



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Montana Ecological Services Field Office
585 Shepard Way, Suite 1
Helena, Montana 59601-6287



In Reply Refer to:
FWS/IR05/IR07
M29 Federal Activities;
2022-0049074

June 2, 2022

Joe Dehnert
IMEG Corporation
1817 South Avenue West
Suite A
Missoula, Montana 59801

Dear Mr. Dehnert:

Thank you for your e-mail, dated and received May 17, 2022, requesting U.S. Fish and Wildlife Service (Service) comment on the West End Homes Subdivision (Project).

Our comments are prepared under the authority of, and in accordance with, the provisions of the Endangered Species Act (ESA; 16 U.S.C. 1531 et. seq.), Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 et seq.), and Bald and Golden Eagle Protection Act (BGEPA; 16 U.S.C. 668-668d, 54 Stat. 250). We offer the following comments for your consideration.

Threatened and Endangered Species

The current list of candidate, proposed, threatened or endangered species, and designated critical habitat occurring in Missoula County, Montana is as follows:

<i>Scientific Name</i>	<i>Common Name</i>	<i>Status*</i>
<i>Lynx canadensis</i>	Canada Lynx	LT
<i>Ursus arctos horribilis</i>	Grizzly Bear	LT
<i>Calidris canutus rufa</i>	Red Knot	LT
<i>Pinus albicaulis</i>	Whitebark Pine	P
<i>Salvelinus confluentus</i>	Bull Trout	LT, CH
<i>Coccyzus americanus</i>	Yellow-billed cuckoo (western pop.)	LT
<i>Danaus plexippus</i>	Monarch Butterfly	C

*LE=Listed as Endangered, LT=Listed Threatened, P=Proposed, C=Candidate, CH=Critical Habitat

INTERIOR REGION 5 MISSOURI BASIN

KANSAS, MONTANA*, NEBRASKA, NORTH DAKOTA,
SOUTH DAKOTA

*PARTIAL

INTERIOR REGION 7 UPPER COLORADO RIVER BASIN

COLORADO, NEW MEXICO, UTAH, WYOMING

Additional information may be obtained using the Service's Information for Planning and Consultation (IPaC) project-planning tool, at <https://ecos.fws.gov/ipac/>.

If a Federal agency authorizes, funds, or carries out a proposed action, the responsible Federal agency, or its delegated agent, is required to evaluate whether the action "may affect" listed species or critical habitat. If the Federal agency or its designated agent determines the action "may affect, is likely to adversely affect" listed species or critical habitat, the responsible Federal agency shall request formal section 7 consultation with this office. If the evaluation shows a "may affect, not likely to adversely affect" determination, concurrence from this office is required. If the evaluation shows a "no effect" determination for listed species or critical habitat, further consultation is not necessary. If a private entity receives Federal funding for a construction project, or if any Federal permit or license is required, the Federal agency may designate the fund recipient or permittee as its agent for purposes of informal section 7 consultation. The funding, permitting, or licensing Federal agency is responsible to ensure that its actions comply with the ESA, including obtaining concurrence from the Service for any action that may affect a threatened or endangered species or designated critical habitat.

A Federal nexus exists whenever an activity is conducted, funded, licensed, or permitted by a Federal agency. Private individuals and companies are required to ensure that their actions do not result in "take" of federally listed animals. It is the responsibility of the Federal agency to ensure that its actions are in compliance with the ESA. Further technical assistance can be provided if you have additional questions regarding project impacts to listed species, or future ESA responsibilities.

Bull Trout

The threatened bull trout and its designated critical habitat are present within approximately 2 miles of the Project area within the Clark Fork River. Please ensure that appropriate best management practices for stormwater are implemented during construction and use of the Project to minimize the potential for runoff containing sediment and contaminants to affect this species and its critical habitat.

Migratory Birds

The MBTA prohibits the purposeful taking, killing, possession, and transportation, (among other actions) of migratory birds, their eggs, parts, and nests, except when specifically permitted. If work is proposed to take place in migratory bird habitats that may result in take of migratory birds, their eggs, or active nests, the Service recommends that the project proponent take all practicable measures to avoid and minimize take, such as maintaining adequate buffers, to protect the birds until the young have fledged. Active nests may not be removed. The Service has developed, and continues to revise and develop, general and industry-specific conservation measures for avoiding and minimizing impacts to birds (<https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/conservation-measures.php>). We recommend that the proposed project consider and incorporate these

measures into project design, construction, and documentation as appropriate.

Bald and Golden Eagles

Montana Natural Heritage Program data indicate that bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*) have been documented within and near to the project area. Your analysis should consider any potential effects of the Project to bald or golden eagles. We provide the following information to assist you in considering such potential effects.

