APPENDIX J

Memorandum of Understanding Between the U.S. Department of Agriculture Forest Service and the U.S. Fish and Wildlife Service To Promote the Conservation of Migratory Birds

FS Agreement # 08-MU-1113-2400-264

MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE AND THE U.S. FISH AND WILDLIFE SERVICE TO PROMOTE THE CONSERVATION OF MIGRATORY BIRDS

This Memorandum of Understanding (MOU) is entered into between the U.S. Department of Agriculture Forest Service, herein referred to as Forest Service and the U.S. Fish and Wildlife Service (FWS) and collectively referred to as the Parties. (hereinafter "the Parties").

A. PURPOSE AND SCOPE

Pursuant to Executive Order 13186, 66 Fed. Reg. 3853 (2001), Responsibilities of Federal Agencies to Protect Migratory Birds, this MOU outlines a collaborative approach to promote the conservation and reduce the take of migratory birds. The Executive Order directs agencies to take certain actions to further comply with the migratory bird conventions, the Migratory Bird Treaty Act (MBTA), the Bald and Golden Eagle Protection Act (BGEPA), and other pertinent statutes. The MBTA, signed in 1918, and amended in 1936, 1974 and 1989, implements the United States' commitment to four international conventions (with Canada, Mexico, Japan, and Russia) for the protection of migratory birds. This MOU does not remove the Parties' legal requirements under the MBTA, BGEPA, or other statutes and does not authorize the take of migratory birds.

The purpose of this MOU is to strengthen migratory bird conservation by identifying and implementing strategies that promote conservation and avoid or minimize adverse impacts on migratory birds through enhanced collaboration between the Parties, in coordination with State, Tribal, and local governments. This MOU identifies specific activities where cooperation between Parties will contribute to the conservation of migratory birds and their habitats. These activities are intended to complement and support existing, and facilitate new, collaborative migratory bird conservation partnerships and comprehensive planning efforts for migratory birds. These include Joint Ventures, and planning efforts and activities of the bird initiatives (North American Waterfowl Management Plan (NAWMP), the North American Waterbird Conservation Plan (NAWCP), the North American Landbird Conservation Plan, the U.S. Shorebird Conservation Plan, and the North American Bird Conservation Initiative (NABCI).

B. STATEMENT OF MUTUAL BENEFIT AND INTERESTS:

The Parties agree that migratory birds are important components of biological diversity. Their conservation and management will help sustain ecological integrity and will meet the growing public demand for conservation education and outdoor recreation, such as wildlife viewing, and hunting opportunities. Migratory birds also are important economically and activities focused on birds provide financial benefits to local communities and businesses. Furthermore, the Parties mutually agree that it is important to: 1) focus on bird populations; 2) focus on habitat restoration and enhancement where actions can benefit specific ecosystems and migratory birds dependent upon them; 3) recognize that actions taken to benefit some migratory bird populations may adversely affect other migratory bird populations; and 4) recognize that actions that may provide long-term benefits to migratory birds may have short-term impacts on individual birds.

1. Authorities

This MOU is entered under the provisions of the following statutes and executive orders:

Alaska National Interest Lands Conservation Act of 1980 (16 USC 3101 et seq.)
Bald and Golden Eagle Protection Act of 1940 (16 U.S.C. 668-668d)
Endangered Species Act of 1973 (16 U.S.C. 1531-1544)
Federal Land and Policy Management Act of 1976 (43 U.S.C. 1701 et seq.)
Fish and Wildlife Act of 1956 (16 U.S.C. 742a et seq.)
Fish and Wildlife Conservation Act of 1980 (16 U.S.C. 2901 et seq.)
Fish and Wildlife Coordination Act of 1934 (16 U.S.C. 661-667)
Migratory Bird Conservation Act (16 U.S.C. 715 et seq.)
Migratory Bird Treaty Act of 1918 (16 U.S.C. 703 et seq.)
Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. 528-531)
National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)
National Forest Management Act of 1976 (16 U.S.C. 1600 et seq.)
Public Rangelands Improvement Act of 1978 (43 U.S.C. 1901 et. seq.)
Responsibilities of Federal Agencies to Protect Migratory Birds, Exec. Order No. 13186, 66 Fed. Reg. 3853 (2001)
Sikes Act of 1960 (16 USC 670a-670o)

2. Forest Service

The mission of the Forest Service is to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations. The Forest Service is responsible for management of national forests and grasslands, comprising 193 million acres. The Forest Service supports and participates in the North American Bird Conservation Initiative (NABCI) and several of its subcommittees, and in Partners in Flight (PIF), both nationally and regionally. The Forest Service also assisted with the development and implementation of the North American Waterfowl Management Plan

(NAWMP), the North American Waterbird Conservation Plan (NAWCP), the North American Landbird Conservation Plan, and the U.S. Shorebird Conservation Plan.

The Forest Service is recognized as a national and international conservation leader and plays a pivotal role in conservation of migratory bird populations and their habitats. Additionally, many national forests and grasslands are nationally and internationally recognized Important Bird Areas or other migratory bird designations. The agency created a Migratory Bird Conservation Team in the national headquarters to coordinate Forest Service national and international bird conservation activities between four major administrative areas: the National Forest System, State and Private Forestry, Research and Development, and International Programs. One of the goals of this team is to augment accomplishments for all bird conservation across the Americas.

Within the National Forest System, conservation of migratory birds focuses on providing a diversity of habitat conditions at multiple spatial scales and ensuring that bird conservation is addressed when planning for other land management activities. The National Forest Management Act (NFMA) requires that each national forest develop a land and resource management plan and provide for diversity of plant and animal communities in order to meet overall multiple-use objectives.

