

From: "Cirian, Mike" <Cirian.Mike@epa.gov>
To: "dproll@yahoo.com" <dproll@yahoo.com>
Sent: Wednesday, May 22, 2013 11:08 AM
Subject: FW: Concern about replacement of Flower Creek Dam near Libby on the Kootenai National Forest (UNCLASSIFIED)

Hi Doug,

Here is the email I discussed with you. Let me know if you need anything else.

Mike

Mike Cirian, PE
US EPA, Region 8
108 East 9th Street
Libby, MT 59923
406-293-6194

-----Original Message-----

From: Tillinger, Todd N NWO [mailto:Todd.N.Tillinger@usace.army.mil]
Sent: Thursday, May 16, 2013 11:33 AM
To: Potts, Stephen; Berkley, Jim; Ott, Toney; Meredith, Sienna; jeryan@mt.gov;
jmeek@mt.gov; Cdemartino@mt.gov; scottspaulding@fs.fed.us; byoung01@fs.fed.us;
tegenhoff@fs.fed.us; jwcarlson01@fs.fed.us; Schroeder, Christina L NWO
Cc: Coate, Carson; DalSoglio, Julie; Strobel, Philip; Larry_Lockard@fws.gov; Mollander, Karen
-FS
Subject: RE: Concern about replacement of Flower Creek Dam near Libby on the Kootenai National Forest (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Steve,

The Corps has responded to a couple of pre-application requests since first being notified in early 2012.

We do not presently have an application yet but are aware of the planned work.

Todd N. Tillinger, P.E.
Montana Program Manager
US Army Corps of Engineers
Omaha District - Regulatory
10 West 15th Street, Suite 2200
Helena, Montana 59626

Phone 406-441-1376
Blackberry/Cell 406-422-7527
Fax 406-441-1380

<http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Montana.aspx>

-----Original Message-----

From: Potts, Stephen [mailto:Potts.Stephen@epa.gov]

Sent: Thursday, May 16, 2013 11:06 AM

To: Berkley, Jim; Ott, Toney; Meredith, Sienna; jeryan@mt.gov; jmeek@mt.gov; Cdemartino@mt.gov; scottspaulding@fs.fed.us; byoung01@fs.fed.us; tegenhoff@fs.fed.us; jwcarlson01@fs.fed.us; Schroeder, Christina L NWO

Cc: Coate, Carson; DalSoglio, Julie; Strobel, Philip; Tillinger, Todd N NWO; Larry.Lockard@fws.gov; Mollander, Karen -FS

Subject: Concern about replacement of Flower Creek Dam near Libby on the Kootenai National Forest

I received a phone call today from Larry Lockard of the U.S. Fish & Wildlife Service in Kalispell expressing concerns about pending replacement of the Flower Creek dam near the City of Libby on the Kootenai National Forest. Larry said the City of Libby received a \$13 million USDA Rural Development Grant for this dam replacement project, since Flower Creek provides public water supply for the City of Libby. He also said the project would need to obtain a Special Use Permit from the Forest Service and a 404 permit from the Army Corps of Engineers, and perhaps other permits and authorizations.

His understanding is that the City of Libby intends to build a new concrete dam below the current dam, and then will remove the existing dam. Larry said trucks and construction materials are being stockpiled on site. He also said the dam stores approximately 220 acre-ft of water. He is concerned about potential project effects on threatened bull trout, since Flower Creek is occupied bull trout habitat, and also noted that sediment transport downstream during dam construction/removal may be a concern to other fisheries, and may also be of concern to the downstream Libby water treatment plant operations.

I told Larry that his phone call was the first I had heard of this project, and that I had not seen any NEPA document for the project, and did not know if others within EPA were aware of the project (drinking water program, 404 permit review, etc.). I found some information on the dam at the City of Libby website, <http://cityoflibby.com/water-treatment-plant/flower-creek-dam/> <<http://cityoflibby.com/water-treatment-plant/flower-creek-dam/>> , indicating that the existing Flower Creek dam is at risk of failure.

I advised Larry that I was retiring May 31st, and did not have much time to follow up on his complaint, but did tell him that I would check with others within EPA and other agencies to see if they were aware of the project, and/or involved in reviewing or permitting the project, and ask that they contact him.

If any recipient of this message has any information regarding this project, please contact Larry Lockard at 406-758-6883. Thank you.

Stephen Potts

NEPA Compliance and Review
EPA Region 8 Montana Office
10 West 15th St., Suite 3200
Helena, Montana 59626
Email: potts.stephen@epa.gov
Phone at Missoula Forest Service Office: 406-329-3313
Phone at Helena EPA Office: 406-457-5022
FAX at Helena EPA Office: 406-457-5055

Classification: UNCLASSIFIED
Caveats: NONE

----- Forwarded Message -----

From: Jim Hammons <jim.hammons@cityoflibby.com>
To: 'Doug Roll' <dproll@yahoo.com>
Sent: Wednesday, May 29, 2013 4:28 PM
Subject: FW: Flower Creek Dam - Agency comments on Bull Trout

Doug,
Mikes phone #1-406-253-4326

Jim Hammons
City Administrator
Libby Montana
406-293-2731 Ext-4

From: Paul E. Burnham [<mailto:pburnham@m-m.net>]
Sent: Thursday, January 17, 2013 2:51 PM
To: Jim Hammons (jim.hammons@cityoflibby.com)
Cc: dproll@yahoo.com; Ryan Jones
Subject: Flower Creek Dam - Agency comments on Bull Trout

Jim – please review the attached responses from the Montana Fish, Wildlife and Parks (page 7) and the US Fish and Wildlife Service (page 8). The letter from Mike Hensler (MT FWP) indicates his concern regarding stream bed and bank impacts, and makes no other mention of requirements beyond applying for the SPA 124 permit. The SPA 124 permit is part of the Joint Application to the Corps of Engineers that we will make in late February or Early March 2013.

I spoke with Mike again on November 20, 2012. During that phone conversation he reiterated that the MT FWP was only concerned with stream bed and bank preservation and restoration, and had no intention of requiring a fish passage. He said MT FWP was not proposing a fish ladder – that the dam has been there since 1946. Mike indicated the Montanore Mine may have been required to do some off-site mitigation, including fish passages in the Flower Creek drainage. However, he also said that the fish passage appears to have been removed from the list of requirements on Montanore.

The email response from Mark Wilson (US FWS) indicates no substantial wildlife-related work would arise from the dam construction. I also contacted Mark on November 27, 2012, to discuss the fish passage issue that had been brought up. During that phone conversation, Mark said that the US FWS felt that there were no significant adverse effects to species.

In short, both agencies with purview over fish habitat indicated that no additional provisions were necessary to accommodate fish species. Please call or email if you have any questions on this. Thanks, Paul B.

Paul E. Burnham, PE
Senior Engineer, Water/Wastewater Group



125 Schoolhouse Loop
Kalispell, MT 59901
Main: 406.752.2216
Direct: 406.751.5845

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United States
Department of
Agriculture

Forest
Service

Kootenai National Forest
406 293-6211

Forest Supervisor's Office
31374 US Highway 2
Libby, MT 59923-3022

File Code: 7720

Date: February 27, 2012

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FEB 29 2012

~~Morrison~~ - Maierle, Inc.

Paul Burnham
Morrison Maierle, Inc
P O Box 8057
Kalispell, MT 59904

Dear Mr. Burnham:

We have received the maps and information regarding the City of Libby water system proposal in Flower Creek for the municipal water supply.

The new proposed pipe line distribution system appears to be located on State of Montana and other private lands and therefore we would have no comment as far as the distribution system.

The map does not indicate where the new access road to the new Flower Creek dam is to be located, but your letter indicates that it will not be on National Forest land. Therefore we have no comment as to road location(s).

The only National Forest System lands affected by the project would be City of Libby's use of National Forest System Road #128 (Flower Creek road) for access to the dam site. We request that the city obtain a road use permit for use of the road during the construction period. Through this permit, arrangements are made for the maintenance of the road, safety signing, and intermittent closure periods (if necessary).

Thank you for your request for comments and we look forward to cooperating with the City of Libby on the project. Please contact the Libby District Ranger, Mr. Malcolm Edwards, for any additional assistance at (406) 293-7773.

Sincerely,

PAUL BRADFORD
Forest Supervisor



Big Sky. Big Land. Big History.
Montana
Historical Society

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FEB 15 2012

Morrison - Maierle, Inc.

*Historic Preservation
Museum
Outreach & Interpretation
Publications
Research Center*

February 14, 2012

Paul Burnham
Morrison Maierle, Inc
PO Box 8057
125 Schoolhouse Loop
Kalispell MT 59904

RE: CITY OF LIBBY, WATER SYSTEM IMPROVEMENTS PROJECT. SHPO Project #:
2012021316

Dear Mr. Burnham:

I have conducted a cultural resource file search for the above-cited project located in Sections 10, 15, 16, 20, 21, T30N R31W. According to our records there have been a few previously recorded sites within the designated search locales. In addition to the sites there have been a few previously conducted cultural resource inventories done in the areas. I've attached a list of these sites and reports. If you would like any further information regarding these sites or reports you may contact me at the number listed below.

It is SHPO's position that any structure over fifty years of age is considered historic and is potentially eligible for listing on the National Register of Historic Places. The Lower Flower Creek Dam has been previously recorded (24LN1110) as a historic site, however the Upper Flower Creek Dam has not. If these structures are going to be altered or removed we would recommend that they be recorded and a determination of their eligibility be made prior to any disturbance taking place.

If you have any further questions or comments you may contact me at (406) 444-7767 or by e-mail at dmurdo@mt.gov. I have attached an invoice for the file search. Thank you for consulting with us.

Sincerely,



Damon Murdo
Cultural Records Manager
State Historic Preservation Office

File: USDA/RUS/2012

225 North Roberts Street
P.O. Box 201201
Helena, MT 59620-1201
(406) 444-2694
(406) 444-2696 FAX
montanahistoricalsociety.org

Site #	Twp	Rng	Sec	Qs	Site Type1	Site Type 2	Time Period	Owner	NR Status
24LN0908	30 N	31W	15	SW	Historic Timber Harvesting	Historic Railroad Building/Structure	1910-1919	Forest Service	Unresolved
24LN0907	30 N	31W	16	SE	Historic Road/Trail	Null	1890-1899	Forest Service	undetermined
24LN0908	30 N	31W	16	SE	Historic Timber Harvesting	Historic Railroad Building/Structure	1910-1919	Forest Service	Unresolved
24LN0907	30 N	31W	20	SE	Historic Road/Trail	Null	1890-1899	Forest Service	undetermined
24LN0907	30 N	31W	21	Comb	Historic Road/Trail	Null	1890-1899	Forest Service	undetermined
24LN1110	30 N	31W	21	Comb	Historic Dam	Null	Historic More Than One Decade	Forest Service	undetermined
24LN0906	30 N	31W	21	NE	Lithic Material Concentration	Firehearth or Roasting Pits, FCR	No Indication of Time	Forest Service	undetermined
24LN2245	30 N	31W	21	NE	Lithic Material Concentration	Null	No Indication of Time	Forest Service	undetermined
24LN0908	30 N	31W	21	SW	Historic Timber Harvesting	Historic Railroad Building/Structure	1910-1919	Forest Service	Unresolved

Township: 30 N Range: 31 W Section: 10

BEAN PAUL J

12 / 16 / 2002 CULTURAL RESOURCE INVENTORY OF THE PROPOSED INSTALLATION OF CELLULAR EQUIPMENT,
LIBBY, LINCOLN COUNTY MONTANA

CRABS Document Number: LN 6 25410

Agency Document Number:

Township: 30 N Range: 31 W Section: 10

WHITE MARK J.

6 / 29 / 2010 A CULTURAL RESOURCE INVENTORY OF THE FLOWER CREEK PROJECT

CRABS Document Number: LN 6 32279

Agency Document Number: 10-KO-5-4

Township: 30 N Range: 31 W Section: 15

BAKER JOSEPH A.

6 / 3 / 1985 CABINET VIEW LAND EXCHANGE

CRABS Document Number: LN 1 4758

Agency Document Number: 85-KO-5-1

Township: 30 N Range: 31 W Section: 15

WHITE MARK J.

6 / 29 / 2010 A CULTURAL RESOURCE INVENTORY OF THE FLOWER CREEK PROJECT

CRABS Document Number: LN 6 32279

Agency Document Number: 10-KO-5-4

Township: 30 N Range: 31 W Section: 15

WHITE MARK J.

6 / 7 / 1988 INTAKE BUGS TIMBER SALE

CRABS Document Number: LN 1 4971

Agency Document Number: 88-KO-5-1

Township: 30 N Range: 31 W Section: 15

JOURNEY ALFRED E.

10 / 14 / 1976 ARCHAEOLOGICAL RECONNAISSANCE (LIBBY RANGER DISTRICT)

CRABS Document Number: LN 1 4624

Agency Document Number: 76-KO-5-4

Township: 30 N Range: 31 W Section: 15

JOURNEY ALFRED E.

10 / 14 / 1976 ARCHAEOLOGICAL RECONNAISSANCE (LIBBY RANGER DISTRICT)

CRABS Document Number: LN 1 4624

Agency Document Number: 76-KO-5-4

Township: 30 N Range: 31 W Section: 15

JOURNEY ALFRED E.

