Draft
Environmental Assessment

Tongue River Railroad
Grant of Easement and Right of Way

November 2008

Montana Fish, Wildlife & Parks

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Chapter 1.0: Purpose of and Need for Action

1.1 Proposed Action

Montana Fish, Wildlife & Parks (FWP) proposes to grant an easement and right of way on property belonging to the State of Montana that is a portion of the Miles City Fish Hatchery (MCFH) facility, which is operated by the Montana Department of Fish, Wildlife & Parks, to the Tongue River Railroad Company, Inc. (TRRC), a Delaware corporation. The easement and right of way is required for the sole purpose of constructing and operating a single track railroad line, together with bridges, culverts, crossings, rails, ties, ballasts, signals, wires, switches, and other materials in, on, over and across land owned by the MCFH. This action will impact 24.85 acres of the total 242.25-acre site located west of Miles City, Montana (see Appendix A for legal description and detailed maps of the area that would be required for the right of way).

1.2 Need for the Action

The Tongue River Railroad Company, Inc. has been granted authority by the federal Surface Transportation Board (STB) to construct and operate 89 miles of rail line between Miles City and Decker MT, as well as a 41 mile extension of that line from Decker to Ashland MT via the "Western Alignment." The request by TRRC to build a railroad from Miles City to Decker was approved by federal regulators in three separate decisions. In *TRRC I*, the ICC approved an 89-mile line between Miles City and Ashland on May 9, 1986. In *TRRC II*, the STB approved a 41-mile extension between Ashland and Decker on November 8, 1996. In *TRRC III*, on October 9, 2007, the Board approved a re-alignment of the southernmost 17 miles of the 41-mile line along the so-called Western Alignment. That latter decision was issued following the preparation by the STB of a Supplemental EIS which re-stated and revised the mitigation conditions adopted in the prior proceedings. The STB subsequently adopted those mitigation conditions. The purpose of the TRRC rail line is to provide for the transport of coal from existing and future mines in the Montana-Wyoming Powder River Basin to markets in the upper Midwest and northeast states.

The STB is an economic regulatory agency that Congress charged with the fundamental missions of resolving railroad rate and service disputes and reviewing proposed railroad mergers. The agency has jurisdiction over railroad line construction and line abandonment. The STB is administratively affiliated with the U.S. Department of Transportation although it has independent decision-making authority (http://www.stb.dot.gov/stb/about/overview.html). It was created by the Interstate Commerce Commission Termination Act of 1995 and is the successor agency to the Interstate Commerce Commission.

Under 49 U.S.C. 10901(c), the STB must approve a proposal to construct or operate a rail line unless the STB finds that such activities are inconsistent with the "public convenience and necessity" (a broad public interest standard under which the STB weighs the transportation need or benefits against any kind of harm likely to result).

Historically, the agency has evaluated whether there is a public demand or need for the proposed service; whether the applicant is financially able to undertake the construction and provide rail service; and whether the proposal is in the public interest and will not unduly harm existing services. The interests of shippers are accorded substantial importance in assessing the public interest (STB Finance Docket No. 30186 (Sub-No. 3) Decision, 2007 pp 13). Safety and environmental concerns are also considered and weighed against transportation concerns in evaluating the public interest.

Two options are available to the State. FWP can negotiate an easement agreement with TRRC in which all critical concerns of FWP and the MCFH would be addressed and mitigated or FWP can refuse to grant an easement, in which case TRRC would have the option of initiating condemnation proceedings (MCA Sections 70-30-201 through 70-30-207 and 70-30-301 through 70-30-312) to appropriate the lands required for the right of way necessary to construct the rail line as granted by the STB.

The route approved by the STB traverses the Miles City Fish Hatchery property along the eastern and northeastern sides. The rail line will pass approximately 1,050 feet east of the main hatchery building and approximately 450 feet east of Pond #45 to the north of the hatchery building (Wilson, Ihrig & Associates, 2007; Shannon & Wilson, 2007). The hatchery produces warm-water fish species including walleye, bass, channel catfish and pallid sturgeon (an endangered species) for stocking rivers, lakes and reservoirs throughout the state. The importance of MCFH "to the state's recreational fishery cannot be overemphasized as it is the sole source for warm water game fish for 68 reservoirs, and provides cool and cold water fish for an additional 67 reservoirs in Montana" (STB Finance Docket No. 30186 (Sub-No. 3) Draft Supplemental EIS Volume II 2004, Appendix F). There are 48 ponds and 2 intake/settling ponds in use, and two water intake lines – the original line from the Tongue River (used as a backup) and the main line from the Yellowstone River (STB Finance Docket No. 30186 (Sub-No. 3) Draft Supplemental EIS 2004, Volume I Chapter 5).

Construction is expected to occur from April through October over a 3-year period (USFWS, Biological Opinion. 2006). A variety of heavy equipment would operate within the right of way (ROW) during construction. Construction activities would include clearing existing vegetation, grading/cutting/filling the ROW, preparing the rail bed, laying track and placing ballast, and reclaiming and re-vegetating disturbed areas (USFWS, Biological Opinion. 2006).

TRRC trains will operate at speeds of up to 55 miles per hour, but will operate at a much slower speed (closer to 20 miles per hour) in the vicinity of the hatchery since this is very close the point where the TRRC line intersects with the BNSF line. Within five years, there will be approximately seven roundtrip coal trains or 14 train movements per day on the Ashland to Miles City portion of the line. This will increase to 18-25 train movements per day by the 15th year of operation.

The STB has imposed mitigation measures (Mitigation Measures 84, 85, 86, 87, and 92) for the entire line as part of its 2007 final decision approving construction of the southern

end of the line along the so-called Western Alignment in the *TRRC III* proceeding. As relevant, these mitigation measures are meant to ensure that any effects on the hatchery will be minimized. The Board has allowed FWP to impose additional reasonable mitigation measures on TRRC in any easement granted by the State (Mitigation Measure 87). The State of Montana has the authority to grant an easement and to attach such reasonable stipulations as deemed necessary to protect the hatchery.

However, by virtue of the exclusive jurisdiction granted to the STB over rail line construction pursuant to Section 10501(b) of the ICC Termination Act, 49 U.S.C. § 10501(b), any state action that would interfere with the construction of the rail line would be preempted. Thus, FWP cannot impose unreasonable conditions or take other steps that would have the effect of impairing TRRC's ability to construct or operate its line along the alignment approved by the STB, which includes the portion of the line through the hatchery.

