



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Idaho State Office
1387 South Vinnell Way
Boise, Idaho 83709-1657

In Reply Refer To:
4120/6840 (931) P

August 1, 2003

EMS
Information Bulletin No. ID-2003-142

To: ICT/IMF

From: State Director

Subject: Mitigation Requirements of Certain Federal Laws

I have attached a letter we recently received from the U.S. Fish and Wildlife Service Division of Law Enforcement (FWS) warning us of possible criminal prosecution to enforce the Migratory Bird Treaty Act (MBTA). This warning resulted from our inattention to rangeland use supervision and maintenance of range improvement projects, specifically bird ladders in watering troughs. Please read the attached materials carefully and understand your responsibilities under the MBTA. While this issue is specific to the MBTA, similar issues could also be associated with the Endangered Species Act and National Historic Preservation Act, federal laws that also require mitigation of adverse effects.

It is important for us to design and allow use of projects in a manner that avoids or greatly reduces unnecessary adverse effects to other public land values. This is a significant part of multiple-use management. Because of this, I want all managers engaged in making sure that necessary mitigation features designed to avoid or reduce adverse effects to other public resources are part of project planning, construction, and maintenance and are effective throughout the life of the project.

Within this letter the FWS Agent asks the field manager if similar problems [lack of bird ladders in troughs] exist in other Bureau of Land Management grazing allotments. I want to assure him that all field offices are reviewing the status of their range improvement maintenance program and will be making appropriate adjustments, as needed, to avoid incidental take of migratory birds.

Signed
K Lynn Bennett

Authenticated
Caureen Miller
Staff Assistant, 930

Attachment
1 – MBTA Letter (6 pp)



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Division of Law Enforcement

1387 S. Vinnell Way, Suite 341

Boise, Idaho 83709

Tel: 208/378-5333 Fax: 208/378-5339



July 28, 2003

Phil Damon, Field Manager
Bureau of Land Management, Pocatello Field Office
1111 North 8th Avenue
Pocatello, ID 83201

Pleasantview Livestock and Grazing Association



Dear Sirs:

I have recently been made aware of a troubling situation on the Pleasantview grazing allotment, which is administered by the Bureau of Land Management (BLM) and grazed by the Pleasantview Livestock and Grazing Association (PLGA). Specifically, the complaint is regarding numerous migratory birds apparently drowning in water troughs on this allotment. This appears to be happening due to the absence of ladders or other devices that would allow birds and other animals that fall into the water to escape.

It became obvious that this was a serious problem requiring immediate action when I was advised that a private biologist documented almost 100 dead migratory birds in about 30 water troughs on the Pleasantview allotment during a two-day survey. It also seems reasonable to assume that the problem is actually much worse than this since the biologist surveyed only about a third of the troughs on the allotment in a very narrow window of time. I am also curious if similar problems exist on other BLM grazing allotments.

All migratory birds are protected by the Migratory Bird Treaty Act (MBTA - 16 USC 703). The MBTA prohibits the taking (killing) of any migratory bird without authorization from the U.S. Fish and Wildlife Service. All birds other than some non-migratory upland game birds (such as quail, grouse and turkey) and non-native birds (European Starlings, Pigeons and English House Sparrows) are protected by the MBTA. Any unauthorized take of migratory birds is a violation of the MBTA, regardless of whether the responsible party intended to kill the birds.

There is significant case law affirming convictions of individuals, corporations and associations for "incidental take" violations of the MBTA. As an example, many criminal fines have been

paid by oil companies that allow birds to be killed in tanks and pits by failing to take steps to protect birds (Such as installing bird netting over tanks, etc.).

It appears to me that both the BLM and PLGA have been aware of the hazard these water troughs pose to wildlife for some time. I have a copy of a newspaper article from 1997 that describes a meeting between the BLM, PLGA and environmental activists to discuss the need for wildlife escape devices on the water troughs in the Pleasantview allotment.