7 / 12 / 1976 ARCHAEOLOGICAL RECONNAISSANCE (SCHERTEL ROAD REQUEST - U.S.D.A EASEMENT TO LINCOLN
COUNTY)

CRABS Document Number: LN 1 4612

Agency Document Number: 76-KO-5-2

Township: 30 N Range: 31W Section: 16

TIMMONS REBECCA S.

2 /18/1998 KOOTENAI NATIONAL FOREST REGION 1 PROGRAMMATIC AGREEMENT 1997 ANNUAL REPORT

CRABS Document Number: LN 1 20216

Agency Document Number:

Township: 30 N Range: 31W Section: 16

WHITE MARK J.

6 /29/2010 A CULTURAL RESOURCE INVENTORY OF THE FLOWER CREEK PROJECT

CRABS Document Number: LN 6 32279

Agency Document Number: 10-KO-5-4

Township: 30 N Range: 31W Section: 16

WHITE MARK J.

6 /7/1988 INTAKE BUGS TIMBER SALE

CRABS Document Number: LN 1 4971

Agency Document Number: 88-KO-5-1

Township: 30 N Range: 31W Section: 20

TIMMONS REBECCA S.

/ /1999 KOOTENAI NATIONAL FOREST REGION 1 PROGRAMMATIC REPORT 1998

CRABS Document Number: LN 1 21857

Agency Document Number:

Township: 30 N Range: 31W Section: 20

WHITE MARK J.

6 /29/2010 A CULTURAL RESOURCE INVENTORY OF THE FLOWER CREEK PROJECT

CRABS Document Number: LN 6 32279

Agency Document Number: 10-KO-5-4

Township: 30 N Range: 31W Section: 21

TIMMONS REBECCA S.

/ /2000 KOOTENAI NATIONAL FOREST 2000 ANNUAL HERITAGE REPORT IN FULLFILLMENT OF THE REGION 1 PROGRAMMATIC AGREEMENT

CRABS Document Number: ZZ 1 24042

Agency Document Number:

Township: 30 N Range: 31W Section: 21

KROSCHER MICHAEL J.

7 /8/1993 KOOTENAI X-C SKI CLUB TRAIL EXPANSION PROJECT

CRABS Document Number: LN 1 15330

Agency Document Number: 93-KO-5-20

Township: 30 N Range: 31W Section: 21

TIMMONS REBECCA S.

2 /18/1998 KOOTENAI NATIONAL FOREST REGION 1 PROGRAMMATIC AGREEMENT 1997 ANNUAL REPORT

CRABS Document Number: LN 1 20216

Agency Document Number:

Township: 30 N Range: 31W Section: 21

WHITE MARK J.

6 / 7 / 1988 INTAKE BUGS TIMBER SALE

CRABS Document Number: LN 1 4971

Agency Document Number: 88-KO-5-1

Township: 30 N Range: 31W Section: 21

JOURNEY ALFRED E.

10 / 14 / 1976 ARCHAEOLOGICAL RECONNAISSANCE (LIBBY RANGER DISTRICT)

CRABS Document Number: LN 1 4624

Agency Document Number: 76-KO-5-4

Township: 30 N Range: 31W Section: 21

JOURNEY ALFRED E.

10 / 14 / 1976 ARCHAEOLOGICAL RECONNAISSANCE (LIBBY RANGER DISTRICT)

CRABS Document Number: LN 1 4624

Agency Document Number: 76-KO-5-4

Township: 30 N Range: 31W Section: 21

WHITE MARK J.

6 / 29 / 2010 A CULTURAL RESOURCE INVENTORY OF THE FLOWER CREEK PROJECT

CRABS Document Number: LN 6 32279

Agency Document Number: 10-KO-5-4

Township: 30 N Range: 31W Section: 21

JOURNEY ALFRED E.

7 / 12 / 1976 ARCHAEOLOGICAL RECONNAISSANCE (SCHERTEL ROAD REQUEST - U.S.D.A EASEMENT TO LINCOLN COUNTY)

CRABS Document Number: LN 1 4612

Agency Document Number: 76-KO-5-2



**Montana Fish,
Wildlife & Parks**

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MAR 06 2012

Morrison - Maierle, Inc.

Mike E. Hensler MFWP
385 Fish Hatchery RD
Libby, MT 59923
(406) 293-4161
FAX 293-2235
mhensler@mt.gov
Ref: MH16.12
Date: 3/5/12

Paul Burnam, P.E.
Morrison Maierle, Inc.
P.O. Box 8057
125 Schoolhouse Loop
Kalispell, MT 59904

SUBJECT: City of Libby Proposed Water System Improvements Project

Mr. Burnam;

I have reviewed your letter of 2/12/12 requesting comments for the Libby Water System Improvements project. I'm sure the plans will be more specific as construction date nears. Bull trout (listed as threatened) have been captured in portions of Flower Creek upstream and downstream of the proposed project. Montana Fish, Wildlife & Parks concerns are with any portion of the project that impacts the bed and banks of Flower Creek. As I'm sure you are aware the City of Libby is required to complete an application for the Stream Protection Act (SPA 124) for projects like this. Once that is completed (or sooner if it is your determination to consult prior to completing the application) if necessary I will make recommendations that I believe will best protect the stream and fishery given the constraints of the project. Thank you.

Sincerely,

Mike E. Hensler
Fisheries Management Biologist

Paul E. Burnham

From: Mark_Wilson@fws.gov
Sent: Tuesday, February 28, 2012 3:12 PM
To: Paul E. Burnham
Subject: Re: Libby Flower Creek Letter
Attachments: ER LETTER USFWS.pdf

Hi Paul: I looked over the Flower Creek Dam Replacement Project outline you e-mailed to me. Although the threatened grizzly bear and bull trout both occur in proximity to the project area, we believe that the nature of the project and the semi-urban setting location for the proposed work will prevent this project from resulting any significant adverse effects to threatened or endangered species, or other fish, wildlife, and habitat resources under the purview of the U.S. fish and Wildlife Service.

Let me know if you need anything else from us relative to this project.

Take care.

Mark

R. Mark Wilson, Field Supervisor
U.S. Fish and Wildlife Service
Division of Ecological Services
585 Shepard Way
Helena, MT 59601-6287
406/449-5225, ext. 205

"You will find as you grow older that courage is the rarest of all qualities to be found in public life." - B. Disraeli-

Former British Prime Minister

~ "Paul E. Burnham" <pburnham@m-m.net>

"Paul E.
Burnham"
<pburnham@m-m.net>

To "mark_wilson@fws.gov" <mark_wilson@fws.gov>

cc

02/28/2012 01:30 PM

Subject: Libby Flower Creek Letter

Paul E. Burnham, PE

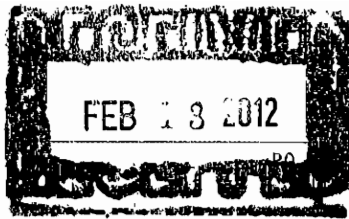
Senior Engineer, Water/Wastewater Group

125 Schoolhouse Loop
Kalispell, MT 59901

Main: 406.752.2216
Direct: 406.751.5845

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(See attached file: ER LETTER USFWS.pdf)



February 10, 2012

Ms. Susan Ennenbach, Chairperson
Lincoln Conservation District
PO Box 2170
949 U.S. Highway 93 North
Eureka, Montana 59917-2170

RE: City of Libby
Proposed Water System Improvements Project

Dear Ms. Ennenbach:

The City of Libby, Montana is in the process of performing an environmental review pursuant to the National Environmental Policy Act for the USDA, Rural Utilities Service in order that it may assess the environmental impacts of the Water System Improvements Project in Libby, Lincoln County, Montana. The purpose of this project is to upgrade Libby's water system and address deficiencies within the system. This project comprises three primary components:

1. Construct the access road for the Flower Creek Dam Replacement Project.
2. Construct the replacement dam downstream of the existing Flower Creek Dam and dismantle the existing dam.
3. Upgrade the existing water distribution system to address the most significant water-loss areas within the system.

Enclosed is a U.S. Geological Survey map depicting the project location, and a project description with affected land sections.

All proposed improvements are located at the existing Flower Creek Dam site, the raw water transmission corridor (Lower Flower Creek Reservoir to the Libby Water Treatment Plant), and on previously disturbed ground within the city limits.

We are requesting information on the possible environmental impacts as a result of any proposed improvements to the City's water facilities, and are seeking any recommendations you may have to minimize or avoid these impacts.

If you do not have any comments regarding this plan, we ask that you simply countersign the bottom of this letter and return it as soon as possible. If we do not receive any comments within 30 days of the date of this letter, we will assume you have no comments.



Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul E. Burnham".

Paul E. Burnham, P.E.

Encl.: U.S.G.S Vicinity Map; Project Description and Location

The Lincoln Conservation District does not have any comments regarding the improvements proposed.

A handwritten signature in black ink, appearing to read "Susan Ennenbach, Chairman".

Lincoln Conservation District

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

WATER RESOURCES DIVISION • 1424 Ninth Avenue, Helena, MT 59601
(406) 444-6601 Telefax (406) 444-0533

BRIAN SCHWEITZER, GOVERNOR



STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074
FAX: (406) 444-2684

PO BOX 201601
HELENA, MONTANA 59620-1601

Friday, March 05, 2012

Paul Burnham, P.E.
Morrison Maierle, Inc
P.O. Box 8057
Kalispell, MT 59904

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MAR 07 2012

Morrison - Maierle, Inc.

RE: City of Libby Proposed Water System Improvements

Dear Mr. Burnham:

The Department of Natural Resources and Conservation has the following comments on the proposed improvements:

It is our understanding that the replacement dam will be directly downstream of the existing dam. It will be necessary for the City to apply for a dam safety construction permit through our Department. More information on dam safety construction permits is available on our web site:
http://dnrc.mt.gov/wrd/water_op/dam_safety/repair_dam.asp

During the construction permit review process, our agency will include a review of construction practices as well as compliance Montana Environmental Policy Act (MEPA) requirements. Information used to comply with environmental review pursuant to the National Environmental Policy Act (NEPA) may be considered.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Lamson".

Joe Lamson
Deputy Director



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
HELENA REGULATORY OFFICE
10 WEST 16TH STREET, SUITE 2200
HELENA, MONTANA 59626-9705

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FEB 29 2012

Morrison - Maierle, Inc.

February 28, 2012

Regulatory Branch
Montana State Program
Corps No. **NWO-2012-00381-MTH**

Subject: USACE Comments to City of Libby Proposed Water System Improvements and Dam Replacement

Morrison Maierle, Inc.
Attn: Paul E. Burnham
Post Office Box 8057
Kalispell, Montana 59904

Dear Mr. Burnham:

This letter is in response to your request for comments on the proposed water system improvements for the City of Libby. The project is located in Sections 3, 4, 9, 10, 20, and 21, Township 30N, Range 31W, in Lincoln County, Montana.

The mission of the U.S. Corps of Engineers (USACE) regulatory program is to protect the Nation's aquatic resources while allowing reasonable development through fair, flexible and balanced permit decisions. In particular, under 404 of the Clean Water Act, we work to protect the biological, physical, and chemical integrity of the Nation's aquatic resources. Projects are evaluated on a case-by-case basis to determine the potential benefits and detriments that may occur as a result of the proposal. In all cases an applicant must avoid and minimize impacts to aquatic resources to the greatest extent practicable.

DA permits are required for the discharge of fill material into waters of the U.S. Waters of the U.S. include the area below the ordinary high water mark of stream channels and lakes or ponds connected to the tributary system, and wetlands adjacent to these waters. Isolated waters and wetlands, as well as man-made channels, may be waters of the U.S. in certain circumstances, which must be determined on a case-by-case basis.

The project consists of three components: the construction of an access road; the construction of a replacement dam downstream of the existing dam and dismantling of the existing dam; and the upgrade of the existing water distribution system. After reviewing the available information, it appears the proposed project will impact Waters of the U.S. (WOUS) and will require a permit from the USACE, therefore we offer the following comments on each component of the project, as well as the project as a whole:

1. Component 1: Construction of an access road for the Flower Creek Dam Replacement Project. All road construction projects require a permit from the Corps if they will result in any impacts to wetlands, streams, or other waters of the U.S. Plan-view and cross-sectional drawings must be submitted for each wetland and stream crossing. If any culverts or bridges will be constructed the details of their size and placement must be provided, and the amount of fill material that will be placed in each crossing must be provided.

