

Road Committee Meeting with USFWS, April 21, 2009 Meeting Summary

Meeting was held at the USFWS office in Creston, MT. Attending from the U. S. Fish and Wildlife Service (FWS) were Ben Conard and, via telephone, Scott Jackson in Helena. Road Committee members included: Betsy Holycross, Margaret Heaphy and Ed Heger. The objective of the meeting was to learn more about the USFWS's Section 7 Consultation process and the planning and mitigation processes involved in road upgrade and paving projects. Scott and Ben were generous with their time and were very helpful.

As background, there was a plan to pave Canyon to Camas in 1980. At that time, the proponent Agency for the project was, as they are now called, the Western Federal Lands Highway Division (WFLHD), a part of the Federal Highway Administration which deals with public roads which provide access to government lands such as Forest, Park and Refuge areas. WFLHD's program is administered in close coordination with the USFS and MDT and in coordination with Counties as well. However, WFLHD has ultimate authority over its program. They are the road engineers for roads which provide access to federal lands.

The North Fork Road, Forest Highway 61, was nominated for this action by the US Forest Service and Flathead County. At that time, the USFS had contractors with numerous commercial haulers for lumber, etc. The U.S. Forest Service (USFS) was under pressure from the commercial haulers to "do something about the road." The proponent agency was required to comply with the National Environmental Protection Act (NEPA) to do an Environmental Impact Statement because paving the road required federal dollars and because it was a "major federal action" that could significantly affect the environment. As part of the process, and to comply with the Endangered Species Act (ESA) because of the presence of Threatened and Endangered Species in the project area, Western Lands requested a Section 7 consultation with the USFWS. The USFWS determined that the paving project would "jeopardize the continued existence of the grizzly bear and gray wolf." This "jeopardy" opinion" was a critical factor in determining that it was not feasible to go forward with the paving project. (For more information on NEPA and the ESA, please see addendum at the end of this summary.)

So we wanted to find out more about the ongoing importance of the jeopardy opinion and learn more about the role of the FWS in the overall process. Here's what we learned:

1. Any time there is an action "authorized, funded or carried out" by the federal government which may affect threatened or endangered species, a section 7 consultation with the USFWS is required.
2. In general, "Forest Highways," (those for which the Western Federal Lands, Highway Division is responsible) are roads that are often in sensitive areas and tend to have controversial environmental issues when upgrades are discussed. Because of the nature of these roads—and our North Fork road is a perfect example--environmental

documentation can be contentious; the NEPA process often lasts for years and can be very expensive.

3. Any action on the North Fork road beyond “maintenance” would most likely involve federal dollars and require NEPA compliance, possibly an Environmental Impact Statement. This would again likely require a Section 7 formal consultation with the FWS which would issue a Biological Opinion. The baseline environmental circumstances surrounding the jeopardy opinion on the North Fork road have changed since the last EIS. For example, gray wolves have been delisted in Montana and Idaho (although that decision continues to be litigated); the Canada lynx and bull trout have been listed as Threatened; land use planning measures have been implemented; the human population has grown and recreational traffic has increased substantially. It would be impossible to say, without another round of analysis, what the outcome would be. What we do know, however, is that any future paving project would require funding not only for the paving, but for the multi-year environmental process that would precede it. (When federal money was earmarked for a paving project on the North Fork Road ten or so years ago, it ended up being diverted to the Big Mountain Road because nobody planned for the process of, or the funding for, the environmental documentation process.)

4. A critical part of the process is the development of mitigation measures to minimize adverse impacts on threatened and endangered species. Although the proponent agency is responsible for developing these mitigation measures, the FWS is often involved when the road is a Forest Highway.