1.3 Objectives of the Action (desired outcomes and conditions)

1.3.1 Objective #1

Avoid, minimize or eliminate impacts and disruptions to hatchery operations or facilities that are necessary to fish production. Given that the STB has approved the rail line that passes along the east side of the hatchery, it is in the interest of the MCFH to negotiate detailed mitigation measures with the TRRC to address all critical concerns of FWP.

1.3.2 Objective #2

Establish procedures so that, in the event of a collision, derailment or spill, the clean up and remediation of the effects of the incident will occur as quickly as possible. A requirement for TRRC to implement an Emergency Response Plan and a Spill Prevention Plan will ensure that there are established procedures to follow. It is also desirable to establish a procedure to apportion the costs associated with remediation should there be any dispute and to require that TRRC maintain a liability insurance policy so that funds will be available in case of the need for remediation.

1.4 Relevant Plans, EISs, EAs, Regulations, and Other Documents

1.4.1 Draft 10/06/08 Grant of Easement and Right of Way

The draft of the easement grant clearly states the mitigation measures required by FWP to minimize potential impacts from the construction, operation, and maintenance of a rail line on hatchery property.

1.4.2 Surface Transportation Board Decision Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment

This STB Finance Docket No. 30186 (Sub-No. 3) (*TRRC III*) decision to approve the construction and operation of a 17.3-mile line in Rosebud and Big Horn Counties, MT, known as the Western Alignment, was issued on October 9, 2007.

Approval was subject to the environmental conditions recommended in the Supplemental Environmental Impact Statement (SEIS) dated October 13, 2006. That SEIS was prepared by the STB's Section of Environmental Analysis (SEA), which is the office within the Surface Transportation Board responsible for directing the environmental review process, conducting independent analysis of all environmental data, and making environmental recommendations to the STB. The SEIS included mitigation measures that address the portion of the initial line approved by the STB in 1986, and specifically address the concerns raised with respect to the MCFH. The STB revised and updated these mitigation measures from those originally imposed in its 1986 decision in the *TRRC I* proceeding.

1.4.3 Miles City State Fish Hatchery High Resolution Acoustical Study

Womack & Associates completed a study (August 2007) on the effects of vibration and noise on fish at the MCFH. This study is an implementation of all but one aspect of the "Revised Work Plan for High Resolution Vibration Monitoring and Potential Mitigation at Miles City Fish Hatchery" prepared by Womack & Associates for TRRC April 2006.

1.4.4 Tongue River Railroad Project Acoustical Study: Miles City Fish Hatchery

Wilson, Ihrig & Associates, Inc. completed a study (March 2007) for TRRC on the effects of TRR operations on the underwater sound pressure levels in the hatchery's tanks and ponds.

1.4.5 An Evaluation of Pallid Sturgeon Responsiveness to Railroad Induced Vibration

Shannon & Wilson, Inc. completed a study (June 2007) to evaluate whether additional noise from the TRR would negatively impact spawning success rates, survivability, and growth of pallid sturgeon in the MCFH. The evaluation concluded that effects on the rearing of pallid sturgeon at the MCFH should be negligible since ambient levels of noise and vibration are higher than the projected levels from TRR operations.

1.4.6 Biological Opinion on the Construction and Operation of the Tongue River Railroad

The U.S. Fish and Wildlife Service (USFWS), Montana Field Office provided this opinion (July 12, 2006) following draft submissions for the Tongue River III proposal. In the covering letter to this document, R. Mark Wilson, Field Supervisor concurs that TRRC proposed actions are not likely to adversely affect the pallid sturgeon given the final mitigation measures put in place but requests that STB re-initiate consultation between TRRC and FWP if there is a significant decrease in fertility, survivorship or health of eggs, larvae, juvenile or adult fish at the MCFH.

1.4.7 Final Supplemental Environmental Impact Statement Tongue River Railroad Company – Construction and Operation – Western Alignment: Tongue River III – Rosebud and Big Horn Counties

This STB Finance Docket No. 30186 (Sub-No. 3) was delivered to U.S. EPA on October 13, 2006. It includes a list of all required mitigation measures as well as copy of the "Revised Work Plan for High Resolution Vibration Monitoring and Potential Mitigation at Miles City Fish Hatchery", by Womack & Associates, April 13, 2006. This work plan must be completed as required by Mitigation Measure 92 and has been fully completed.

1.4.8 Draft Supplemental Environmental Impact Statement Tongue River Railroad Company – Construction and Operation – Western Alignment: Tongue River III – Rosebud and Big Horn Counties

This STB Finance Docket No. 30186 (Sub-No. 3) was delivered to U.S. EPA on October 15, 2004. The document assesses the impacts to the MCFH of the Western Alignment option proposed by TRRC and also assesses modifications to the other portions of the TRRC line, including the portion near the MCFH. While the Branum Lake portion of the hatchery would no longer be required, there are still potential impacts on fish production at the MCFH. Mitigation measures to minimize these impacts are presented.

1.4.9 Final Environmental Impact Statement Tongue River Railroad Company – Construction and Operation – of a line of railroad in Custer, Rosebud, and Powder River Counties, Montana

This STB Finance Docket No. 30186 was delivered to U.S. EPA on August 23, 1985. This is known as *TRRC I*. It presents the impacts from the Preferred and BN Options. The BN option would require the entire 60-acre Branum Lake Fishing Access site for TRR rail yards in addition to 9 acres of MCFH property for a right of way. The BN option was later dropped in favor of a modified alignment and thus is no longer relevant to this matter. The *TRRC I* application to construct the rail line from Miles City to Decker was approved by the Interstate Commerce Commission on May 9, 1986, subject o certain mitigation conditions that have since been updated and revised in the STB's October 2007 decision in *TRRC III*.

1.4.10 Supplement to Draft Environmental Impact Statement Tongue River Railroad Company – Construction and Operation – of a line of railroad in Custer, Rosebud, and Powder River Counties, Montana

This STB Finance Docket No. 30186 was delivered to U.S. EPA on January 19, 1984. This is a supplement to the draft environmental impact statement for *TRRC I* which discusses the impacts of the BN Option. This option would have had the greatest impact on the MCFH as the entire Branum Lake Fishing Access Site would have been required for the rail yards. The BN option was later dropped in favor of a modified alignment through the MCFH which avoids the impacts that would have been associated with the BN Option.