2. Component 2: Construction of a replacement dam downstream of the existing Flower Creek Dam and the dismantling of the existing dam. Plan-view and cross-sectional drawings of the proposed dam must be submitted. The foot print of the area to be flooded by the new dam must also be shown on a drawing and the acreage of this area provided. The material from the existing dam must be removed and disposed of in an appropriate upland location.
3. Component 3: Upgrading the existing water distribution system to address the most significant water-loss areas within the system. If the proposed upgrades to the water distribution system will involve impacts to any waters of the U.S., a permit is required. All impacts to waters of the U.S. must be identified and plan-view and cross-sectional drawings must be provided that depict the impacts.
4. It is required that we have a valid Jurisdictional Determination (JD) on file before we can process a permit application. This determination cannot be more than five years old when a permit is issued. You can help expedite this process by providing a current delineation of all waters within the review area for all three components of the project, to include special aquatic sites such as riffle and pool complexes and wetlands.
5. An in depth alternatives analysis must be completed for each component of the project. Each alternative must be assessed for its impact on the aquatic environment, as well as its impact on the environment overall. The least environmentally damaging practicable alternative (LEDPA) should be identified, as well as your preferred alternative and an explanation as to why it is the preferred alternative.
6. Section 7(a)(2) of the Endangered Species Act requires Federal agencies to ensure that any action it authorizes is not likely to jeopardize the continued existence of any federally listed species or result in the destruction or adverse modification of designated critical habitat. If the project may affect endangered species or critical habitat you must provide documentation that all necessary consultation with the U.S. Fish and Wildlife Service has been completed.
7. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties. If the project will result in impacts to historic properties or other cultural resources you must provide documentation that coordination with the State Historic Preservation Office (SHPO) as well as any relevant American Indian tribes has been completed.
8. Compensatory mitigation is required for unavoidable losses to aquatic resources. If the proposed project will result in more than minimal impacts, a compensatory mitigation plan must be submitted as a part of the proposal. Please refer to Final Rule 33 CFR 325 and 332 for guidance on this requirement. For information regarding stream mitigation procedures and wetland mitigation procedures, see <http://www.nwo.usace.army.mil/html/od-rmt/mtsmp.html>
9. It is recommended you incorporate a fish passage into the dam reconstruction portion of the project to allow the necessary movement of fish and other aquatic species in the stream.
10. Due to the size and scope of the proposed project it will most likely require an Individual 404 permit from the Corps of Engineers as well as an individual 401 certification from the Montana

Department of Environmental Quality. Once a complete application has been received by the Corps, a joint public notice will be issued for both organizations. Individual permits from the Corps typically take between 90-120 days to issue once a complete application has been received. If any substantial issues are raised during the public notice process they can often take longer than 120 days to issue. Please take this into consideration when planning your project so there are no time conflicts.

Once a project proposal is submitted, other factors relevant to the USACE regulatory program which are not included in the above list may need to be considered. Please contact me at (406) 441-1365 if you have questions and reference Corps File Number NWO-2012-00381-MTH.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stephanie McCary', with a long, wavy horizontal stroke extending to the right.

Stephanie McCary
Project Manager

----- Forwarded Message -----

From: Paul E. Burnham <pburnham@m-m.net>

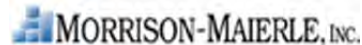
To: "dproll@yahoo.com" <dproll@yahoo.com>

Sent: Thursday, May 30, 2013 10:18 AM

Subject: USACE Response and Direction March 2013

Doug – this is the response back in March 2013. At that time we were preparing to submit the Joint Application since we had a preliminary design that the USACE could review. I'll send another email with the USACE's most recent response, essentially rescinding the March 2013 response. The change from USACE was not due to any changes in the design or new information provided to the USACE. The change in USACE's response appears to be from their recent contact with the National Forest and the USFWS.

Paul E. Burnham, PE



Direct: 406.751.5845

----- Original Message -----

Subject: RE: NWO-2012-00381-MTH: Flower Creek Dam (UNCLASSIFIED)

From: "McCary, Stephanie" <Stephanie.D.McCary@usace.army.mil>

To: Christine Pearcy <cpearcy@m-m.net>

CC:

Classification: UNCLASSIFIED

Caveats: NONE

Hi Christine,

Since you will be moving the dam downstream of the existing dam, presumably because the existing dam is no longer adequate and needs repair, and you will only be impacting approximately 130 linear feet of stream, the project will most likely fit under Nationwide Permit number 3 for maintenance and repair. We will still need final plans which should show the existing dam as well, and a wetland delineation done for the newly flooded area before we can issue you a verification letter.

If during finalizing the project you discover you will be impacting more than 300 linear feet of stream, or that you will be impacting wetlands, you may need to provide mitigation for the impacts. However, based on the information you provided it does not seem like that will be the case.

The review time for a simple Nationwide permit 3 with no mitigation requirement is very short, but keep in mind that if you find you will be impacting more than 130 linear feet of stream or any wetlands, the review time may take longer.

And to answer your question, for the corps to officially review the project we will need the wetland delineation of the fill area, the final project plans showing the extent of the fill in waters of the U.S., and you will need to submit a permit application, which I've attached to this email.

Let me know if you have any more questions,

Stephanie McCary
Regulatory Project Manager
US Army Corps of Engineers
Omaha District - Regulatory
10 West 15th Street, Suite 2200
Helena, Montana 59626

Phone 406-441-1365

Fax 406-441-1380

<http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Montana.aspx>

-----Original Message-----

From: Christine Percy [<mailto:cpearcy@m-m.net>]

Sent: Wednesday, March 13, 2013 7:59 AM

To: McCary, Stephanie

Cc: Paul E. Burnham

Subject: NWO-2012-00381-MTH: Flower Creek Dam

Dear Stephanie,

Thanks for speaking with me on the phone on Friday, March 8, regarding USACE permitting requirements for the Flower Creek Dam Replacement project (Corps file number: NWO-2012-00381-MTH) near Libby, Montana. During our conversation, we decided that the best way to proceed is for me to send you an email outlining impacts as we currently understand them. Then, you could advise whether we were looking at a NWP or an Individual Permit.

The project consists of the construction of a new dam approximately 85 feet downstream of the existing Flower Creek Dam. The proposed dam will replace the existing Flower Creek Dam. The existing dam impounds the Upper Flower Creek Reservoir, which serves as the primary water supply storage facility for the City of Libby. The replacement project will include dismantling the top 25 feet of the existing 58-foot high dam. During construction of the replacement dam, the existing dam will be partially dismantled, and the reservoir will be lowered from approximately 220 acre-feet to 42 acre-feet. A low level bypass will be installed in the replacement dam to allow for continued supply of raw water to the downstream lower diversion and the Libby Water Treatment Plant during construction and filling operations.

The project has reached the 30% design phase and we now have the ability to quantify impact to Flower Creek (preliminarily determined to be a jurisdictional waterway). Approximately 130 linear feet of stream will be permanently impacted in order to install the new dam. A total of 255,000 cubic feet of material will be placed in Flower Creek during construction of the new dam. During the removal process, the 10-foot long base of the existing dam will remain in place, and 18,000 cubic feet of material will be removed from the top of the dam. This will result in a net increase of 130 linear feet (237,000 cubic feet), of material in Flower Creek. Please also find a plan view drawing of the proposed dam attached to this email.

Off-site investigations did not indicate the presence of wetlands within the project area. At this time, it is assumed that no wetlands will be impacted during the construction of this dam. However, a wetland investigation will take place upon commencement of the growing season.

Please let us know what additional information that you need in order to determine the appropriate course of regulatory compliance under Section 404 of the Clean Water Act.

Thanks for your help, and I look forward to working with you on this project.

Kind regards,

Christine

Christine Percy
Environmental Scientist
Morrison-Maierle, Inc.

2880 Technology Blvd W (59718)
P.O. Box 1113
Bozeman, MT 59771
Main: 406.587.0721
Direct: 406.922.6846
Cell: 406.581.6543

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Classification: UNCLASSIFIED
Caveats: NONE

----- Forwarded Message -----

From: Paul E. Burnham <pburnham@m-m.net>

To: "dproll@yahoo.com" <dproll@yahoo.com>

Sent: Thursday, May 30, 2013 10:26 AM

Subject: USACE most recent response

Doug – this is the most recent response from the USACE. The 2012 letter that Todd references indicated that an individual permit would most likely be necessary. However, once the USACE had sufficient information, they determined that the project could be covered under a nationwide permit, and we proceeded under that direction. Let me know if you have any questions on this.

Paul B.

-----Original Message-----

From: Tillinger, Todd N NWO [mailto:Todd.N.Tillinger@usace.army.mil]

Sent: Monday, May 20, 2013 10:48 AM

To: Christine Percy

Cc: Paul E. Burnham; Ken Salo

Subject: RE: NWO-2012-00381-MTH (City of Libby-Morrison-Maierle-Flower Creek-Water System Improvements-Lincoln County) (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Christine,

Thank you for the additional messages you provided this morning. I made those part of our record. I understand that the project manager recently said it could be a Nationwide Permit 3, but our first assessment of an individual permit being needed (as described in our 2012 letter) is correct. Regarding permit type, Nationwide permits can only be used for projects that have no more than minimal impact on the aquatic environment. Nationwide Permit 3 specifically is only valid for maintenance where there is no more than minor modification to the character, scope, or size of the previous structure or fill. The described work appears to exceed those thresholds, so an individual permit will be required.

Regarding Mitigation, there may be a need for compensatory mitigation. That remains to be determined once we have received a permit application and all adverse impacts are disclosed and assessed. The amount of impacted area includes the footprint of the dam and fills as well as any increase in the areas inundated. If stream channel or wetlands are flooded that were not previously flooded, that conversion of aquatic resource area may require compensatory mitigation.

As always, successful completion of all required consultations under the Endangered Species Act and Section 106 is necessary before any Corps authorization can be provided.

Finally, you were correctly informed that delineations of special aquatic sites, including wetlands and riffle-pool complexes, are required with the application.

I am travelling this afternoon and in meetings tomorrow, but should be in Wednesday and Thursday if you have questions.

Todd N. Tillinger, P.E.
Montana Program Manager
US Army Corps of Engineers
Omaha District - Regulatory
10 West 15th Street, Suite 2200
Helena, Montana 59626

Phone 406-441-1376
Blackberry/Cell 406-422-7527
Fax 406-441-1380

<http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Montana.aspx>

-----Original Message-----

From: Christine Percy [mailto:cpearcy@m-m.net]
Sent: Monday, May 20, 2013 9:44 AM
To: Tillinger, Todd N NWO
Cc: Paul E. Burnham; Ken Salo
Subject: RE: NWO-2012-00381-MTH (City of Libby-Morrison-Maierle-Flower Creek-Water System Improvements-Lincoln County) (UNCLASSIFIED)

Hi Todd,
Attached are some of our previous conversations with Stephanie McCrary. I'll call in the early afternoon to discuss this further, but thought this background information would be helpful.

Thanks,
Christine

Christine Percy
Morrison-Maierle, Inc.
Direct: 406.922.6846

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-----Original Message-----

From: Tillinger, Todd N NWO [mailto:Todd.N.Tillinger@usace.army.mil]

Sent: Thursday, May 16, 2013 10:37 AM

To: Paul E. Burnham; Christine Pearcy

Subject: FW: NWO-2012-00381-MTH (City of Libby-Morrison-Maierle-Flower Creek-Water System Improvements-Lincoln County) (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Paul and Christine,

I was contacted by the USFWS this morning about the Flower Creek dam project for the City of Libby. It appears that in March 2013 you or another project proponent were contacted by Stephanie McCary from this office. Ms. McCary is no longer working for us, but I noted that she may have alluded to the use of a Nationwide Permit for the Dam replacement, perhaps under Nationwide Permit 3 for Maintenance.

It is not clear that use of a NWP will be possible or likely, since the expected impacts may be more than minimal; therefore, a standard (individual) permit would be required, which has a processing time of at least 120 days once we receive a complete application.

Note that if the project will likely require successful completion of both Section 7 ESA consultation and Section 106 NHPA consultation prior to issuance of any Department of Army (DA) permit.

We have a file for the project already that includes pre-application information, so please refer to Corps File Number NWO-2012-00381-MTH (City of Libby-Morrison-Maierle-Flower Creek-Water System Improvements-Lincoln County) on future inquiries and permit application submittals for the work. Attached is a copy of a letter from this office provided in 2012 regarding the project.

Thanks and let me know if you have any questions.

Todd N. Tillinger, P.E.

Montana Program Manager

US Army Corps of Engineers

Omaha District - Regulatory

10 West 15th Street, Suite 2200

Helena, Montana 59626

Phone 406-441-1376

Blackberry/Cell 406-422-7527

Fax 406-441-1380

<http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Montana.aspx>

Classification: UNCLASSIFIED

----- Forwarded Message -----

From: Paul E. Burnham <pburnham@m-m.net>

To: "dproll@yahoo.com" <dproll@yahoo.com>

Sent: Thursday, May 30, 2013 11:23 AM

Subject: ER LETTER USFWS

Doug – the letter referenced in Mark Wilson's email was the original MMI letter that we sent to him. I had called him as a follow up to the letter and he asked me to email him a copy. I've attached the letter to this email. It is similar to the letters that went to all other agencies. Let me know if you need anything else on this. Also, would it be helpful for me to call Vicki and clarify events with her? I'm good to call her or it sounds like you are in contact with her. Paul B.

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February 10, 2012

Mr. Mark Wilson, Supervisor
U.S. Fish and Wildlife Service
Ecological Services
585 Shepherd Way
Helena, MT 59601

RE: City of Libby
Proposed Water System Improvements Project

Dear Mr. Wilson:

The City of Libby, Montana is in the process of performing an environmental review pursuant to the National Environmental Policy Act for the USDA, Rural Utilities Service in order that it may assess the environmental impacts of the Water System Improvements Project in Libby, Lincoln County, Montana. The purpose of this project is to upgrade Libby's water system and address deficiencies within the system. This project comprises three primary components:

1. Construct the access road for the Flower Creek Dam Replacement Project.
2. Construct the replacement dam downstream of the existing Flower Creek Dam and dismantle the existing dam.
3. Upgrade the existing water distribution system to address the most significant water-loss areas within the system.

Enclosed is a U.S. Geological Survey map depicting the project location, and a project description with affected land sections.