The BLM manual (H-1741-2), since 1990, has required wildlife escape ramps in every water trough. BLM also has a Technical Bulletin (89-4) that gives suggestions and recommendations on the construction and installation of bird ramps in water troughs. Additionally, an Executive Order, dated 01/11/01, tasks all Federal agencies with taking appropriate steps to conserve and protects migratory birds.

I believe BLM and PLGA have had more than adequate time during which they could consult and take the simple steps required to remedy this situation. I strongly urge the BLM and/or PLGA to act with due haste to install wildlife escape devices that are built to BLM's own specifications (or any design that is superior).

It is my sincere wish that the BLM and PLGA take appropriate action in a timely fashion that will avert the possibility of initiating criminal prosecution to enforce MBTA compliance.

Please do not hesitate to contact me if you have any questions, or if I may be of any assistance.

Sincerely,

/s/ Craig A. Taylor

Craig A. Tabor
Resident Agent in Charge, USFWS - Boise, ID

cc: Benito Perez - Special Agent in Charge, Pacific Region, USFWS
Paul Chang - Assistant Special Agent in Charge, Pacific Region, USFWS
K. Lynn Bennett - State Director, BLM
Dexter Pitman - Regional Director, Southeast Region, Idaho Fish and Game

enclosure: Executive Order; "Responsibilities of Federal Agencies to Protect Migratory Birds"

Executive Order 13186

Presidential Documents

Executive Order 13186 -- Responsibilities of Federal Agencies To Protect Migratory Birds

January 10, 2001

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in furtherance of the purposes of the migratory bird conventions, the Migratory Bird Treaty Act (16 U.S.C. 703-711), the Bald and Golden Eagle Protection Acts (16 U.S.C. 668-668d), the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c), the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347), and other pertinent statutes, it is hereby ordered as follows:

Section 1. Policy. Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. Such conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment-Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States. This Executive Order directs Executive departments and agencies to take certain actions to further implement the Act. Sec. 2. Definitions. For purposes of this Order:

(a) "Take" means take as defined in 50 C.F.R. 10.12, and includes both "intentional" and "unintentional" take.

(b) "Intentional take" means take that is the purpose of the activity in question.

(c) "Unintentional take" means take that results from, but is not the purpose of, the activity in question.

(d) "Migratory bird" means any bird listed in 50 C.F.R. 10.13.

(e) "Migratory bird resources" means migratory birds and the habitats upon which they depend.

(f) "Migratory bird convention" means, collectively, the bilateral conventions (with Great Britain/Canada, Mexico, Japan, and Russia) for the conservation of migratory bird resources.

(g) "Federal agency" means an Executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.

(h) "Action" means a program, activity, project, official policy (such as a rule or regulation), or formal plan directly carried out by a Federal agency. Each Federal agency will further define what the term "action" means with respect to its own authorities and what programs should be included in the agency-specific Memoranda of Understanding required by this Order. Actions delegated to or assumed by nonfederal entities, or carried out by nonfederal entities with Federal assistance, are not subject to this Order. Such actions, however, continue to be subject to the Migratory Bird Treaty Act.

(i) "Species of concern" refers to those species listed in the periodic report "Migratory Nongame Birds of Management Concern in the United States," priority migratory bird species as documented by established plans (such as Bird Conservation Regions in the North American Bird Conservation Initiative or Partners in Flight physiographic areas), and those species listed in 50 C.F.R. 17.11.

Sec. 3. Federal Agency Responsibilities. (a) Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.

(b) In coordination with affected Federal agencies, the Service shall develop a schedule for completion of the MOUs within 180 days of the date of this Order. The schedule shall give priority to completing the MOUs with agencies having the most substantive impacts on migratory birds.

(c) Each MOU shall establish protocols for implementation of the MOU and for reporting accomplishments. These protocols may be incorporated into existing actions; however, the MOU shall recognize that the agency may not be able to implement some elements of the MOU until such time as the agency has successfully included them in each agency's formal planning processes (such as revision of agency land management plans, land use compatibility guidelines, integrated resource management plans, and fishery management plans), including public participation and NEPA analysis, as appropriate. This Order and the MOUs to be developed by the agencies are intended to be implemented when new actions or renewal of contracts, permits, delegations, or other third party agreements are initiated as well as during the initiation of new, or revisions to, land management plans.