1.4.11 Draft Environmental Impact Statement Tongue River Railroad Company – Construction and Operation – of a line of railroad in Custer, Rosebud, and Powder River Counties, Montana

This STB Finance Docket No. 30186 was delivered to U.S. EPA on July 15, 1983. This is the TRR I draft which discusses the impacts of the TRRC preferred route at the time.

1.5 Decision That Must Be Made

Montana Department of Fish, Wildlife and Parks must decide whether or not to grant an easement for the right of way across the Miles City Fish Hatchery property as requested by TRRC. Two options are available to the State. FWP can negotiate an easement agreement with TRRC in which all critical concerns of FWP and the MCFH would be addressed and mitigated or FWP can choose not to grant an easement, in which case TRRC would have the option of initiating condemnation proceedings (MCA Sections 70-30-201 through 70-30-207 and 70-30-301 through 70-30-312) to appropriate the lands required for the right of way necessary for construction of the rail line as granted by the STB. The State of Montana has the authority to grant such an easement and to attach such stipulations as may be necessary to protect the MCFH facility.

Environmental concerns have been addressed by the Section of Environmental Analysis of the STB. Basic mitigation measures have been required in the approval by the STB. As part of STB's decision-making process, FWP was directed to negotiate additional or more detailed reasonable mitigation measures to include in granting an easement and right of way.

1.6 Scope of This Environmental Analysis

1.6.1 History of the Planning and Scoping Process

FWP assumed direction and responsibility of MCFH from the USFWS in April 1983. In July of that same year the Draft Environmental Impact Statement, Tongue River Railroad Company – Construction and Operation – of a line of railroad in Custer, Rosebud, and Powder River Counties, Montana was completed, concluding that the MCFH would be impacted by the proposed rail line. In January of 1984 a supplement to the original draft presented an alternative route which was called the Burlington Northern (BN) option. This option included the development of a yard and facilities area south and west of Miles City, at a point near Branum Lake. The now-discarded BN Option would have had significant impacts on the MCFH, possibly rendering it inoperable. The removal of Branum Lake (approximately 60 acres) as well as an additional 9 acres for rail line and use of the lake as a forage fish pond, vibration effects on fish production and the water supply system, and effects of spills of coal, fuel, toxic chemicals or herbicide applications were all potential impacts on the MCFH (STB Finance Docket No. 30186 Final EIS, 1985).

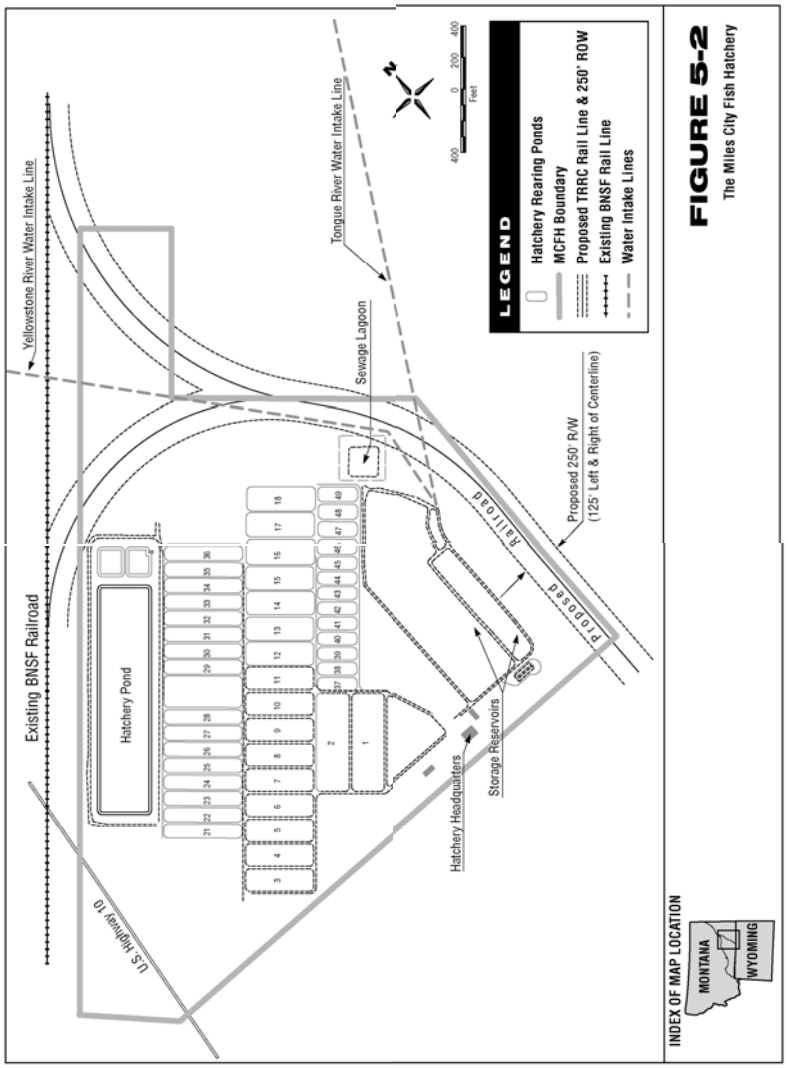
Three mitigation measures were considered given the possible impacts of the BN Option on the hatchery (STB Finance Docket No. 30186 Supplement to Draft EIS 1984 pp 26).

1) Require that the TRRC carry general liability insurance that would cover any long term or serious impacts to the fish hatchery. This would ensure that sufficient monies would be available to mitigate as yet unquantifiable impacts.
2) Move the yard location to an area west of Branum Lake. This would minimize impacts from spills to the MCFH.
3) TRRC would assist FWP in relocating all or part of the fish hatchery to a more suitable location more proximate to the Yellowstone River. This would provide a more dependable source of water.

Both the US Department of Interior and the State of Montana expressed serious concerns about the BN Option (STB Finance Docket No. 30186 Final EIS, 1985 Appendix A). Relocation of the hatchery was considered the only mitigating measure that would reduce potential impacts to an acceptable level. It was also noted that any change in land use for the Branum Lake Fishing Access Site would require approval by the Secretary of Interior (under Section 6(f) of the Land & Water Conservation Fund (L&WCF) Act) and would require the substitution of other properties of at least equal fair market value, reasonably equivalent usefulness, and relatively close in location.