All proposed improvements are located at the existing Flower Creek Dam site, the raw water transmission corridor (Lower Flower Creek Reservoir to the Libby Water Treatment Plant), and on previously disturbed ground within the city limits.

The proposed project should not represent a "major construction activity" as defined in 50 CFR 402.02, as this project replaces the existing dam and repairs existing water conveyance and distribution components. We request a list of any Federally-listed or proposed threatened or endangered species and designated or proposed critical habitat that may be present in the project area. In addition, please advise us of any present concerns you may have related to possible effects of the proposed project on such species or critical habitat, as well as any other wildlife concerns.

If you do not have any comments regarding this plan, we ask that you simply countersign the bottom of this letter and return it as soon as possible. If we do not receive any comments within 30 days of the date of this letter, we will assume you have no comments.

Thank you for your time and consideration.

Sincerely,

Paul E. Burnham, P.E.

Encl.: U.S.G.S Vicinity Map; Project Description and Location

The U.S. Fish and Wildlife Service does not have any comments regarding the improvements proposed.

U.S. Fish and Wildlife Service

----- Forwarded Message -----

From: Allan Payne <rpayne@doneylaw.com>
To: Doug and Pam Roll <dproll@yahoo.com>; Bill Bischoff <billb@libby.org>
Sent: Thursday, June 13, 2013 3:26 PM
Subject: RE: Dam project

Doug,

Short, sweet and to the point. See attached.

R. Allan Payne

DONEY | CROWLEY | PAYNE | BLOOMQUIST P.C.
P.O. Box 1185
Helena, MT 59624-1185
(406) 443-2211 Fax: (406) 449-8443

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From: Doug and Pam Roll [<mailto:dproll@yahoo.com>]
Sent: Thursday, June 13, 2013 10:31 AM
To: Allan Payne
Subject: RE: Dam project

Allan, could you put it together and forward it to me and Bill. Then we can decide what direction we want to take. Thank you very much Doug

From Doug & Pam Roll
dproll@yahoo.com

--- On **Thu, 6/13/13**, Allan Payne <rpayne@doneylaw.com> wrote:

From: Allan Payne <rpayne@doneylaw.com>
Subject: RE: Dam project
To: "Bill Bischoff" <billb@libby.org>
Cc: "'Doug Roll'" <dproll@yahoo.com>, "Lucy Page Chesnutt" <lpchesnutt@doneylaw.com>
Date: Thursday, June 13, 2013, 10:28 AM
OK, happy to. To whom should the letter be addressed?

R. Allan Payne

DONEY | CROWLEY | PAYNE | BLOOMQUIST P.C.
P.O. Box 1185
Helena, MT 59624-1185
(406) 443-2211 Fax: (406) 449-8443

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From: Bill Bischoff [<mailto:billb@libby.org>]
Sent: Wednesday, June 12, 2013 8:03 AM
To: Allan Payne
Cc: 'Doug Roll'
Subject: Dam project

Hi, Allan

Doug would like you to proceed with writing the letter about the dam project that we discussed last week. He would like you to send him a draft before it's sent.

Bill

June 13, 2013

ADDRESSEE

RE:

As you are aware, the City of Libby is facing a serious public health emergency. The center of its public water system, the dam on Flower Creek, has been classified as “high-hazard” for failure. It is critical that the dam be replaced before it fails. Pursuant to § 7 of the Endangered Species Act (ESA), the USFWS was informally consulted about the City’s plan to replace the dam. On February 28, 2012 Mark Wilson on behalf of the USFWS found:

Although the threatened grizzly bear and bull trout both occur in proximity to the project area, we believe that the nature of the project and the semi-urban settling location for the proposed work will prevent this project from resulting [in] any significant adverse effects to threatened or endangered species, or other fish, wildlife, and critical habitat resources under the purview of the U.S. [F]ish and Wildlife Service.

Based on that finding and resulting closure of the informal consultation, the City has progressed with its planned dam replacement as was outlined to the USFWS. However, it now appears the USFWS is seeking to reopen the § 7 consultation and require a full assessment for grizzly bear and bull trout. That effort to reinitiate consultation under the ESA does not appear to be in compliance with the USFWS’ own regulations. In particular, 50 C.F.R. § 402.16 authorizes the agency to reinitiate a consultation only in very limited circumstances as follows:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

As the project and its impacts have not changed (subsection (a) and (c)) and USFWS has not identified new endangered or threatened species or critical habit that may be affected (subsection (d)), that leaves only information newly available to USFWS which reveals effects of the action that affect listed species or critical habitat in a manner or extent not previously considered (subsection (b)) as the basis to support any reinitiation of the § 7 consultation. The City is aware of no such new information and is confident that if it existed and formed the basis for the USFWS' attempt to reinitiate, it would have already been provided to the City.

That said, if there is such new information about the project, please provide a detailed description to the City at your first opportunity. Otherwise, the City expects the USFWS to rescind any attempt to reinitiate the § 7 consultation immediately.

Sincerely,

----- Forwarded Message -----

From: Paul E. Burnham <pburnham@m-m.net>

To: "dproll@yahoo.com" <dproll@yahoo.com>

Sent: Wednesday, June 19, 2013 12:58 PM

Subject: USFWS Response

Doug – attached is the 30% technical memorandum that went to the DNRC, USDA RD and the City of Libby in early March 2013. This was part of the comprehensive 30% design submittal. The USFWS portion (bottom of page 2 and top of page 3) indicates the USFWS had rescinded their initial response from 2012. We will include you on any future correspondence regarding permitting. Let me know if you need anything else on this.

Paul E. Burnham, PE

Senior Engineer, Water/Wastewater Group



125 Schoolhouse Loop
Kalispell, MT 59901
Main: 406.752.2216
Direct: 406.751.5845

Technical Memorandum 12

FLOWER CREEK DAM ENVIRONMENTAL AND STREAM PERMITTING

PREPARED BY: Paul Burnham, PE

REVIEWED BY: Ken Salo, PE
Christine Percy

DATE: March 14, 2013

1. INTRODUCTION

As part of the Flower Creek Dam Project, Morrison-Maierle, Inc. is assisting the City of Libby with the environmental permitting process. In February 2012, Morrison-Maierle, Inc. solicited comments from the following agencies regarding potential concerns regarding the water system improvements:

- Montana Department of Fish, Wildlife & Parks
- Montana Department of Environmental Quality
- Department of Natural Resources and Conservation
- State Historic Preservation Office
- Lincoln Conservation District
- US Army Corps of Engineers
- US Environmental Protection Agency, Montana Office
- US Fish and Wildlife Service
- US Forest Service, Kootenai National Forest
- Lincoln County Emergency Management Agency (Jan. 2013 contact)

These agencies also received the Environmental Checklist and portions of the Preliminary Engineering Report describing the preferred alternatives. A description of agency comments and direction is included in the section below, titled STATUS OF PERMITS.

The comments submitted by the responding agencies were included in the April 2012 Environmental Report. The United States Department of Agriculture Rural Development, the funding agency, and the requested that the 2012 Environmental

Report be separated into two reports, one for the Flower Creek Dam Replacement Project and the other for the Libby Water Distribution System Improvements Project. The attached report is the January 2013 Libby Flower Creek Dam Environmental Report.

2. AGENCY COORDINATION

2.1. Agency Responses

The agencies listed in the introduction responded to the solicitation for comments. These responses are included in the attached January 2013 Libby Flower Creek Dam Environmental Report.

2.2. Status of Permits

The agencies listed below have permitting oversight on this project. Listed with these agencies are the individual permits and the status of each permit.

United States Army Corps of Engineers (USACE)

The USACE requires compliance under Section 404 of the Clean Water Act for any activity that will result in the placement of dredge or fill material into waters of the United States. It is currently unknown if the project will be permitted under an existing Nation Wide Permit (NWP) or will require an Individual Permit. A NWP can be applied for using the Joint Application for Proposed Work in Streams, Lakes and Wetlands in Montana (Joint Application). This application will meet permitting requirements of other regulatory agencies, as noted below.. If an Individual Permit is required, a more lengthy permitting process, in addition to public notification will occur.

Status: MMI contacted the USACE (Stephanie McCary 406-441-1365) with 30% design information with the intent of determining if the USACE permit will be an individual 404 permit or will be covered under the existing General Nationwide Permit. Response is pending as of the date of this memo.

Montana Fish, Wildlife and Parks (MFWP)

MFWP indicated that the Stream Protection Act -124 Permit would be required. This permit is part of the Joint Application.

Status: MMI is preparing to submit this application in March or April 2013. The contact at the MFWP is Mike Hensler, 406-293-4161. A construction timing window may be implemented by MFWP to protect spawning or migrating fish populations.

United States Fish and Wildlife Service (USFWS)

The USFWS responded in February 2012:

Although the threatened grizzly bear and bull trout both occur in proximity to the project area, we believe that the nature of the project and the semi-urban setting location for the proposed work will prevent this project from resulting any significant adverse effects to threatened or endangered species, or other fish, wildlife, and habitat resources under the purview of the U.S. fish and Wildlife Service.

Status: The US FWS has since rescinded their initial response and have indicated that a biological assessment (BA) is necessary for both the grizzly bear and bull trout. The US FWS has not indicated if the BA will be completed by a regulatory agency or if this will be completed by the City of Libby and MMI. MMI will determine this in conjunction with USACE. The initial contact at US FWS was Mark Wilson, 406-449-5337, ext. 205. The current contact is Brent Esmoil or Tim Bodurtha, 406-758-6882.

Lincoln County Emergency Management Agency (LCEMA)

MMI contacted the LCEMA in January 2013. LCEMA is the floodplain administrator for Lincoln County. LCEMA indicated that they would require a completed Joint Application, and stated the following:

Since this is something that is pertinent to the Water supply and safety of the City of Libby, I will do an expedited permit. Fill out this application [Joint Application] and attach \$100 (payable to LCEMA) and I will start the process.

Status: MMI will submit the Joint Application to LCEMA in March or April 2013. The contact at LCEMA is Lisa Oedewaldt, 406-293-6295.

Montana Department of Environmental Quality (MDEQ)

MMI will submit the Joint Application to the MDEQ to satisfy the requirements of the Short-term Water Quality Standard for Turbidity – 318 Authorization. MFWP may issue this authorization on behalf of the MDEQ.

Status: MMI will determine if this authorization will be administered by either the MDEQ or the MT FWP. MMI will submit the Joint Application to the administering agency in March or April 2013. The contact for the authorization is Jeff Ryan. The MDEQ Water Protection Bureau contact is Jeff Ryan, 406-444-3080.

United States Forest Service (USFS) – Kootenai National Forest

The USFS indicated a Road Use Permit would be required prior to the commencement of construction activities.

Status: As requested by the USFS, MMI will submit projected traffic loading information by email to the USFS contact during March 2013. The USFS will then determine how to

proceed with issuing a Road Use Permit. The contact at the USFS is Malcom Edwards, 406-283-7598.

Montana Historical Society – State Historic Preservation Office (SHPO)

The SHPO responded to solicitations for comments in February 2012. The SHPO recommended the Flower Creek Dam be recorded and a determination made of their eligibility for listing on the National Register of Historic Places.

Status: MMI will contact the SHPO in March 2013 to determine the Flower Creek Dam's eligibility for listing on the National Register of Historic Places, and will determine how to proceed with recording the current structure. The contact at the SHPO is Damon Murdo, 406-444-7767.

Department of Natural Resources and Conservation (DNRC)

The Flower Creek Dam has already been classified as "high hazard" by the DNRC. The DNRC requires a Construction Permit through the Dam Safety Program. MMI will apply for this permit at the 100% design level, as directed by the DNRC. The application will include construction drawings, specifications and an engineering design report. The typical review period is up to 60 days.

Status: MMI will contact the DNRC in March 2013 to apprise the DNRC of the status of the dam design, and to receive guidance on applying for the Construction Permit. The dam is currently at a 30% design level, and will be submitted for DNRC review in March 2013. The contact at the DNRC is Michele Lemieux, 406-444-6613.

3. SUMMARY

This section will be updated as permits are obtained.

----- Forwarded Message -----

From: Allan Payne <rpayne@doneylaw.com>

To: Doug Roll <dproll@yahoo.com>

Cc: Bill Bischoff <billb@libby.org>; Rachel Kinkie <RKinkie@doneylaw.com>; Lucy Page Chesnutt <lpchesnutt@doneylaw.com>

Sent: Monday, July 22, 2013 1:48 PM

Subject: USFWS response

FYI. Short version: USFWS does not see the Feb 2012 as its informal consultation. It was simply providing [bad] technical assistance.

R. Allan Payne

DONEY | CROWLEY | PAYNE | BLOOMQUIST P.C.

P.O. Box 1185

Helena, MT 59624-1185

(406) 443-2211 Fax: (406) 449-8443

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United States Department of the Interior

Fish and Wildlife Service

Ecological Services
Kalispell Sub-office
780 Creston Hatchery Rd
Kalispell, Montana 59901
Phone: (406) 758-6882 Fax: (406) 758-6877



1374
RECEIVED
JUL 22 2013
By RAP, JLH

July 19, 2013

R. Allen Payne, RGp,MS
Doney, Crowley, Payne, Bloomquist p.c.
Attorneys at Law
Diamond Block, Suite 200
44 West 6th Avenue
P.O. Box 1185
Helena, MT 59624-1185

Dear Mr. Payne:

This letter responds to your June 13, 2013, letter regarding Flower Creek Dam Section 7 consultation. We received your letter in the Kalispell suboffice of the U.S. Fish and Wildlife Service (USFWS) on June 18, 2013.