The bald eagle and golden eagle are protected from a variety of harmful actions via take prohibitions in both the MBTA (16 U.S.C. 703-712) and the BGEPA. The BGEPA, enacted in 1940 and amended several times, prohibits take of bald eagles and golden eagles, including their parts, nests, young or eggs, except where otherwise permitted pursuant to Federal regulations. Incidental take of eagles from actions such as electrocutions from power lines or wind turbine strikes are prohibited unless specifically authorized via an eagle incidental take permit from the Service.

BGEPA provides penalties for persons who "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part, nest, or egg thereof." The BGEPA defines take to include the following actions: "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." The Service expanded this definition by regulation to include the term "destroy" to ensure that "take" also encompasses destruction of eagle nests. Also, the Service defined the term disturb which means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

The Service has developed guidance for the public regarding means to avoid take of bald and golden eagles:

- The 2007 National Bald Eagle Management Guidelines serve to advise landowners, land managers, and others who share public and private lands with bald eagles when and under what circumstances the protective provisions of BGEPA may apply. They provide conservation recommendations to help people avoid and/or minimize such impacts to bald eagles, particularly where they may constitute "disturbance," which is prohibited by the BGEPA.

<https://www.fws.gov/northeast/ecologicalservices/pdf/NationalBaldEagleManagementGuidelines.pdf>

The Service also has promulgated new permit regulations under BGEPA:

- New eagle permit regulations, as allowed under BGEPA, were promulgated by the

Service in 2009 (74 FR 46836; Sept. 11, 2009) and revised in 2016 (81 FR 91494; Dec. 16, 2016). The regulations authorize the limited take of bald and golden eagles where the take to be authorized is associated with otherwise lawful activities. These regulations also establish permit provisions for intentional take of eagle nests where necessary to ensure public health and safety, in addition to other limited circumstances. The revisions in 2016 included changes to permit issuance criteria and duration, definitions, compensatory mitigation standards, criteria for eagle nest removal permits, permit application requirements, and fees in order to clarify, improve implementation and increase compliance while still protecting eagles. <https://www.gpo.gov/fdsys/pkg/FR-2016-12-16/pdf/2016-29908.pdf>

The Service's Office of Law Enforcement carries out its mission to protect eagles through investigations and enforcement, as well as by fostering relationships with individuals, companies, industries and agencies that have taken effective steps to avoid take, including incidental take of these species, and encouraging others to implement measures to avoid take. The Office of Law Enforcement focuses its resources on investigating individuals and entities that take eagles without identifying and implementing all reasonable, prudent and effective measures to avoid that take.

Those individuals and entities are encouraged to work closely with Service biologists to identify available protective measures, and to implement those measures during all activities or situations where their action or inaction may result in the take of an eagle(s).

In addition to the above guidance, the 2010 Montana Bald Eagle Management Guidelines: An Addendum to Montana Bald Eagle Management Plan (1994) developed by Montana Fish, Wildlife and Parks (FWP) also provides guidance for avoiding and minimizing the risk for bald eagle take (<http://fwp.mt.gov/fwpDoc.html?id=44181>).

Additional Comments

If wetlands will be affected by the project, the Service recommends keeping wetland disturbances to the minimum extent and duration possible, with as much occurring "in the dry" as possible. This would reduce impacts to aquatic species relative to disturbance and sediment inputs. We also recommend that appropriate erosion and sediment control efforts and measures be implemented during and following construction to avoid introducing sediments or other contaminants to adjacent waters.

In addition to coordination with the Service, we recommend coordination with FWP and the Montana Natural Heritage Program. These agencies may be able to provide updated, site-specific information regarding fish, wildlife, and sensitive plant resources occurring in the proposed project area. Contact information for these two agencies is below:

Montana Fish, Wildlife and Parks
1420 East Sixth Avenue
P.O. Box 200701

Montana Natural Heritage Program
1515 East 6th Avenue, Box 201800
Helena, Montana 59620-1800

Mr. John Dehnert

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Helena, Montana 59620-0701
Phone: (406) 444-2535

Phone: (406) 444-5354

Thank you for the opportunity to comment on the proposed project. The Service appreciates your efforts to incorporate fish and wildlife resource concerns into your project planning. If you have further questions related to this letter, please contact Jacob Martin at (406) 430-9007 or jacob_martin@fws.gov.

Sincerely,

A handwritten signature in blue ink that reads "Jacob M Martin". The signature is written in a cursive style with a large initial "J" and "M".

for Ben Conard
Acting Office Supervisor