5. The Montana Field Office of the USFWS in Helena has been involved in numerous such discussions for federal highways in sensitive areas (such as Forest Highways) and is working to make the process less contentious and acrimonious. For example, five or six years ago, there was a Western Federal Lands Highway Division (WFLHD) project proposed on the Little Joe Creek Road (MT Forest Highway 84) in Mineral County, MT near St. Regis. The alternative WFLHD was promoting was to pave 16.2 miles of what was currently a gravel road. At that time the project was considered to be categorically excluded from NEPA, so no EA or EIS had been prepared, and no biological assessment had been prepared relative to T/E species (for bull trout, gray wolves and Canada lynx in this case). And, there had been very little interagency coordination. Shortly before construction was to begin, there was a meeting on site with several resource agency reps, land management agency reps, and representatives from the transportation agencies and it was clear to many of them that the project would impact fish and wildlife and that an EA or EIS should have been done and that there should have been a Section 7 consultation. The project was subsequently cancelled. This event brought to light the need for much better and earlier coordination between WFLHD and the resource agencies in Montana. There have been conversations among the agencies on how to improve coordination on the Forest Highway program.

6. Specifically, the FWS is getting involved with WFLHD’s planning office earlier in the process to try and figure out what is possible before time and money are spent in preliminary design and before the community gets invested in either stopping or pushing

a project. A “pre-NEPA” “feasibility study” is a MT Department of Transportation (MDT) process by which the county, community, state, FWS and others try to ascertain what is really wanted and what is feasible. Issues are fleshed out before NEPA begins, saving enormous amounts of time and money. The feasibility study includes public meetings to determine if a solution can be generally agreed upon, such as fixing a couple of bad corners or stretches or improving snow storage.

7. In assessing possible mitigation measures, planners, including the FWS, are now making an effort to look at broader “ecological impacts,” rather than just the impacts of the project’s “footprint.” The FWS defines an “action area” as the entire area that would be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. Mitigation of indirect impacts is the most difficult since these include projections for population growth, future land use, increases in recreational uses, sanitation challenges, etc.

8. Even some actions which do not require an EIS may nevertheless involve coordination with the FWS. The FWS provides “Technical Assistance” on some non-Federal projects which do not require EISs to determine whether or not the project might harm or harass a threatened or endangered species and therefore which may constitute a “taking.” Any concerned individual, organization or government agency, can request “technical assistance” on a non-federal project from the FWS.

9. Outside of Libby, the Cabinet-Yaak Ecosystem grizzly population is low and has a declining trend. There is a court order prohibiting any additional “take” as a result of a proposed Federal action. In that area, MDT recently implemented their “feasibility study” approach to the Pipe Creek Road (Forest Highway 67) corridor. Through this interagency process, it was determined that there were desired improvements to that road that may be possible while still complying with the “no take” Court Order. This process may have potential applicability to other Forest Highways, such as other portions of Forest Highway 67 across the divide in the Yaak River drainage or to the North Fork road corridor.

10. A “jeopardy opinion” cannot be overridden by a governor or any other state, local or federal agency or individual. Such an opinion is not a “veto,” per se. In fact, any jeopardy biological opinion must include a “reasonable and prudent alternative” to the proposed action that was anticipated to cause jeopardy. This was the case on the earlier North Fork road project where a non-paving alternative was recommended and subsequently adopted. Action which are undertaken in spite of jeopardy opinions and their accompanying “reasonable and prudent alternatives,” risk violations of the Endangered Species Act and are fought by various environmental groups.

ADDENDUM

NEPA is the National Environmental Policy Act and requires federal agencies to review the effects of their projects before making a decision. These reports often take the form of either an EIS (Environmental Impact Statement) if the project would have significant environmental impacts, or an EA (Environmental Assessment) if the project would have insignificant impacts. While endangered species are one subject of such a report, an EA/EIS also covers a spectrum of issues from air and water quality, to cultural resources, to effects on communities, and more.

The ESA requires federal agencies to specifically consider the consequences of their projects on threatened and endangered species and not to “jeopardize” their continued existence. To do so, the agency prepares a Biological Assessment for FWS consideration. If the proponent determines the project is not likely to adversely affect listed species, FWS may respond with a letter agreeing with their determination (this exchange is called “informal consultation”). But if the proponent determines that the project may have some adverse impact on listed species, then we must prepare a Biological Opinion. This exchange is called “formal consultation.”

In some cases, the Biological Opinion acknowledges there might be an impact but recommends terms and conditions (mitigation measures) to minimize the impact. Other times the Biological Opinion concludes that the project is too harmful and issues a Jeopardy Opinion.