You reference in your letter an email from Mark Wilson (dated February 28, 2012) on behalf of the USFWS that indicates that although the threatened grizzly bear and bull trout occur in proximity to the project area, due to the nature of the proposed work and its location, significant adverse effects to threatened and endangered species are not expected. This statement was provided as technical assistance. However, it did not relieve the Federal action agency (USDA Rural Development) of further analysis to confirm and/or determine potential effects to threatened and endangered species, nor did it fulfill the Federal action agency consultation responsibilities under section 7(a)(2) of the Endangered Species Act. As such, on February 27, 2013, the USFWS sent a letter to the City of Libby's consultant (Morrison and Maierle, Inc.) at their request which explained why a biological assessment under section 7 consultation implementing regulations (50 CFR § 402) was needed and that new information (collected in 2012 surveys) regarding the presence of bull trout was relevant to the consultation.

Since our February 2013 letter, the USFWS has been assisting the City of Libby's consultant with development of a biological assessment [50 CFR § 402.12 (b)(1)] to determine whether the proposed action is "likely to adversely affect" a federally listed species and designated critical habitat that may occur within the vicinity of the project. The results of the biological assessment will help determine the effects of the proposed action on listed species and designated critical

habitat and whether formal consultation is required (50 CFR § 402.14). The analysis in the biological assessment should contain the best scientific and commercial data currently available [50 CFR § 402.14 (c)(1-6)(d)] in order to ensure accuracy and not cause delay in the consultation process.

If the biological assessment determines the proposed action is “likely to adversely affect” a listed species, initiation of formal consultation is required and should be requested by the Federal action agency in writing [50 CFR § 402.14 (c)]. Once the USFWS receives the request to initiate formal consultation from the Federal action agency we will begin the preparation of the USFWS’s biological opinion which has specific time requirements from the date of receipt of the request [(50 CFR § 402.14(e)]. Please be mindful that we understand the urgency of the current situation and that we will do all we can to expedite the consultation process, including preparation of a biological opinion.

In your letter you mention “reinitiation” of consultation which is a process that pertains only to formal consultation (50 CFR § 402.16 – Reinitiation of formal consultation) and is a standard closing statement of the formal consultation package (i.e., biological opinion). Because formal consultation was not initiated for this proposed action, the USFWS is therefore not in violation of section 7 implementing regulations.

You also stated that the City is not aware of new information about federally listed species in the project vicinity and if there is new information you request the USFWS to provide it to the City. As mentioned above, the USFWS is aware of information collected by a consultant for Montanore Minerals Corporation (MMC) in 2012 regarding bull trout presence above and below the project. That information has been provided to the consultant.

In summary, the USFWS is assisting the City of Libby’s consultant with preparation of the biological assessment. We anticipate continued coordination with USDA Rural Development and the City’s consultant and will strive to meet the timeline for project implementation as we understand it.

Sincerely,



Tim Bodurtha
Supervisor
USFWS Kalispell Suboffice

Copy to: USFWS Montana Field Office (Attn: Jodi Bush)
USFWS Regional Office, Denver (Attn: Mike Thabault)

----- Forwarded Message -----

From: Paul E. Burnham <pburnham@m-m.net>

To: "dproll@yahoo.com" <dproll@yahoo.com>

Sent: Wednesday, July 24, 2013 1:32 PM

Subject: Bull Trout - Flower Creek Dam

Doug – the attached .pdf shows information on the two bull trout hybrids that were found in Flower Creek. One was found above the Flower Creek Reservoir and one was found below the lower diversion. None were found between the dam and the lower reservoir. Table 3 (page 5) shows the results of the electrofishing survey. Figure 4 (page 9) shows the locations where electrofishing was completed in Flower Creek. Let me know if you need anything else on this. I'll have a response back to you on the USFWS letter tomorrow afternoon.

Paul E. Burnham, PE

Senior Engineer, Water/Wastewater Group



125 Schoolhouse Loop
Kalispell, MT 59901
Main: 406.752.2216
Direct: 406.751.5845

TECHNICAL MEMORANDUM

To: Eric Klepfer, Jessie Conrad

From: Ed Kline, Michele Savor (Savor Environmental Services)

Subject: Summary of data collected during 2012 for inclusion in the Aquatic Biological Assessment for the Montanore Project

Date: December 13, 2012 (revision of 11/28/12 memorandum)

This memorandum replaces a memorandum with the same header information that was prepared on November 28, 2012. Errors were found in Table 2 (deep pools per mile on Rock Creek mainstem) and Table 3 (location of upper electrofishing reach on East Fork Rock Creek). These are the only changes.

Stream habitat and fish surveys that are relevant to the Aquatic Species Biological Assessment (BA) for the Montanore Project were conducted during 2012. Montanore Minerals Corporation (MMC) consultants conducted habitat surveys on East Fork Bull River to provide additional baseline data at the request of the U.S. Fish and Wildlife Service (USFWS). MMC consultants also conducted fish surveys at the request of USFWS to evaluate the potential for bull trout mitigation in Flower Creek and Poorman Creek, to evaluate potential implications of planned mitigation on Swamp Creek for impacts to Waters of the U.S., and to provide additional baseline data for Big Cherry Creek. The Montana Department of Fish, Wildlife and Parks (MFWP) conducted fish surveys on Swamp Creek that are relevant to the BA (see above), and Copper Gulch, which offers bull trout mitigation potential. The U.S. Forest Service (USFS) conducted habitat surveys on Rock Creek, East Fork Rock Creek, and West Fork Rock Creek and a fish survey on West Fork Rock Creek. The Rock Creek and East Fork Rock Creek surveys provided

additional baseline data. West Fork Rock Creek offers bull trout mitigation potential. A representative of USFWS accompanied the MFWP and MMC electrofishing crews.

All of the raw data were provided to Kline Environmental Research. Some of the data for Rock Creek, East Fork Rock Creek, and West Fork Rock Creek are reported in a 2012 report (Littlejohn, L. [Salmon Environmental Services, LLC]. November 14, 2012. Rock Creek Fisheries and Aquatic Habitat Assessment Supplement. Prepared for RC Resources, Inc.). The remaining data have not been reported in a citable format prior to this memorandum. This memorandum provides the necessary survey information and data summaries (Tables 1-3, Figures 1-4) to support references in the BA to these 2012 surveys. This memorandum does not necessarily contain all data that were collected during 2012 that are relevant to the BA. Other reports that were released during 2012 are currently being reviewed, and any pertinent data will be incorporated into the revised BA data set.

Table 1. Summary of 2012 stream habitat and fish surveys.

Stream	Fish Surveys Using Electrofishing	Fish Genetics Samples	Habitat and Large Woody Debris Surveys	Purpose
East Fork Bull River	not surveyed	0	3 reaches (MMC)	Baseline data for impact assesment
Rock Creek	1 reach (MFWP)	0	Entire stream (USFS. Results also in Littlejohn 2012)	Baseline data for impact assesment
East Fork Rock Creek	2 reaches (MFWP)	0	To fish barrier falls (USFS. Results also in Littlejohn 2012)	Baseline data for impact assesment
West Fork Rock Creek	1 reach (USFS)	0	To fish barrier falls (USFS. Results also in Littlejohn 2012)	Investigate mitigation potential
Big Cherry Creek	3 reaches (MMC)	1	not surveyed	Baseline data for impact assesment
Poorman Creek	2 reaches (MMC)	0	not surveyed	Investigate mitigation potential
Flower Creek	3 reaches (MMC)	2	not surveyed	Investigate mitigation potential
Copper Gulch	2 reaches (MFWP)	0	not surveyed	Investigate mitigation potential
Swamp Creek	2 reaches (MMC)	0	not surveyed	Investigate impact potential from Waters of the U.S. mitigation
	2 reaches (MFWP)	0	not surveyed	

Table 2. Habitat survey information.

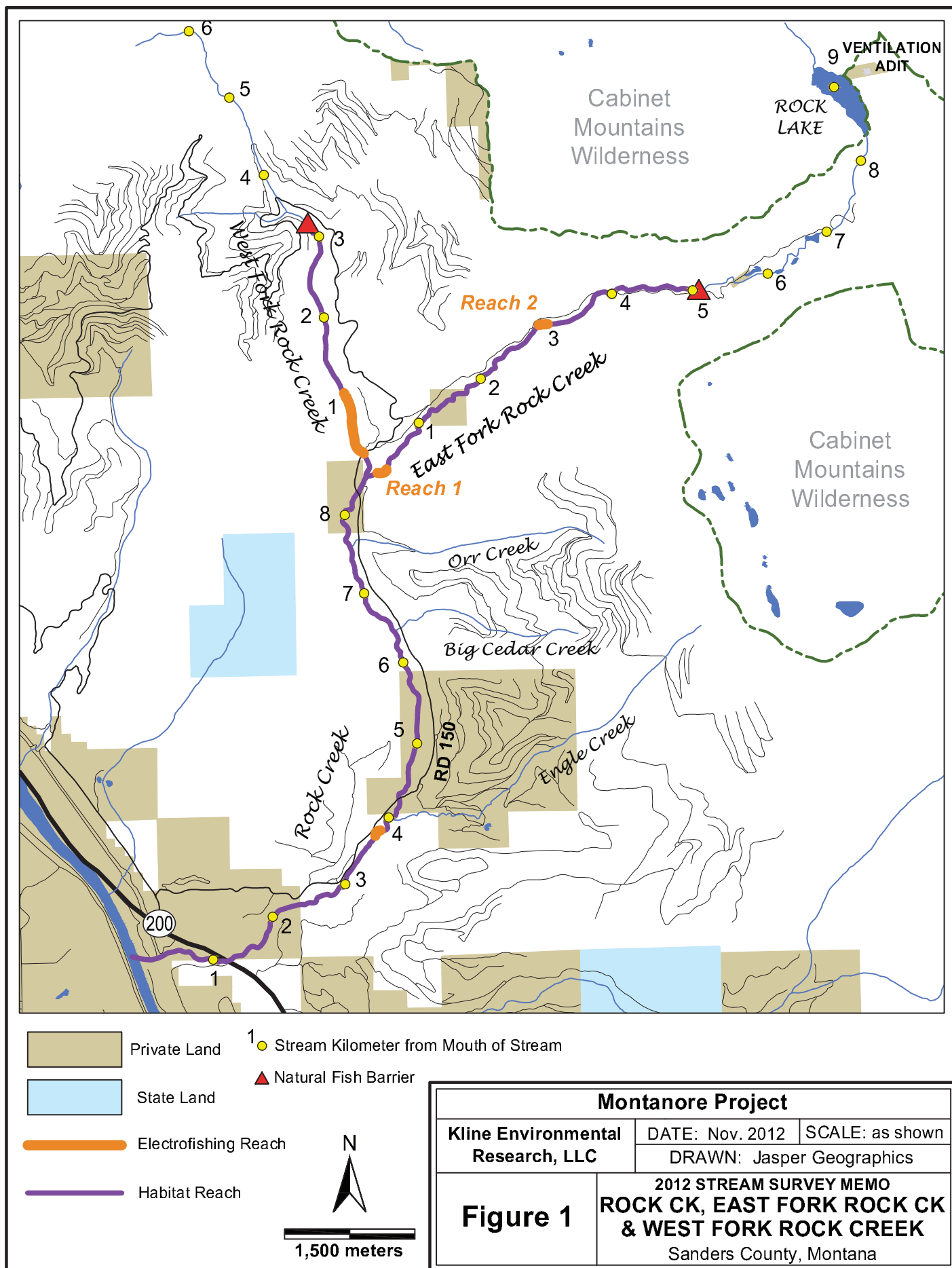
Stream (Reach)	WF Rock Cr	EF Rock Cr	Rock Cr mainstem	EF Bull R (Reach 1)	EF Bull R (Reach 2)	EF Bull R (Reach 3)
Date	8/2/2012	8/8/2012	8/9/2012	8/9/2012	8/22/2012	8/23/2012
Surveyor	USFS	USFS	USFS	MMC	MMC	MMC
Lower Boundary	Rock Creek mainstem	Rock Creek mainstem	Clark Fork River	LGR just above screw trap (stream meter 682)	Halfway between Snake Creek and Snake Cr Pass Rd (stream meter 2994)	HGR above small plunge pools and large LWD stack out of water (stream meter 6238)
Upper Boundary	Fish barrier falls (stream meter 3200)	Fish barrier falls (stream meter 5071)	Confluence East and West Fork Rock Creek	Where channels split (stream meter 1495)	Upstream of large pool below stretch of laddered LWD (stream meter 3507)	Top of three-way split channel (stream meter 6558)
Reach Length (ft)	10,775	16,376	29,077	2,667	1,684	1,050
# Habitat Units/1000 ft	11.32	4.27	6.71	12.37	17.22	23.81
Avg. Wetted Width (ft)	11.2	19.6	20.0	21.2	22.8	20.7
Wetted Width/Avg Depth	13.6	21.9	22.8	20.1	23.6	29.2
Max Depth (ft)	3.65	2.40	3.38	2.20	1.70	1.30
Avg Depth (ft)	0.92	1.10	1.18	1.20	1.02	0.82
Pools per mile *	29.0	11.0	18.5	25.7	37.6	50.3
Avg Pool Width/ AvgDepth	11.9	15.5	12.3	13.1	18.8	23.2
Scour pool avg width/max depth	6.10	6.02	5.82	6.74	7.81	6.23
Large pools per mile (at baseflow, >3 m avg width, >1 m max depth)	0.00	3.55	14.71	11.88	6.27	5.03
Deep pools/ mile (>3 ft max depth)*	1.0	5.6	12.7	11.9	12.5	5.0
LWD/mi (>6 in diameter, length > bankfull channel width)*	48.4 to 229.5 (range for 3 reaches)	28.3	1.2 to 29.1 (range for 3 reaches)			
LWD/mi (>6 in diameter, >15 ft length, aggregates count as 1)				59	63	96
LWD/mi (>6 in diameter, >15 ft length, all pieces in aggregates counted)				323	702	739
% Pocket Pools Area, Avg	32.6	32.1	17.5			
% Pocket Pools Area, Max	70	75	45			
Pool Crest Depth, Avg	0.67	1.11	0.91			
Pool Crest Depth, Max	1	2	1.8			
% Fines, Pool Crest, Avg	41.1	14.7	26.9			
% Fines Pool Crest, Max	90	40	100			
% Stable Streambank				92.0	94.1	96.1
Substrate (max % comp., one Wolman transect per stream)	large gravel and small cobble	cobble	small cobble and cobble	small cobble	gravel	cobble
Rosgen Channel Type				B3c	B3	A3 - A2