TRRC subsequently proposed to eliminate the BN Option and move the staging yard and all necessary facilities to a location south of I-94 and proposed a "wye" track to connect to the BNSF railway line (see Figure 1 taken from the Draft Supplemental Environmental Impact Statement Tongue River Railroad Company – Construction and Operation – Western Alignment: Tongue River III – Rosebud and Big Horn Counties). Under this alternative, Branum Lake would not be lost to the hatchery but the right of way required by TRRC would be a total of 24.85 acres of property that would be lost to the hatchery. FWP was also concerned about potential impacts on the water supply lines, noise and vibration effects on the production of fish, the infrastructure and maintenance of the hatchery, slope stability of the "Camelsback" area, potential adverse affects of herbicide use on fish and the possible adverse affects on fish of coal dust from train cars.

Figure 1. Proposed right of way on the Miles City Fish Hatchery property. See Appendix A for complete legal descriptions and detailed maps of each part of the right of way.



FWP met with TRRC in February 2004 and reached agreement on mitigation measures to ensure the protection of water pipelines and to minimize impacts from weed control in areas adjacent to the MCFH. The possible impacts of noise and vibration on hatchery operations remained a concern.

TRRC has continued to negotiate with FWP to ensure that all critical concerns of the state will be addressed in an acceptable manner prior to the granting of an easement. Five mitigation measures pertaining specifically to the MCFH were stipulated in the by the STB in the TRRC III proceeding in 2007. They are as follows:

- **Mitigation Measure 84 (Protection of MCFH Water Supply Pipelines).** As agreed to by TRRC and FWP, TRRC shall relocate, as necessary, portions of the water supply pipelines from the Yellowstone River and Tongue River so that each pipeline crosses the rail right-of-way at a right angle or perpendicular to the rail alignment. To ensure structural integrity of the water supply pipelines, the portion of each pipeline lying perpendicular beneath the rail alignment shall be encased in a reinforced concrete pipe (RCP). The RCP shall be of sufficient size to allow for inspection and maintenance of the water supply pipelines. Access to the pipelines beneath the rail alignment shall be provided by installation of reinforced concrete manholes, located on each side of the rail alignment. The RCP manholes shall meet or exceed the American Railway Engineering and Maintenance of Way Association's standard specifications for installation of utilities underneath railway embankments. The design plans for the relocated section of the water pipelines and all associated elements shall be prepared by TRRC and provided to the FWP for review and approval prior to being constructed. TRRC shall locate and protect (and replace if harmed) outgoing water pipelines that would impact operations if affected by rail construction or operation.

- **Mitigation Measure 85 (Weed Control on MCFH).** As agreed to by TRRC and FWP, TRRC shall use only mechanical means of weed control in its right- of-way adjacent to the Miles City Fish Hatchery between the points where the rail line crosses Interstate 94 to the connection with the BNSF Railway Company main line. If it becomes necessary to utilize herbicides to utilize herbicides to control noxious weeds along the right-of-way in this area, herbicides will only be used with prior approval from the FWP, as to the type of herbicide, application rate, means of application, wind speed and direction.

- **Mitigation Measure 86 (MCFH Continuing Consultation).** TRRC shall continue to make itself available to consult with FWP to reach consensus on any remaining issues concerning the environmental effects on the Miles City Fish Hatchery from railroad construction and operations, for a period

up to six months after the effective date of the Board's final decision in Tongue River III. TRRC shall use its best efforts to achieve resolution of any outstanding issues during that period. If no resolution is achieved during that period, the requirement for continued consultation shall cease unless both TRRC and the hatchery agree that the period should be extended and so advise the Board in writing. At the end of the consultation period (whether extended by mutual agreement or not), TRRC shall advise the Board of its position in writing. FWP also shall be invited to provide its position, and either TRRC or FWP (or both) may request that the Board develop a condition designed to mitigate any remaining concerns of FWP related to the environmental effects on the hatchery that the Board determines warrant mitigation.

- **Mitigation Measure 87 (MCFH).** TRRC shall adhere to the reasonable mitigation conditions imposed by FWP in any easement granted by the State allowing TRRC to cross the Miles City Fish Hatchery.

- **Mitigation Measure 92 (Miles City Fish Hatchery).** As agreed to by TRRC, TRRC shall implement the work plan entitled, "Revised Work Plan for High Resolution Vibration Monitoring, Evaluation of Tongue River Railroad Construction and Operation, and Potential Mitigation at Miles City Fish Hatchery" prepared by Womack & Associates, dated April 13, 2006.

FWP has clarified the details for these mitigation measures in negotiations with TRRC in a Draft Grant of Easement and Right of Way. The draft also includes additional requirements for immediate remediation of spills, a general liability insurance policy, and just compensation for land, damages, and depreciation as determined through the required appraisal process. These modifications will further protect the integrity and operation of the MCFH.

1.6.2 Issues Studied in Detail

The impact of railroad noise and vibration on the production of fish at the hatchery is of utmost concern to FWP and the MCFH. Pallid sturgeon have been listed by the USFWS as an endangered species since September 1990. Loss or reduction of pallid sturgeon production at the MCFH will substantially degrade recovery efforts (USFWS, 2006. Cover letter from Mark Wilson, USFWS to SEA July 12, 2006).

Wilson, Ihrig & Associates (2007) measured the effects of predicted TRR operations on the underwater sound pressure levels in the hatchery's tanks and ponds. They concluded that:

- The maximum predicted underwater sound pressure levels produced by TRR train vibration are expected to be lower than levels to which the fish are currently exposed.

- Construction noise and vibration will be less than existing levels inside the hatchery building and will be the same or less than existing levels at the outdoor ponds. Therefore, construction will not have an adverse impact on hatchery operations.

Shannon & Wilson (2007) evaluated the potential impacts of additional vibration and noise from construction and operation of the TRR on spawning success rates, survivability and growth of pallid sturgeon. An extensive literature review and evaluation of the underwater sound pressures measured and predicted by Wilson, Ihrig & Associates (2007) at the MCFH led to the conclusion that existing sound pressure levels during development of the eggs and the earliest portion of the larval stages of the pallid sturgeon were 12 to 50 times greater than levels projected from the TRR operations. Similarly, ambient vibration levels measured in the fry tanks used to rear the fry of pallid sturgeon exceeded all projections for TRR induced vibration in all frequencies. The concrete tanks and the large adult holding tank also followed this trend. The only exception to this trend occurred in the blue isolation tanks "where the projected underwater pressure levels in the 5 to 10 Hz range from TRRC (which ranged from 89 to 92 dB) equaled or exceeded the measured ambient sound pressure levels at the hatchery (which ranged from 85 to 90 dB)".

