



Why Survey for Nongame Birds

Laws and Policies



Migratory Bird Treaty Act

- ✘ The original statute implemented the 1916 Convention between the US and Great Britain (for Canada) for the protection of migratory birds
- ✘ Later amendments added the conventions between the US and Mexico, Japan, and the Soviet Union
- ✘ The MBTA gave DOI enforcement authority



Take

"to pursue, hunt, take, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention...for the protection of migratory birds...or any part, nest, or egg of any such bird." (U.S.C. 703)



Does MBTA apply to the Federal Agencies?



- ⌘ In late 1990s, various District Courts ruled on cases filed against the Forest Service for logging which resulted in the take of migratory birds
- ⌘ Position of DOJ was that the MBTA does not apply to Federal agencies



MBTA and Federal Agencies



- ⌘ In July 2000, District Court of Appeals in DC ruled that the prohibitions of the MBTA do apply to Federal agencies and that intentional taking without a permit violates the MBTA
- ⌘ DOJ advised DOI that incidental take is also prohibited



MBTA and Federal Agencies



- ⌘ In 2002, the District Court in DC ruled that military training exercises of the Department of Navy that incidentally take migratory birds without a permit are a violation of the MBTA.
- ⌘ Congress enacted the 2003 National Defense Authorization Act. This Act directed the Secretary of the Interior to prescribe regulations for the Armed Forces for the incidental take of migratory birds during readiness activities.



MBTA and Federal Agencies

- ✘ In February 2007, the FWS published a rule to allow the Armed Forces to “take” migratory birds in the course of military readiness activities, as directed by the 2003 National Defense Authorization Act.
- ✘ The Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures.



The Executive Order

- ✘ January, 2001 - Executive Order 13186 - Responsibilities of Federal Agencies to Protect Migratory Birds
- ✘ Each agency directed to develop and implement an MOU with the FWS that shall promote the conservation of migratory bird populations (by January 2003)
- ✘ Includes a monitoring requirement



EO

- ✘ The EO pertains to all birds covered under MBTA and makes a reference to Species of Concern.
- ✘ States that each agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, with a focus on Species of Concern.



Species of Concern

- ☒ Species listed by the Service in “Migratory Nongame Birds of Management Concern in the United States”
- ☒ Priority species documented in Bird Conservation Region plans, or other bird plans, such as Partners in Flight physiographic plans
- ☒ Species listed as endangered or threatened



Status of the MOUs

- ☒ More than 20 agencies are developing MOUs with the FWS.
- ☒ DOD and DOE signed MOUs in 2006.
- ☒ FS, BLM, and NPS all have draft MOUs.



Internal (within FWS) application of the EO

- ☒ FWS manual chapter 720 FW 2
- ☒ Proactive conservation of migratory birds
- ☒ Continue to highlight current bird conservation activities
- ☒ Place greater emphasis on bird conservation in environmental reviews



Internal Application

- ✘ Incorporate the priorities identified in the 4 bird plans in Service program priorities (e.g., when developing refuge CCPs)
- ✘ Participate in bird surveys
- ✘ Reduction of incidental take resulting from Service land management activities (mowing, burning, etc.)



What's the hold-up on getting MOUs signed?

- ✘ MBTA is a strict liability law. If you “take” migratory birds you are guilty and subject to penalties - regardless of your knowledge.
- ✘ Debate about the term “take” - how to describe non-intentional or incidental take.
- ✘ DOI Solicitor’s Office will issue an opinion before we sign any MOUs



More on the Hold-up

- ✘ Other agencies want the same type of rule as that issued for the Armed Forces for military readiness activities.



Agency Policies - BLM

- ☒ Bureau of Land Management
- ☒ Federal Land Policy and Management Act of 1976
 - requires a periodic inventory of resources, giving priority to areas of critical environmental concern.





Agency Policies - FWS

- ☒ US Fish and Wildlife Service
- ☒ Fish and Wildlife Conservation Act of 1980
- ☒ 1990 amendment required the Service to monitor and assess migratory nongame birds.
- ☒ This is the authority for the Birds of Conservation Concern list





Agency Policies - FWS

- ☒ US Fish and Wildlife Service - National Wildlife Refuge System
- ☒ National Wildlife Refuge System Improvement Act of 1997
 - amended the National Wildlife Refuge System Administration Act of 1966
 - FWS Manual contains direction to collect baseline information on plants, fish and wildlife. Also, to monitor species and species groups.





Agency Policies - NPS

- ☒ National Park Service
- ☒ The Act of Aug. 25, 1916 (39 Stat. 535) and amendments thereto.
- ☒ Management Policies 2001
 - Natural systems will be monitored.
 - Identify, acquire, and interpret needed inventory, monitoring, and research.



Agency Policies - FS

- ☒ US Forest Service
- ☒ National Forest Management Act of 1976
- ☒ Requires assessment of forest lands
- ☒ Requires a comprehensive inventory of all NFS lands and renewable resources.
- ☒ The inventory must be kept current.
- ☒ National Forest planning regulations.



Forest Service

- ☒ In 1982, the USDA promulgated regulations to protect wildlife and fish, soils, water, outdoor recreation, and other public resources. The 1982 Planning Regulations included a species viability provision, which provided that “fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.”



Forest Service

- ✘ On January 5, 2005, the USDA published the 2005 Rule.
- ✘ This rule eliminated species viability and diversity requirements, increased discretion on the part of local agency officials, and stated a new role that science plays in agency decisions.



Forest Service

- ✘ The agency concluded that the 2005 Rule was strategic rather than prescriptive in nature, and that the rule did not require NEPA consultation. The agency also concluded they did not need to consult under ESA.
- ✘ Several groups sued the FS. The U.S. District Court in San Francisco ruled in March 2007, on the lawsuit.



Court Ruling

- ✘ Given the 2005 Rule's potential *indirect* effects on listed species, combined with the USDA's lack of documentation in support of their "no effect" determination, the failure to consult and/or prepare any type of biological analysis in conjunction with the 2005 Rule was arbitrary and capricious.



Court Ruling

⌘ The matter is remanded to the USDA for compliance with the APA, ESA, and NEPA, ... because the 2005 Rule may significantly affect the quality of the human environment under NEPA, and because it may affect listed species and their habitat under ESA, the agency must conduct further analysis and evaluation of the impact of the 2005 Rule in accordance with those statutes. The USDA is ENJOINED from implementation and utilization of the 2005 Rule until it has fully complied with the pertinent statutes.