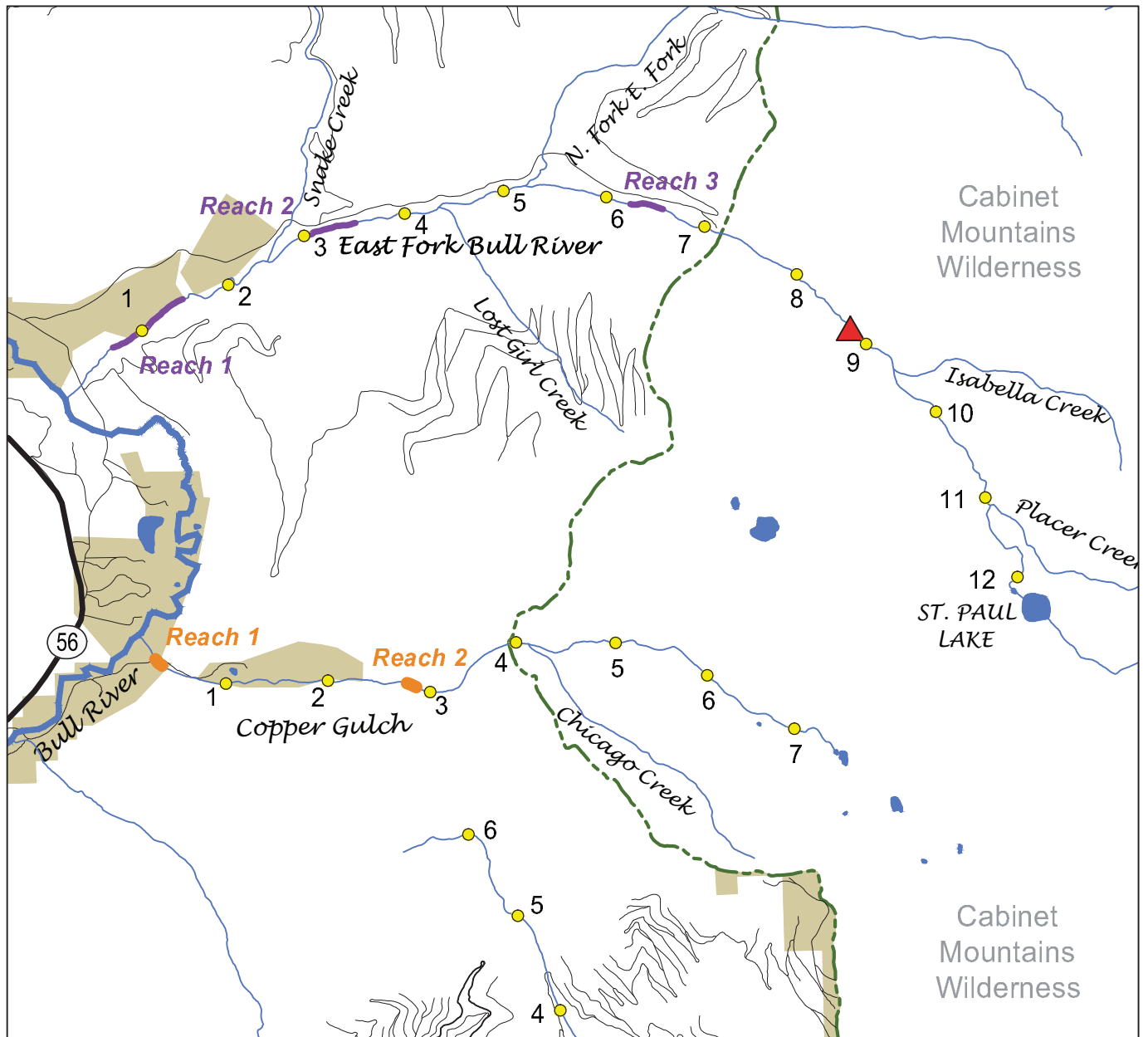
* From Salmon Environmental Services (2012).

Table 3. Electrofishing survey information.

Stream	Surveyor	Date	Stream Meter at Lower End	Reach Description	Number of Passes	Reach Length (meters)	Bull Trout (BL)	Brook Trout (BR)	BL x BR	Rainbow Trout (RB)	Cutthroat Trout (CT)	RB x CT	Brown Trout	Mini- mum	Maxi- mum	Average
East Fork Rock Creek	MFWP	8/15/2012	146	1. Above West Fork Rock Creek confluence	3	125	15	0	0	0	43	0	0	56	275	163
		8/17/2012	2981	2. Trailhead	3	105	14	0	0	0	42	0	0	122	183	153
West Fork Rock Creek	USFS	8/29/2012	300	Above FS Rd 150	1	762	6	0	0	0	42	0	0	158	177	167
Rock Creek	MFWP	9/12/2012	3670	Below Engle Creek	2	97	0	23	0	0	24	0	0			
Copper Creek	MFWP	8/29/2012	280	1. Lower-just above bridge	2	88	0	26	0	0	0	4	12			
		8/28/2012	2765	2. Upper-Above private property	3	95	0	0	0	0	57	0	0			
Big Cherry Creek	MMC	8/7/2012	15576	1. Mile 9.7 just below FS Rd 876 bridge	1	34	0	0	0	0	0	2	0			
			15835	2. Mile 9.9 above FS Rd 876 bridge	1	177	0	1	0	0	0	12	0			
			22252	3. Mile 12.9 just below FS Rd 4785 bridge	1	168	4*	0	0	0	0	12	0	95	564	213
Poorman Creek	MMC	8/8/2012	1550	1. Mile 0.9 below culvert	1	70	0	0	0	14	0	1	0			
			1720	2. Mile 1.0 above culvert	1	122	0	0	0	27	0	1	0			
Flower Creek	MMC	8/20/2012	5440	1. Mile 3.5 below lower reservoir	1	238	0	10	1*	0	4	14	0			
			5764	2. Mile 3.8 upstream of lower reservoir	1	195	0	8	0	0	0	20	0			
			9732	3. Mile 6.1 below road upstream of reservoirs	1	238	0	0	1*	0	0	48	0			
Swamp Creek	MFWP	7/2/2012	1267	1. 100 ft below Farm to Market Rd culvert to 100 ft above	1	61	0	12	0	0	0	0	0			
			4429	2. 1/4 mile upstream of dumpsters	1	76	0	20	0	0	0	0	0			
	MMC	8/6/2012	5280	3. Mile 3.2 forest	2	90	0	42	0	0	2	4	0			
			5400	4. Mile 3.3 meadow	1	84	0	10	0	0	0	4	0			

* Genetic analysis: The two putative hybrids from Flower Creek were both genotyped as hybrids. The largest bull trout from Big Cherry Creek assigned to W. Fisher River as its most likely population and Callahan Creek as its second most likely population. Both of these tributaries are located below Libby Dam.