Underwater sound pressure levels in Pond 45 were predicted to be 10-20 dB higher for TRR operations than ambient levels. "Underwater sound pressure levels were due to the airborne pressure waves (or sound) from the train crossing the water /air interface." This increase was comparable to the additional vibration during the operation of the air compressor at the hatchery which added between 4 and 29 dB (the average for all 22 frequencies was approximately 16 dB) above ambient conditions. There was no discussion of the potential compounding effects. There would be no impact on pallid sturgeon as they are not held in any of the ponds.

Analysis of these detailed studies completed at the MCFH by Womack & Associates (2007) concluded that the effects of construction and operation of the TRR on pallid sturgeon and other fish are expected to be negligible. Measurements of actual noise and vibration during the construction and operation of the TRR must still be made in order to compare actual levels to predicted levels. Based on studies to date, they concluded that:

- Existing ambient sound pressure levels in the hatchery tanks are higher than projected levels from the proposed TRR.
- Vibration levels in the ponds caused by rail traffic are lower than existing ambient levels within the hatchery building.

Effects of construction and operation of TRR on pallid sturgeon and other fish are expected to be negligible.

Noise was one of the factors evaluated by the STB. The only reference in the TRRC I final EIS (STB Finance Docket No. 30186 Final EIS 1985 Ch 4 pp 97) is "The Spotted Eagle Lake Recreational Area would be one sensitive receptor in the area subject to the impacts that would occur. In addition, the Miles City Fish Hatchery might be subjected to noise levels of a nuisance nature."

1.6.3 Issues Eliminated from Further Study

FWP and TRRC reached agreement on the impact of coal dust on the MCFH. Womack & Associates (1999) reviewed the literature and determined that blowing coal dust did not pose a threat to the hatchery. Trains will be traveling at relatively slow speeds ("Train performance modeling completed by Corporate Strategies, Inc. on behalf of TRR indicates that train operation will be limited to a maximum speed of approximately 20 mph in order for unit coal trains, either empty or loaded, to safely navigate the degree of curvature and run onto or leave the BNSF mainline at the northern terminus.")(STB Finance Docket No. 30186 (Sub-No. 3) Draft Supplemental EIS Tongue River III Volume II, 2004 Appendices) through the MCFH ROW and coal dust would have settled to the bottom of the rail cars long before the trains reach the MCFH.

The use of herbicides could be detrimental to fish health. Studies by Dr. Anderson (Womack & Assoc., 1999) concluded that herbicide use did not pose a threat to the hatchery. However, FWP still had concerns and TRRC agreed to accept mitigation measures required by FWP. Mechanical methods of weed control would be used along the TRR right of way from Interstate 94 north to the BNSF Railway's mainline. Any use of herbicides would require FWP prior approval as to the type of herbicide to be applied, application rate, means of application and timing of application. This mitigation measure (#85) was stipulated as part of the final approval granted by the STB. Additional details have been negotiated with TRRC for the draft grant of easement and right of way.

The State of Montana also raised concerns about the potential for slope instability resulting from construction and operation of the TRR. The TRR right of way would pass approximately 200 feet east of the east flank of the Camelsback, about 500 feet east of the closest fish hatchery ponds. The slope stability of the Camelsback area on MCFH property was studied by Womack & Associates (1999 & 2004). They found that the "the calculated factors of safety against a slope failure indicated that the Camelsback is stable under existing (static) conditions and assuming vibration accelerations in the slope (pseudo-static) far in excess of those expected to result from coal-train operations." They concluded that there is no significant risk of a slope failure.

The potential impacts on the water supply pipelines to the hatchery have also been addressed by the STB. Studies on the potential impacts of construction and operation of TRR on the water supply to the hatchery were not required as TRRC agreed to mitigation measures requested by FWP. The STB imposed mitigation measure 84 to ensure the protection and long-term viability of the water supply

pipelines from the Yellowstone and Tongue Rivers serving the MCFH. Timing of construction must be coordinated with the hatchery manager so as not to disrupt water flow to the hatchery. This requirement has been included in the draft easement grant negotiated with TRRC.

1.7 Applicable Permits, Licenses, and Other Consultation Requirements

1.7.1 Permits

No additional permits are required in order to grant the easement. The STB has already approved the construction and operation of the Tongue River Railroad. However, 87-1-209, MCA, requires approval by the FWP Commission of any easements across FWP properties.

1.7.2 Licenses/Entitlements

The lands associated with the MCFH were granted to FWP for the sole use as part of the Montana Fishery Resources Management Program. The USFWS (phone conversation with Mr. Ed Bennett of the USFWS Denver Regional Office on October 10, 2008) has stated that the STB authority supersedes that of USFWS, and that so long as hatchery operations continue as required by the deed, the USFWS has no position relative to the easement.

1.7.3 Coordination Requirements

Timing of construction of the rail line on hatchery property must be coordinated with FWP so that there is no disruption to hatchery operations. No disruption of the water supply can occur during that time period.

Chapter 2.0: Alternatives Including the Proposed Action

2.1 Introduction

The STB has approved construction of the TRR along a route that passes through the MCFH. However, a railroad's right to acquire the property needed to construct and operate a Board-approved line is governed by state laws concerning eminent domain. Thus the STB approved route still requires the granting of a right of way across Miles City Fish Hatchery property. The STB believes that "the proper forum for detailed mitigation plans and commitments regarding the hatchery will be at the State of Montana easement application process".

Two options are available to the State:

1) FWP can negotiate an easement agreement with TRRC in which all critical concerns of FWP and the MCFH would be addressed and mitigated or
2) FWP can refuse to grant an easement, in which case TRRC would have the option of initiating condemnation proceedings (MCA Sections 70-30-201 through 70-30-207 and 70-30-301 through 70-30-312) to appropriate the lands required for the right of way necessary to construct the rail line as granted by the STB.