(d) Each MOU shall include an elevation process to resolve any dispute between the signatory agencies regarding a particular practice or activity.

(e) Pursuant to its MOU, each agency shall, to the extent permitted by law and subject to the availability of appropriations and within Administration budgetary limits, and in harmony with agency missions:

(1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;

(2) restore and enhance the habitat of migratory birds, as practicable;

(3) prevent or abate the pollution or detrimental alteration of the Environment for the benefit of migratory birds, as practicable;

(4) design migratory bird habitat and population conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning, coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts;

(5) within established authorities and in conjunction with the adoption, amendment, or revision of agency management plans and guidance, ensure that agency plans and actions promote programs and recommendations of comprehensive migratory bird planning efforts such as Partners-in-Flight, U.S. National Shorebird Plan, North American Waterfowl Management Plan, North American Colonial Waterbird Plan, and other planning efforts, as well as guidance from other sources, including the Food and Agricultural Organization's International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries;

(6) ensure that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern;

(7) provide notice to the Service in advance of conducting an action that is intended to take migratory birds, or annually report to the Service on the number of individuals of each species of migratory birds intentionally taken during the conduct of any agency action, including but not limited to banding or marking, scientific collecting, taxidermy, and depredation control;

(8) minimize the intentional take of species of concern by: (i) delineating standards and procedures for such take; and (ii) developing procedures for the review and evaluation of take actions. With respect to intentional take, the MOU shall be consistent with the appropriate sections of 50 C.F.R. parts 10, 21, and 22;

(9) identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts;

(10) within the scope of its statutorily-designated authorities, control the import, export, and establishment in the wild of live exotic animals and plants that may be harmful to migratory bird resources;

(11) promote research and information exchange related to the conservation of migratory bird resources, including coordinated inventorying and monitoring and the collection and assessment of information on environmental contaminants and other physical or biological stressors having potential relevance to migratory bird conservation. Where such information is collected in the course of agency actions or supported through Federal financial assistance, reasonable efforts shall be made to share such information with the Service, the Biological Resources Division of the U.S. Geological Survey, and other appropriate repositories of such data (e.g, the Cornell Laboratory of Ornithology);

(12) provide training and information to appropriate employees on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory bird habitat;

(13) promote migratory bird conservation in international activities and with other countries and international partners, in consultation with the Department of State, as appropriate or relevant to the agency's authorities;

(14) recognize and promote economic and recreational values of birds, as appropriate; and

(15) develop partnerships with non-Federal entities to further bird conservation.

(f) Notwithstanding the requirement to finalize an MOU within 2 years, each agency is encouraged to immediately begin implementing the conservation measures set forth above in subparagraphs (1) through (15) of this section, as appropriate and practicable.

(g) Each agency shall advise the public of the availability of its MOU through a notice published in the Federal Register.

Sec. 4. Council for the Conservation of Migratory Birds. (a) The Secretary of Interior shall establish an interagency Council for the Conservation of Migratory Birds (Council) to oversee the implementation of this Order. The Council's duties shall include the following: (1) sharing the latest resource information to assist in the conservation and management of migratory birds; (2) developing an annual report of accomplishments and recommendations related to this Order; (3) fostering partnerships to further the goals of this Order; and (4) selecting an annual recipient of a Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.

(b) The Council shall include representation, at the bureau director/administrator level, from the Departments of the Interior, State, Commerce, Agriculture, Transportation, Energy, Defense, and the Environmental Protection Agency and from such other agencies as appropriate.

Sec. 5. Application and Judicial Review. (a) This Order and the MOU to be developed by the agencies do not require changes to current contracts, permits, or other third party agreements.

(b) This Order is intended only to improve the internal management of the Executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

William J. Clinton
The White House,
January 10, 2001.