Private Land



Electrofishing Reach



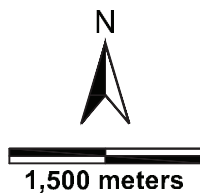
Habitat Reach

1

● Stream Kilometer from Mouth of Stream



▲ Natural Fish Barrier



Montanore Project

Kline Environmental
Research, LLC

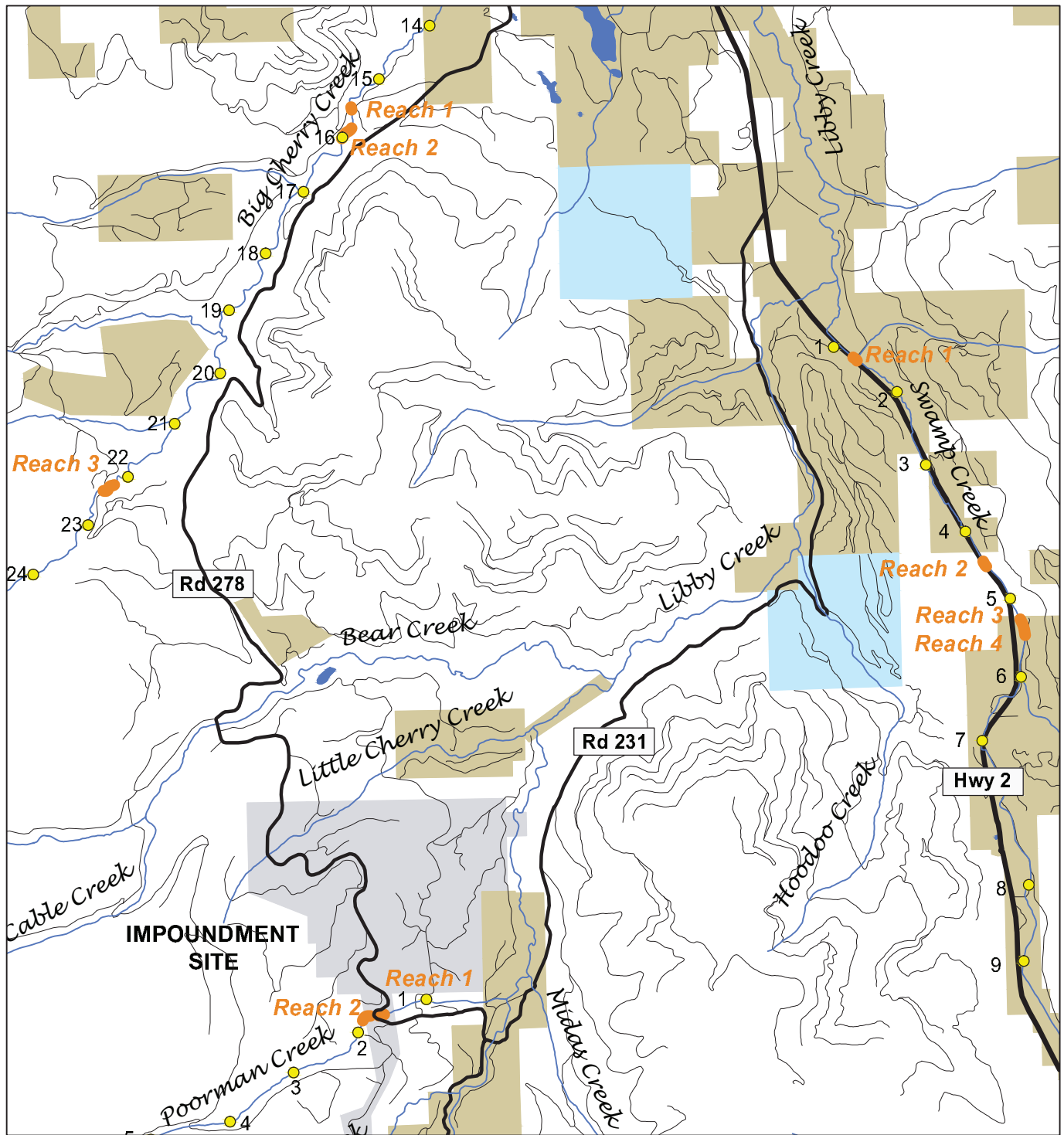
DATE: Nov. 2012 | SCALE: as shown

DRAWN: Jasper Geographics

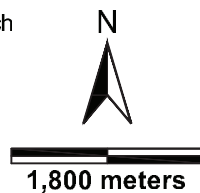
Figure 2

2012 STREAM SURVEY MEMO
EAST FORK BULL RIVER &
COPPER GULCH

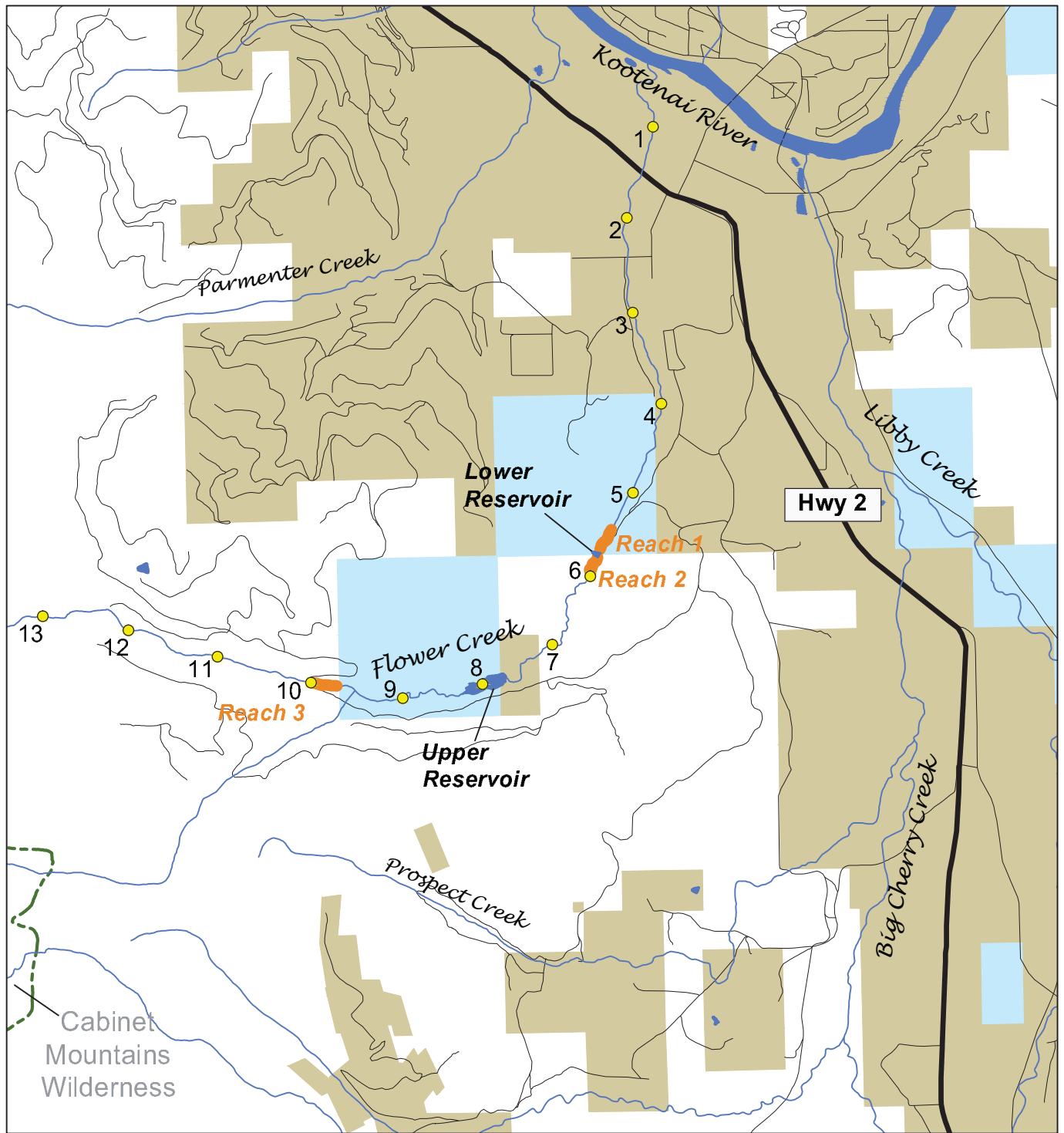
Sanders County, Montana



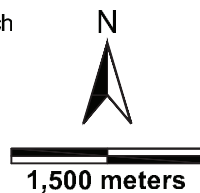
- Private Land
- State Land
- Electrofishing Reach
- 1 Stream Kilometer from Mouth of Stream



Montanore Project		
Kline Environmental Research, LLC	DATE: Nov. 2012	SCALE: as shown
	DRAWN: Jasper Geographics	
Figure 3	2012 STREAM SURVEY MEMO	
	BIG CHERRY CREEK, POORMAN CREEK & SWAMP CREEK	
	Lincoln County, Montana	



- Private Land
- State Land
- Electrofishing Reach
- 1 Stream Kilometer from Mouth of Stream



Montanore Project		
Kline Environmental Research, LLC	DATE: Nov. 2012	SCALE: as shown
	DRAWN: Jasper Geographics	
Figure 4	2012 STREAM SURVEY MEMO	
	FLOWER CREEK	
	Lincoln County, Montana	



City of Libby
952 E. SPRUCE
POST OFFICE BOX 1428
LIBBY, MT 59923

Phone 406-293-2731
Fax 406-293-4090

July 25, 2013

Antoinette Urioste, FOIA Coordinator
USF&W Service
Region 6
PO Box 25486
Denver, CO 80225

Dear Ms. Urioste,

The City of Libby, Montana is requesting records under the Freedom of Information Act.

Background:

The City of Libby is currently in the process of replacing a City-owned dam on upper Flower Creek near Libby, Montana. The current dam is in jeopardy of failing and needs to be replaced as soon as possible to protect Libby's only water source. Failure of the dam would also result in catastrophic damage and possible injury or death to residents located below the dam.

During the preliminary engineering process for the reconstruction of the dam, our engineering firm consulted with all federal and state agencies about required permits and consulting requirements. This included the U.S. Fish and Wildlife Service.

Initially, we received e-mail correspondence from the USF&W that the reconstruction of the existing dam would not have any detrimental effect on wildlife or fisheries in the area and would not require any further consultation since the dam already existed and was going to be replaced near its current location. Several months later, a different office changed that original opinion and is requiring a Biological Assessment.

This change in opinion has substantially delayed the project and resulted in the loss of a major funding opportunity. It has also resulted in putting the City at risk of losing their only water source and our residents at risk for their safety.

Records request:

Due to these circumstances, the City of Libby is formally requesting the following records under the FOIA for the past five (5) years:

- All records, including e-mail correspondence, concerning or including a reference to the Flower Creek Dam and reservoir near Libby, Montana.
- All records, including e-mail correspondence, concerning or including a reference to the mitigation of Bull Trout for the proposed Montanore Mine near Libby, Montana.
- All records, including e-mail correspondence, concerning or including a reference to the City of Libby, its Mayor, Council members, agents, or consultants.

The City of Libby believes that this request is in the public interest and is likely to contribute significantly and meaningfully to public understanding of the operations or activities of the federal government. The City also believes that the public's understanding of the actions of the USF&W Service actions with respect to the Flower Creek dam will contribute to the understanding of a broad audience of persons interested in this subject beyond the residents of the City of Libby, that would include Lincoln County residents, State of Montana residents, U.S. Residents, and various news agencies.

Because of these reasons, the City of Libby is requesting a waiver of any fees for this information.

Sincerely,

Doug Roll, Mayor
City of Libby, Montana

The City of Libby is also requesting expedited processing of this information request because of the possible imminent danger of the failure of the Flower Creek dam and the substantial risk to life and property if a total dam failure occurs. I certify that the above statement concerning expedited processing is true and correct to the best of my knowledge and belief.

Doug Roll, Mayor
City of Libby

----- Forwarded Message -----

From: Allan Payne <rpayne@doneylaw.com>

To: Bill Bischoff <billb@libby.org>

Cc: Doug Roll <dproll@yahoo.com>; Jeri Hoffman <jhoffman@doneylaw.com>

Sent: Wednesday, July 31, 2013 5:05 PM

Subject: RE: Flower Creek Dam Letter

Here it is.

R. Allan Payne

DONEY | CROWLEY | PAYNE | BLOOMQUIST P.C.

P.O. Box 1185

Helena, MT 59624-1185

(406) 443-2211 Fax: (406) 449-8443

This message may contain confidential privileged material, including attorney-client communications and attorney work product. This electronic transmission does not constitute a waiver of privilege. Please contact sender immediately if you have received this message in error. Thank you.

From: Bill Bischoff [<mailto:billb@libby.org>]

Sent: Wednesday, July 31, 2013 4:46 PM

To: 'Doug and Pam Roll'; Allan Payne

Subject: RE: Flower Creek Dam Letter

Allan,

Could you send me a scanned copy after you sign it? Doug has asked Tony to give a copy of it to US F&W when he meets with them next Tuesday in Helena.

Thanks,

DONEY | CROWLEY | PAYNE | BLOOMQUIST P.C.

ATTORNEYS AT LAW

Ted J. Doney (1942-1994)
Frank C. Crowley, MS
John E. Bloomquist
R. Allan Payne, RGp, MS
Patti L. Rowland

Offices in Helena and Dillon, Montana

Marc G. Buyske, LL.M.
Rachel A. Kinkie
Yvette K. Lafrentz, MBA
Hollie Lund, Ph.D.
Jacqueline R. Papez
James L. Shuler

July 31, 2013

Tim Bodurtha
United States Department of the Interior
Fish and Wildlife Service
Ecological Services / Kalispell Sub-office
780 Creston Hatchery Road
Kalispell, MT 59901

RE: Flower Creek Dam

Dear Mr. Bodurtha:

This letter responds to your July 19, 2013 letter regarding Flower Creek Dam. As mentioned previously, the City of Libby is facing a serious public health emergency with regard to the imminent dam failure on Flower Creek.

In your response letter, you explain the need for a Biological Assessment in order to fulfill the Federal agency consultation responsibilities under section 7(a)(2) of the Endangered Species Act. You also mention that reinitiation of consultation only applies to formal consultation. Lastly, you state that information collected in 2012 surveys related to bull trout presence qualifies as new information important to this project.

With regard to your first point, we interviewed Mr. Mark Wilson on July 29, 2013. In this interview he stated that the message you characterize as "technical assistance" is also an informal consultation. He went on to explain that technical assistance is often provided to help provide information as to the best practices of a project as part of the informal consultation process. Thus, not only did the Fish and Wildlife Service engage in informal consultation by offering technical assistance, which fulfills Federal agency consultation responsibilities under Section 7(a)(2), the City of Libby acted in reliance on the information given.

With regard to your second point, you mention that reinitiation of consultation pertains only to formal consultation. While entitled "Reinitiation of Formal Consultation," the Federal government has successfully argued in court that this regulation applies to both the reinitiation of formal and informal consultation. *See, Forest Guardians v. Johanns*, 450 F.3d 455, 458 (9th Cir., 2006). Thus, the exchange you characterized as "technical assistance" ended the informal consultation process, and the reinitiation regulations apply to both the formal and informal

Tim Bodurtha
United States Department of the Interior
Fish and Wildlife Service
July 31, 2013
Page 2 of 2

consultation process. Therefore, consultation can only be reinitiated if one of the four requirements of 50 C.F.R. § 402.16(a)-(d) is met. This leads us to your third point.

You claim information collected by Montanore Minerals Corporation (MMC) in 2012 regarding bull trout hybrids' presence above and below the project justified your reinitiation of the consultation process. However, at the time the original informal consultation occurred, Mr. Wilson acknowledged that bull trout occurred in proximity to the project. It was the size and scope of the project (replacement of a dam on essentially the same location) that lead to Mr. Wilson's conclusion, not the presence or absence bull trout hybrids. In other words, the MMC study does not reveal any information not previously considered by Mr. Wilson. Clearly, there is no "new" information sufficient to satisfy the requirements of 50 C.F.R. § 402.16(b) for consultation to be reinitiated in the form of a biological assessment.

Lastly, your office has provided no response to the City's original position outlined by Mr. Paul Burnham in his February 10, 2012 letter that the proposed project should not represent a "major construction activity" that requires a biological assessment as defined in 50 C.F.R. 402.02. Please provide your office's analysis as to why this project qualifies as a major construction activity.

At this time, you and your staff are proceeding without legal authority and, in doing so, are endangering the lives and property of the citizens of the City of Libby. Moreover, if the dam fails during this break in construction caused by your extra-legal assertion of authority, your office should be prepared to be responsible for supplying water to the City's residences and businesses.

Given that the nature of the dam replacement demands urgent attention to ensure the safety of the citizens of Libby, the biological assessment is not required and the need to allocate government resources efficiently, it seems this issue should easily be resolved if all parties involved sit down and discuss the project and your office's response. The City invites you to schedule a meeting with all parties, including the City of Libby, Morrison-Maierle, Inc., the U.S. Fish and Wildlife Service and the USDA Rural Utilities Service in Libby, Montana. It is our sincere hope that these issues can be resolved expeditiously to benefit all parties involved.

Please contact Mayor Doug Roll to schedule this meeting, and do not hesitate to contact him or the undersigned if you have any further questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Allan Payne", is written over the word "Sincerely,".

R. Allan Payne

c: Doug Roll, Mayor, City of Libby
1394.000 - PL 153668

----- Forwarded Message -----

From: Paul E. Burnham <pburnham@m-m.net>

To: "dproll@yahoo.com" <dproll@yahoo.com>

Sent: Monday, August 5, 2013 4:39 PM

Subject: Permitting Timeline - Libby Response

February 2, 2012

Morrison-Maierle contacted the USDA Rural Development (USDA RD) to make sure all appropriate permitting agencies were on the list of contacts for the upcoming water system improvement projects, including the replacement of the Flower Creek Dam. USDA RD provided additional guidance on regulatory agencies. This discussion and email exchange resulted in finalizing the list of regulatory agencies listed below.

February 6, 2012

MMI met with USDA RD to receive final direction on the extent of the environmental review process. USDA RD indicated they would consider this project a Categorical Exclusion with Environmental Review. The National Environmental Policy Act (NEPA) indicates the following:

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment ... and ... for which, therefore, neither an environmental assessment nor an environmental impact statement is required.
(40 CFR 1508.4)

MMI also contacted the United States Army Corps of Engineers (USACE) to initiate discussions regarding permitting with the USACE Joint Application.