2.2 Description of Alternatives

2.2.1 Alternative A: No Action - Do Not Grant an Easement

2.2.1.1 Principal Actions of Alternative A

If no action is taken, a Grant of Easement and Right of Way would not be prepared for the Miles City Fish Hatchery property. TRRC would have the option of initiating condemnation proceedings in a court of law. FWP would not have an opportunity to negotiate detailed mitigation and monitoring measures but would instead be subject to the order of the court. Mitigation measures specified by the STB would be enforced in the event that condemnation occurs. FWP and the MCFH would be required to abide by the decision of the court. Due to federal preemption of state actions that might impair the construction of an STB-approved railroad, it is doubtful that TRRC could be denied the right to take the property needed to construct its rail line.

2.2.1.2 Mitigation and Monitoring

The final decision of the STB to approve TRR III included mitigation measures that apply specifically to the MCFH. These measures would apply to the TRRC during the construction and operation of the rail line even if the TRRC gains the right of way through condemnation proceedings. Water lines will be protected, and weed control will be by mechanical means unless FWP approves the use of herbicides. Womack & Associates (2007) will measure actual noise and vibration levels during construction and operation and compare actual measurements with predicted levels but the additional mitigating measures negotiated with TRRC and specified in the Draft Grant of Easement and Right of Way might not be required by the court handling the condemnation proceeding..

2.2.1.3 Past Relevant Actions

FWP has been involved in negotiations with TRRC regarding mitigation measures considered essential to the continued operations and integrity of the MCFH. Agreement had been reached on most critical issues but FWP remained concerned about the impacts of noise and vibration on the rearing of pallid sturgeon at the hatchery. Detailed studies conducted for TRRC (Womack & Associates 2007) evaluated the impacts of noise and vibration on the rearing of pallid sturgeon at the hatchery and determined that they would be negligible.

2.2.1.4 Reasonably Foreseeable Relevant Actions Not Parts of the Proposed Action

The STB determined that the construction of the railroad promotes a benefit to the general public therefore it is most likely that the State court will support the TRRC should they initiate condemnation proceedings should FWP implement the “no action” alternative.

2.2.2 Alternative B: Grant of Easement and Right of Way

2.2.2.1 Principal Actions of Alternative B

Granting of an easement on hatchery property requires a final "Grant of Easement and Right of Way", approval from the FWP Commission to grant an easement on MCFH property, and execution of the grant.

2.2.2.2 Mitigation and Monitoring

TRRC would be required to agree to the mitigation measures requested by FWP in the granting of an easement and right of way. Mitigation measures already agreed to in a draft are:

- Just compensation for land, damages, and depreciation as determined through the required appraisal process prior to construction.
- TRRC agrees to pay for all improvements required and to ensure that design and operation meet all federal rail safety regulations.
- Access to the MCFH grounds will be limited to a one-year temporary construction permit.
- Road access is detailed in the easement grant. TRRC will provide two at-grade crossing (one at each water pipeline crossing) for use by MCFH.
- FWP will approve the timing of construction operations.
- FWP has final approval on TRRC engineering and design plans for construction that will affect the hatchery infrastructure.
- FWP must approve final engineering plans and timelines for construction before any construction can occur on entire track.
- TRRC agrees to protect the hatchery water, sewer and utility facilities.
- TRRC agrees to refrain from disturbing operations of the existing sewage lagoon.
- TRRC agrees to provide adequate culverts to prevent flooding and inadequate drainage on hatchery property.
- TRRC agrees, at its cost, to relocate or reconfigure to the MCFH satisfaction the forage fishpond located within the proposed easement.
- TRRC will fence the ROW prior to construction of the railroad.
- After construction, TRRC will promptly restore all natural features to the satisfaction of FWP.
- TRRC agrees to implement an Emergency Response Plan and a Spill Prevention Plan, to comply with the Hazardous Materials Transportation Act, and to comply with Federal Railroad Administration hazardous materials regulations and general rail safety regulations.
- TRRC will replace or restore any hatchery improvements, structures, or operations that are materially adversely affected by the construction, repair, maintenance or operation of the railroad.
- Weed management will be by mechanical means unless otherwise approved in writing by the Fisheries Division Administrator or his designee.

- The ROW will not be used to store materials or equipment of any kind or nature, other than that required for the maintenance and repair of the rail line within the easement.
- A minimum $25 million per occurrence general liability insurance policy must be maintained by TRRC to cover any claim for damages to MCFH and resident fish populations in the event of an accident or incident resulting from the construction or operation of the Tongue River Railroad.
- In the event of a spill, TRRC agrees to clean up and remediate the effects of the spill as soon as reasonably practicable.
- The storage of railroad cards or any other matter is not allowed within the MCFH easement and right of way.
- STB agrees to formally abandon and remediate the railroad track if it does not plan use of the line for railroad purposes.

TRRC is required (as per Mitigation Measure 92 in the STB final decision) to implement the work plan entitled, "Revised Work Plan for High Resolution Vibration Monitoring, Evaluation of Tongue River Railroad Construction and Operation, and Potential Mitigation at Miles City Fish Hatchery" prepared by Womack & Associates, dated April 13, 2006. The monitoring of vibration during construction and operation of the rail line still remains to be done. Once collected, this data can be compared with predicted levels of vibration which will either confirm that there is no impact or will allow for further evaluation of the impacts and discussion of possible additional mitigation measures. Details for negotiations could be included in an easement.

2.3 Process Used to Develop the Alternatives

The request by TRRC to build a railroad from Miles City to Decker was approved by federal regulators in three separate decisions. In *TRRC I*, the ICC approved an 89-mile line between Miles City and Ashland on May 9, 1986. In *TRRC II*, the STB approved a 41-mile extension between Ashland and Decker on November 8, 1996. In *TRRC III*, on October 9, 2007, the Board approved a re-alignment of the southernmost 17 miles of the 41-mile line along the so-called Western Alignment. That latter decision, which also re-stated and revised the mitigation conditions adopted in the prior proceedings, allows TRRC to proceed with negotiations to obtain all lands required for the ROW. The STB requires (Mitigation Measure 87) "TRRC to adhere to the reasonable mitigation measures imposed by FWP in any easement granted". If negotiations fail, TRRC would have the option to initiate condemnation proceedings.

2.3.1 History and Development Process of Alternatives

FWP has been negotiating with TRRC as to the details of an easement for the past year. One of the primary concerns is the impact of noise and vibration on the pallid sturgeon. TRRC commissioned a study (Womack & Assoc., 2007) which concluded that impacts would be negligible. Based on the results of this study it is incumbent upon FWP to ensure that mitigation measures will protect the integrity of the hatchery. The best way to accomplish this objective is to stipulate all

critical requirements in the easement. The alternative is to wait for TRRC to file condemnation proceedings, present a case to the court and accept the court's decision.

