only after a full biological assessment is completed. As noted above, the Service has had no recent meetings with FERC, FERC’s third party consultant, the applicant, or the applicant’s consultant to discuss contents of the Project’s draft BA, or to discuss ESA consultation strategy. The Service requests an

immediate meeting between FERC, the applicant, and the various FWS offices involved with this Project, to discuss and resolve the Service's ESA-related Project issues.

Page 3-56: Foskett Speckled Dace are found in southern Lake County, Oregon, not southern Washoe County, Nevada.

Page 3-136 to 3-141, Table 3.4-21: The Service finds this table of Project impacts and mitigation measures to be lacking in specificity and accuracy, and will need significant expansion. The table lists a limited and incomplete set of Project impacts for each resource category, and generally indicates each impact will be effectively addressed through not fully defined Best Management Practices. There also are no specific compensatory mitigation actions identified, and almost all categories of impact fail to indicate that compensatory mitigation will be necessary. The Project should provide more thorough discussion, and, as needed, compensatory mitigation for impacts to fisheries, wildlife (including migratory birds), upland and riparian habitats, stream channels, wetlands, and other impacted resources.

Page A-21, Table 3A-6: The following streams in Oregon should include listed species (designated as "1") under the column "Fisheries Issues": Twelvemile, Twentymile, and (possibly) Deep creeks.

Conclusion:

The Service has provided numerous significant comments on the Projects resource reports, both within the Service's October 30 letter and herein. Significant work remains for the Applicant to address these Service comments, and successfully develop acceptable Project plans including a migratory bird conservation plan, a sage-steppe habitat conservation plan, a compensatory mitigation plan for impacts to aquatic and terrestrial habitats throughout the Project's alignment, and a plan to conserve Endangered Species Act [ESA] listed species and critical habitats in the Project area. The Service looks forward to working with the Applicant, FERC, and other resource agencies on further refining the overall Project's action, to ensure a proper balance between the nation's energy needs and environmental stewardship requirements.

If you have any questions on these comments, or need more information, please contact Doug Young, Energy Projects Coordinator, Oregon Fish and Wildlife Office, at (503) 231-6179.

Sincerely,



 Paul Henson, PhD
State Supervisor

cc:

David Swearingen, FERC
Francisco Tarin, El Paso Corp.
Nicole Pedigo, El Paso Corp.

Tim Modde, USFWS
Allan Taylor, USFWS
Paul Steblein, USFWS
Rose Owens, ODFW
Mark Mackiewicz, BLM