February 10, 2012

MMI sent requests for comments and initial consultation to the agencies listed below. The letters requesting information summarized the projects and asked agencies to advise on any initial concerns regarding possible effects of the proposed project.

Montana Department of Environmental Quality
Montana Department of Natural Resources and Conservation
United States Environmental Protection Agency
Montana Fish, Wildlife and Parks – Fisheries
Montana Fish, Wildlife and Parks – Wildlife
Lincoln Conservation District
Montana State Historic Preservation Office
United States Army Corps of Engineers
United States Forest Service
United States Fish and Wildlife Service
Lincoln County Emergency Management Agency (contacted in 2013)

February 28, 2012

MMI had received responses from several agencies, but had not heard from others. MMI made follow-up calls to agencies that had not yet responded.

MMI called Mark Wilson, USFWS, to whom the letter had been addressed. MMI discussed project with Mark Wilson. Mark Wilson responded with written email response after receiving letter and phone conversation.

I looked over the Flower Creek Dam Replacement Project outline you e-mailed to me. Although the threatened grizzly bear and bull trout both occur in proximity to the project area, we believe that the nature of the project and the semi-urban setting location for the proposed work will prevent this project from resulting [in] any significant adverse effects to threatened or endangered species, or other fish, wildlife, and habitat resources under the purview of the U.S. fish and Wildlife Service. Let me know if you need anything else from us relative to this project.

The USACE also responded to the request for comments and initial consultation. The USACE letter indicated

April 2, 2012

MMI had gathered comments and direction from the agencies listed above. With this information MMI finalized and published the Environmental Report. The Environmental Report, required by USDA RD, was sent to USDA Rural Development for review by their staff in order to meet permitting agency requirements.

MMI began gathering the necessary information for agency permitting on the dam. Because the permit applications would need to be submitted with a final or near-final design, the permitting process was put on hold while the design was progressing through the summer of 2012.

August 9, 2012

MMI continued consultation with the USACE to complete the Joint Application and to have the USACE make a Jurisdictional Determination as the presence or lack of wetlands.

November 20, 2012

A phone conversation between MMI and Montana Fish, Wildlife and Parks (MTFWP) clarified the state agency's stance on an earlier fish ladder discussion. MTFWP indicated they were not requiring a fish ladder, but that the Montanore Mine may have been required to do some off-site mitigation, including fish passages in the Flower Creek drainage. However, he also said that the fish passage appears to have been removed from the list of requirements on Montanore.

November 21, 2012

MMI requested additional guidance from the Montana Department of Environmental Quality (MDEQ) to determine if the 401 Certification would be necessary.

November 27, 2012

During a phone call with the USFWS, Mark Wilson reiterated his original response, indicating "no significant adverse effects" to species, etc. His original email response was incorporated in the environmental report with other agency responses.

January 7, 2013

As the dam design began to take shape, MMI began to develop permit applications to submit with final or near-final design.

January 30, 2013

MMI called the Lincoln County Emergency Management Agency (LCEMA) to discuss permitting requirements through the floodplain administrator. LCEMA indicated that they will process an expedited permit.

February 1, 2013

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The letter was then issued through an email from Brent Esmoil, Acting Field Supervisor, Helena USFWS office. Mr. Esmoil's email prefaced Mr. Bodurtha's letter with the following: "Attached is our signed correspondence regarding the proposed subject project. My apologies for any difficulties or delays that might have arose from our oversight. Please don't hesitate to contact our office if you have any questions. And thank you for your consideration."

Mr. Bodurtha's letter indicated the following, regarding the USFWS original response: "Regrettably, this message was in error and instead should have recommended that an initial biological assessment be conducted in order to determine potential impacts to threatened and endangered species that may occur in the project vicinity."

March 12, 2013

MMI completed the 30% design drawings for the dam. MMI also completed the 30% technical memorandum regarding permitting, which clarified the recent development of the USFWS rescinding their original response. The drawings and technical memoranda were submitted for review to the lead federal agency, USDA RD, and to the Division of Natural Resources and Conservation, and to the City of Libby.

March 15, 2013

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April 9, 2013

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MMI developed a final list of items necessary to respond to the USFWS' recent condition that a biological assessment be submitted to the lead federal agency. The was a result of discussions with the USFWS and the USACE to determine who would complete the biological assessment. Note: initially, the USFWS indicated that the biological assessment may be completed by the City of Libby or by a federal agency such as the USACE or the USDA RD. At the end of April and beginning of May it became apparent that this would be the City's responsibility.

May 8, 2013

MMI contacted City of Libby staff to coordinate access to the dam site in order to complete field work for the biological assessment.

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The USDA RD called MMI to coordinate the work on the biological assessment and to discuss how this would be submitted to the USDA RD and the USFWS.

----- Forwarded Message -----

From: Paul E. Burnham <pburnham@m-m.net>

To: "dproll@yahoo.com" <dproll@yahoo.com>; Ryan Jones <rjones@m-m.net>

Sent: Thursday, August 8, 2013 5:20 PM

Subject: Permitting Timeline - Libby Response V2

Doug – we have included summaries of all records we have of communication on the biological assessment. The attached timeline is an update from the one presented at the last council meeting. Please call or email if you have any questions.

Paul E. Burnham, PE



Direct: 406.751.5845

City of Libby – Flower Creek Dam
Permitting Timeline – USFWS
August 8, 2013

February 2, 2012

Morrison-Maierle contacted the USDA Rural Development (USDA RD) to make sure all appropriate permitting agencies were on the list of contacts for the upcoming water system improvement projects, including the replacement of the Flower Creek Dam. USDA RD provided additional guidance on regulatory agencies. This discussion and email exchange resulted in finalizing the list of regulatory agencies listed below.

February 6, 2012

MMI met with USDA RD to receive final direction on the extent of the environmental review process. USDA RD indicated they would consider this project a Categorical Exclusion with Environmental Review. The National Environmental Policy Act (NEPA) indicates the following:

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment ... and ... for which, therefore, neither an environmental assessment nor an environmental impact statement is required.
(40 CFR 1508.4)

MMI also contacted the United States Army Corps of Engineers (USACE) to initiate discussions regarding permitting with the USACE Joint Application.

February 10, 2012

MMI sent requests for comments and initial consultation to the agencies listed below. The letters requesting information summarized the projects and asked agencies to advise on any initial concerns regarding possible effects of the proposed project.

Montana Department of Environmental Quality
Montana Department of Natural Resources and Conservation
United States Environmental Protection Agency
Montana Fish, Wildlife and Parks – Fisheries
Montana Fish, Wildlife and Parks – Wildlife
Lincoln Conservation District
Montana State Historic Preservation Office
United States Army Corps of Engineers
United States Forest Service
United States Fish and Wildlife Service
Lincoln County Emergency Management Agency (contacted in 2013)

February 28, 2012

MMI had received responses from several agencies, but had not heard from others. MMI made follow-up calls to agencies that had not yet responded.

MMI called Mark Wilson, USFWS, to whom the letter had been addressed. MMI discussed the

project with Mark Wilson. Mark Wilson responded with written email response after receiving letter and phone conversation.

I looked over the Flower Creek Dam Replacement Project outline you e-mailed to me. Although the threatened grizzly bear and bull trout both occur in proximity to the project area, we believe that the nature of the project and the semi-urban setting location for the proposed work will prevent this project from resulting [in] any significant adverse effects to threatened or endangered species, or other fish, wildlife, and habitat resources under the purview of the U.S. Fish and Wildlife Service. Let me know if you need anything else from us relative to this project.

The USACE also responded to the request for comments and initial consultation. The USACE letter indicated

April 2, 2012

MMI had gathered comments and direction from the agencies listed above. With this information MMI finalized and published the Environmental Report. The Environmental Report, required by USDA RD, was sent to USDA Rural Development for review by their staff in order to meet permitting agency requirements.

MMI began gathering the necessary information for agency permitting on the dam. Because the permit applications would need to be submitted with a final or near-final design, the permitting process was put on hold while the design was progressing through the summer of 2012.

August 9, 2012

MMI continued consultation with the USACE to complete the Joint Application and to have the USACE make a Jurisdictional Determination as to the presence or lack of wetlands.

November 20, 2012

A phone conversation between MMI and Montana Fish, Wildlife and Parks (MTFWP) clarified the state agency's stance on an earlier fish ladder discussion. MTFWP indicated they were not requiring a fish ladder, but that the Montanore Mine may have been required to do some off-site mitigation, including fish passages in the Flower Creek drainage. However, he also said that the fish passage appears to have been removed from the list of requirements on Montanore.

November 21, 2012

MMI requested additional guidance from the Montana Department of Environmental Quality (MDEQ) to determine if the 401 Certification would be necessary.

November 27, 2012

During a phone call with the USFWS, Mark Wilson reiterated his original response, indicating "no significant adverse effects" to species, etc. His original email response was incorporated in the environmental report with other agency responses.

January 7, 2013

As the dam design began to take shape, MMI began to develop permit applications to submit with final or near-final design.

January 30, 2013

MMI called the Lincoln County Emergency Management Agency (LCEMA) to discuss permitting requirements through the floodplain administrator. LCEMA indicated that they will process an expedited permit.

February 1, 2013

Eric Klepfer, Montanore Minerals Corporation (Montanore), called MMI to discuss the potential Flower Creek Dam project. Mr. Klepfer said that Montanore and the USFWS had been in discussions regarding mitigation in the drainages that Montanore mining activities would impact. Regarding the fishery mitigation measures proposed by the USFWS to Montanore, Mr. Klepfer said, "We have to accept the mitigation and we do not accept it. We're not going to do it. They [USFWS] have to now find another solution."

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Mr. Bodurtha's letter indicated the following, regarding the USFWS original response: "Regrettably, this message was in error and instead should have recommended that an initial biological assessment be conducted in order to determine potential impacts to threatened and endangered species that may occur in the project vicinity."

March 4, 2013

USDA RD had asked for separate Environmental Reports, one for the water distribution and one for the dam. MMI prepared separate reports and submitted these to USDA RD by email and by mail. A copy of each went to Dan Johnson and Karen Sanchez at USDA RD.

March 6, 2013

MMI called Stephanie McCary at the USACE to initiate regulatory compliance for the dam project. This was a follow-up phone call to respond to comments on the joint application.

March 12, 2013

MMI completed the 30% design drawings for the dam. MMI also completed the 30% technical memorandum regarding permitting, which clarified the recent development of the USFWS rescinding their original response. The drawings and technical memoranda were submitted for review to the lead federal agency, USDA RD, and to the Division of Natural Resources and Conservation, and to the City of Libby.

March 13, 2013

MMI provided a summary of the project to the USACE. This contained information from the 30% design submittal.

MMI had an internal discussion about which agency or entity would be preparing the biological assessment. At this time, it appeared the USACE may complete the biological assessment.

March 14, 2013

MMI was awaiting response from the USACE regarding their availability to complete the biological assessment.

MMI began outlining a schedule to complete the wetland delineation required by the USACE.

March 15, 2013

MMI submitted the draft Joint Application to the USACE for review and comment. USACE responded with the following: *"Since you will be moving the dam downstream of the existing dam, presumably because the existing dam is no longer adequate and needs repair, and you will only be impacting approximately 130 linear feet of stream, the project will most likely fit under Nationwide Permit number 3 for maintenance and repair."*

March 20, 2013

MMI asked the USACE again if they would be doing the biological assessment. The USACE responded with the following: *"You [MMI] will need to prepare a BA for Grizzly Bear and Bull Trout. You will then need to provide a final copy of the BA to the Corps and we will coordinate that with USFWS."*

April 9, 2013

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The USACE called MMI and indicated that they (USACE) had been contacted by the USFWS regarding the Flower Creek Dam project. The USACE then rescinds their original response regarding coverage under the Nationwide Permit and indicates that an Individual Permit may be necessary.

The USDA RD called MMI to coordinate the work on the biological assessment and to discuss how this would be submitted to the USDA RD and the USFWS.

May – August 2013

MMI has completed the biological assessment and has submitted this to the USDA RD and the USFWS on August 6, 2013.

----- Forwarded Message -----

From: Paul E. Burnham <pburnham@m-m.net>
To: "dproll@yahoo.com" <dproll@yahoo.com>
Cc: Ryan Jones <rjones@m-m.net>
Sent: Thursday, August 15, 2013 12:06 PM
Subject: 401 Certification

Doug – I wanted to provide some background on the 401 Certification. Last November we checked with MDEQ to see if this permit was going to be necessary. The guidance we got from MDEQ in November and again last Monday (Aug 5) was that the 401 would not be necessary if the Corps of Engineers (USACE) issued a permit under the Nationwide Permit. Last Monday (Aug 5) Jeff Ryan, MDEQ, said to wait to see if the USACE would require the 401.

On August 12, the USACE issued a public notice for the Joint Application (404), and in that notice the USACE affirmed that the project would be covered under an individual permit and would require the 401 Certification. Jeff Ryan called our office on August 12 and indicated that the City would need to submit the 401 Certification with the 318 Authorization. We had already submitted the 318 Authorization to MDEQ on August 6. The 401 Certification allows the state (MDEQ) to approve the federal (USACE) permit. Please let me know if you need anything else on this or have any questions.

Paul E. Burnham, PE

Senior Engineer, Water/Wastewater Group



125 Schoolhouse Loop
Kalispell, MT 59901
Main: 406.752.2216
Direct: 406.751.5845

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