2.3.2 Alternatives Eliminated from Detailed Study

There are no other alternatives reasonably available to FWP.

2.4 Summary of Comparison of Predicted Achievement of Project Objectives

The STB has instructed TRRC to adhere to the reasonable mitigation conditions imposed by FWP in any easement granted by the State (Mitigation Measure 87). In granting an easement and right of way (Alternative B), FWP is able to negotiate with TRRC on details and additional measures to avoid, minimize or eliminate impacts and disruptions to hatchery operations or facilities that are necessary to fish. FWP would require TRRC to establish procedures to clean up deal with any spills that might occur and to maintain insurance post a bond so that monetary claims could be made monies would be available in the event of a spill. If no action is taken (Alternative A), FWP would not grant an easement and would therefore be less likely to meet the stated objectives since the denial or granting of the right of way would be a court ordered decision.

2.5 Identification of the Preferred Alternative

Alternative B is the preferred alternative because the granting of an easement would allow FWP to specify detailed mitigation and monitoring measures that would ensure that the impacts of construction and operation of the railroad on MCFH will be minimized. The "No Action" alternative could ultimately result in a condemnation order by the court. A court order would consider just compensation but may not allow FWP to negotiate as thorough a list of mitigation and monitoring measures as would be done in granting an easement. It is in the best interests of MCFH and the fisheries maintained by MCFH to have FWP provide input to and maintain control over decisions that may have an impact on the function or operations at the hatchery. This would best be achieved by negotiating and granting an easement and right of way that includes all necessary mitigation measures.

Chapter 3.0: Affected Environment

3.1 Introduction

This section outlines existing conditions related to the MCFH as background documentation and does not include effects of proposed alternatives. Environmental resources that might be affected include air, water, vegetation, fish & wildlife, the human environment, land use, and risk/health hazards.

3.2 Description of Relevant Affected Resources

3.2.1 Air Quality

Coal dust from passing railroad cars is expected to be negligible. Trains will be traveling at relatively slow speeds (maximum 20 mph) and dust generally settles to the bottom of the rail cars within the first few miles. Minor amounts of dust and emissions will be created by heavy equipment during construction.

3.2.2 Water

There could be an increase in flooding or inadequate drainage on hatchery property as a result of railroad construction. Water quality could be affected by the use of herbicides for noxious weed control were herbicide use allowed by FWP. The water supplies from the Yellowstone and Tongue Rivers are critical to hatchery operations, and TRRC has agreed to take special steps to protect the water supply as per Mitigation Measure No. 84 and the Easement Agreement.

3.2.3 Vegetation

Relocation of portions of the water pipelines from the Yellowstone and Tongue rivers would disturb some vegetated areas. The re-vegetated areas may have a different species composition and community diversity than is currently present because invading species offer significant competition to native species.

3.2.4 Fish/Wildlife

The hatchery produces warm-water fish species including walleye, bass, channel catfish and pallid sturgeon (an endangered species) for stocking rivers, lakes and reservoirs throughout the region. Resident's fish could potentially be impacted by noise and vibration of rail line construction and operation and spills due to collisions and derailments.

3.2.5 Human Environment

There would be a temporary increase in noise level during construction of the rail line but it is not expected to be excessive and will end after completion. Operation of the railroad would bring an increase in overall noise level.

3.2.6 Land Use

The right of way would result in the loss of 24.85 acres of hatchery property including land currently occupied by a forage fish pond. The right of way would require the relocation of that pond.

3.2.7 Risk/Health Hazards

There is a risk of a spill resulting from derailment or collision which could be significant in the event that hazardous materials are transported over the easement and right of way or if a major spill (even of coal) affected the rearing ponds either directly or by seeping into the ground water.

Chapter 4.0: Environmental Consequences

4.1 Introduction

This chapter provides information to evaluate alternatives in relation to project objectives, effects on relevant resources and unavoidable adverse effects.

4.2 Predicted Attainment of the Project Objectives of all Alternatives

4.2.1 Predicted Attainment of Project Objective #1

4.2.1.1 Alternative A: No Action - Do Not Grant an Easement

A decision not to grant an easement and right of way will terminate negotiations with TRRC to specify detailed mitigation measures to avoid, minimize or eliminate impacts and disruptions to hatchery operations or facilities that are necessary to fish production.

4.2.1.2 Alternative B: Grant of Easement and Right of Way

TRRC has agreed to the conditions stipulated in the draft grant of easement document. Objective 1 will be met by granting an easement and right of way that clearly defines detailed measures to avoid, minimize or eliminate impacts and disruptions to hatchery operations or facilities that are necessary to fish production.

4.2.2 Predicted Attainment of Project Objective #2

4.2.2.1 Alternative A: Do Not Grant an Easement (No Action)

The requirement to maintain general liability insurance, established procedures for clean up and remediation and a method for apportioning costs associated with remediation in case of a spill are highly desirable in the event of an emergency situation at the MCFH. In the no action alternative (A), these mitigation measures will be at the discretion of the courts.

4.2.2.2 Alternative B: Grant of Easement and Right of Way

The draft grant of easement and right of way includes provisions for general liability insurance, established procedures for the prompt clean up and remediation as well as a method for apportioning costs associated with remediation in case of a spill at the MCFH. TRRC has agreed to these provisions. Objective #2 will best be met by granting an easement and right of way that specifies all requirements desired by FWP.

4.3 Predicted Effects on Relevant Affected Resources of All Alternatives

4.3.1 Predicted Effects on Air

Neither alternative would have an effect on the potential for coal dust emissions from passing rail cars, although these are expected to be minimal. The granting of an easement and right of way (Alternative B) would allow FWP to specify

considerations in the easement for the timing of construction which might reduce the effects of construction dust and emissions on hatchery operations.

4.3.2 Predicted Effects on Water

The granting of an easement and right of way (Alternative B) will allow FWP to require culverts to flow east under the right of way easement to prevent water accumulation on MCFH property. This will minimize or eliminate the possibility of an increase in flooding or inadequate drainage at MCFH. The draft easement also requires that TRRC get approval in writing from FWP prior to the application of any herbicide within the right of way easement area. This allows FWP, rather than TRRC, to decide when it becomes necessary to use herbicides which might adversely affect water quality. Neither of these mitigation measures would be part of the No Action alternative.

4.3.3 Predicted Effects on Vegetation

The presence of the rail line along the east side of the hatchery property would require weed control measures. TRRC has agreed to use mechanical weed control measures unless it becomes necessary to use herbicides (STB Mitigation Measure 85). The draft easement requires that TRRC get approval in writing from FWP prior to the application of any herbicide which might have adverse impacts on adjacent vegetation within the right of way. This allows FWP, rather than TRRC, to decide "when it becomes necessary to use herbicides for the control of noxious weeds". The draft easement also requires the restoration of any areas on MCFH property that are disturbed during construction activities to be restored to pre-existing states. These mitigation measures would not necessarily be part of the no action alternative results.

4.3.4 Predicted Effects on Fish/Wildlife

While studies have shown that it is unlikely that the impacts on fish at the MCFH of noise or vibration associated with the construction and operation of the railroad will be significant. Such impacts will be subject to further monitoring as per the April 13, 2006 Womack & Associates workplan referenced in STB Mitigation Measure 92.

4.3.5 Predicted Effects on Human Environment

The temporary increase in noise level during construction of the rail line is not expected to be excessive and would end after completion. Operation of the railroad would bring an increase in overall noise level that, according to studies, would not be expected to impact hatchery operations. Train horn noise may be significant and would certainly expose staff and residents to "nuisance" noise levels at a minimum. In granting an easement and right of way (Alternative B), FWP could mitigate this impact by requiring in the easement that TRRC establish a "Quiet Zone" for the MCFH thereby eliminating train horn noise from the area. The No Action alternative would leave this issue to the discretion of the court or would require FWP to petition the STB to impose this mitigation measure. The STB has imposed Mitigation Measure 78 for communities along the proposed

TRR right of way, but train horn noise impacts at the MCFH were not identified by the SEA. Noise contours and impacts on "noise-sensitive receptors" from train horns at the MCFH were not discussed by the STB. The SEA merely acknowledged that the "Miles City Fish Hatchery might be subjected to noise levels of a nuisance nature".

4.3.6 Predicted Effects on Land Use

The right of way would result in the loss of 24.85 acres of hatchery property including land currently occupied by a forage fish pond which would have to be relocated. In granting an easement (Alternative B) FWP would stipulate that a functional replacement pond must be in place prior to any changes to the existing pond in order to assure there is no loss of forage fish production at the hatchery. If the no action alternative is chosen and TRRC files condemnation proceedings to obtain the 24.85 acres for the right of way, FWP could present a case to the court for the pond relocation. The decision of the court would be final.

4.3.7 Predicted Effects on Risk/Health Hazards

The risk of a spill resulting from derailment or collision could be significant in the event that hazardous materials are transported over the easement and right of way or if a major spill (even of coal) were to affect the rearing ponds, either directly or by seeping into the ground water. The granting of an easement and right of way (Alternative B) allows FWP to specify mitigation measures to clean up, remediate, and pay for the effects of a spill in a timely fashion. If the no action alternative (Alternative A) is taken, it is possible that litigation would be required in the event of a spill at the MCFH. This could be a lengthy and costly process.

4.4 Unavoidable Adverse Impacts (on all resources)

The 24.85 acres of land in the right of way required by TRRC would be lost to the MCFH for the life of the railroad. The hatchery would be subjected to "nuisance" level (at a minimum) noise impacts by the construction and operation of the TRR.

Chapter 5.0: Public Participation and Collaborators

5.1 Public Participation

5.1.1 Public Comment Period

The public will be encouraged to comment on this draft EA through:

- Legal notices published in local and regional newspapers.
- Legal notice and posting of draft EA on the FWP website: http://fwp.mt.gov/publicnotices.
- The draft EA will be available at the Region 7 Headquarters in Miles City, the Miles City Fish Hatchery and the FWP Headquarters in Helena.

There will be a 30-day public comment period beginning November 7, 2008 and ending December 7, 2008. Written comments may be emailed to Bob Snyder at mailto:fwpfsh@mt.gov, or sent to the following address:

Bob Snyder
Fisheries Division
Montana Fish, Wildlife & Parks
PO Box 200701
Helena, MT 59620-0701
(406) 444-2449

5.1.2 Public Meetings

A public meeting will be held from 6-8 p.m. on November 20, 2008 in room 322 at the Miles Community College located at 2715 Dickinson Street, Miles City.

5.2 People Associated with the Project

5.2.1 Other agencies/offices that contributed to the EA

Montana Fish, Wildlife & Parks
Fisheries Division – Bob Snyder
Legal Division – Rebecca Jakes Dockter
Lands Division – Hugh Zackheim (review)
Management and Finance – Rebecca Cooper (review)
MCFH Manager – Mike Rhodes (phone conversation)

5.2.1 EA Preparer

Corinne Selby
Independent Consultant
709 S 6th Ave.
Bozeman, MT 59715

Chapter 6.0: Determination If an Environmental Impact Statement is Required

Potential impacts on the Miles City Fish Hatchery were examined in detail in the Environmental Impact Statements prepared for the Surface Transportation Board by the Section of Environmental Analysis. Based on an evaluation of the potential impacts on the hatchery presented in those documents, this environmental review found no additional significant impacts from the proposal to grant an easement and right of way to the Tongue River Railroad Company, so this environmental assessment is an appropriate level of analysis for the proposed action.

Chapter 7.0: References

Barton, B. A. 2006. Effects of underwater vibration on fishes with particular reference to stress in sturgeons: Serranus Consulting, Ltd. Calgary, Alberta, Canada. 16 pp.

Shannon & Wilson, Inc. 2007. An Evaluation of Pallid Sturgeon Responsiveness to Railroad-Induced Vibration. Private Report to Tongue River Railroad Company.

U.S. Fish and Wildlife Service, Montana Field Office. 2006. Biological Opinion on the Construction and Operation of the Tongue River Railroad.

Wilson, Ihrig & Associates. 2007. Miles City State Fish Hatchery high resolution Acoustical Study, Miles City, Montana. Private Report to Tongue River Railroad Company.

Womack & Associates, 1999. Miles City State Fish Hatchery investigation to assess potential effects of the construction and operation of the Tongue River Railroad. Private Report to Tongue River Railroad Company.

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Womack & Associates. 2007. Tongue River Railroad project acoustical study: Miles City State Fish Hatchery. Private Report to Tongue River Railroad Company.