National forest and grassland managers design or collaborate in projects that provide for bird conservation in accordance with numerous laws, agreements and collaboratively developed comprehensive planning documents (see Definitions for a list of comprehensive plans). Additionally, District and Forest wildlife biologists frequently incorporate recommendations from comprehensive planning efforts when addressing the effects of proposed actions on migratory bird populations.

3. Fish and Wildlife Service

The mission of the FWS is to work with others to conserve, protect, manage, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. The FWS is legally mandated to implement the conservation provisions of the Migratory Bird Treaty Act, which includes responsibilities for population management (e.g., monitoring), international coordination, and regulations development and enforcement. The Migratory Bird Conservation Act and the Fish and Wildlife Coordination Act provide for habitat conservation mandates that include habitat protection (e.g., acquisition, enhancement, and modification of habitats).

Many FWS programs are involved in bird conservation activities, including:

1. The Division of Migratory Bird Management and the Regional Migratory Bird Program offices serve as focal points for policy development and strategic planning; developing and implementing monitoring and management initiatives that help maintain healthy populations of migratory birds and their habitat; and providing continued opportunities for citizens to enjoy bird-related recreation.

2. The Division of Bird Habitat Conservation is instrumental in supporting habitat conservation partnerships through the administration of bird conservation grant programs and development of Joint Ventures that serve as major vehicles for implementing the various bird conservation plans across the country.

3. Ecological Services Field Offices across the country serve as the primary contacts for technical assistance and environmental reviews that include, when requested, projects developed by national forests involving migratory bird issues. The Field Offices coordinate with the Regional Migratory Bird Offices, as necessary, during these reviews regarding permits and overall migratory bird conservation coordination for Forest Service activities.

4. The Office of Law Enforcement is the principal FWS program that enforces the legal provisions of the MBTA.

The Parties agree that this MOU shall be implemented to the extent permitted by law and in harmony with agency missions, subject to the availability of appropriations.

C. BOTH PARTIES SHALL:

1. Protect, restore, and conserve habitat of migratory birds, addressing the responsibilities in Executive Order 13186.

2. Emphasize an interdisciplinary, collaborative approach to migratory bird conservation in cooperation with foreign governments, State and Federal agencies, Tribal governments, non-federal partners and willing private landowners within the North American Bird Conservation Initiative (NABCI) framework, including the following actions:

   a. Work collaboratively with partners to identify, restore, and conserve Important Bird Areas, Western Hemisphere Shorebird Reserve Network sites, and other significant bird sites.

   b. Develop and integrate information on migratory bird resources into outreach and education materials and activities.

3. Promote collaborative inventory, monitoring, management studies, research, and information exchange, at the appropriate scale, related to the conservation of migratory birds and management of their habitats.

4. Promote and contribute migratory bird population and habitat data to interagency partnership databases: National Biological Information Infrastructure (NBII), the Breeding Bird Research and Monitoring Database (BBIRD), Avian Knowledge Network (AKN), the Waterbird Monitoring Partnership Database (WMPD), the Natural Resources Monitoring Partnership (NRMP), and other databases that meet the needs of the Parties.

5. Adopt the recommendations in the NABCI Monitoring Subcommittee report "Opportunities for Improving Avian Monitoring" (February 2007), where applicable, when developing and implementing migratory bird conservation activities that warrant monitoring. Appropriate steps should also be taken by the Parties to implement actions identified in the NABCI Monitoring Subcommittee's Annual Work Plan (http://www.nabci-us.org/monitoring.html).

6. Provide training to agency employees on bird population and habitat inventory and monitoring methods, as well as management practices that minimize adverse impacts and promote beneficial proactive approaches to migratory bird conservation.

7. Recognize and promote economic and recreation values of birds through support of International Migratory Bird Day and other events that promote bird conservation. Identify and implement projects and programs to maintain or improve the quality of hunting, birdwatching, and other recreational opportunities related to migratory birds.

8. Increase awareness of the information contained within comprehensive planning efforts for migratory birds to facilitate integration of conservation measures into land management and project planning (see Definitions for a list of comprehensive planning efforts for migratory birds).

9. Participate annually, or as needed, in the interagency Council for the Conservation of Migratory Birds to evaluate the implementation of this MOU. The Council's duties include:

   a. Sharing the latest resource information to assist in the conservation and management of migratory birds.

   b. Developing an annual report of accomplishments and recommendations related to Executive Order 13186.

   c. Fostering partnerships to further the goals of Executive Order 13186.

   d. Selecting an annual recipient of a Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.

10. Promote migratory bird conservation internationally, working with domestic and international partners as appropriate or relevant to agencies' authorities. This includes assisting other nations, as appropriate, in sustaining migratory bird populations and habitats through technical cooperation, policy development, and disaster assistance, including conservation planning, project support, cooperative studies, education, and training.

11. Follow the FWS Bald Eagle Management Guidelines which can be found at http://www.fws.gov/migratorybirds/issues/BaldEagle/NationalBaldEagleManagementGuidelines.pdf. The Guidelines include general recommendations for land management practices that will benefit Bald Eagles. The document is intended primarily as a tool for landowners and planners who seek information and recommendations regarding how to avoid disturbing Bald Eagles. Many States and some Tribal entities have developed State-specific management plans, regulations, and/or guidance for landowners and land managers to protect and enhance Bald Eagle habitat, and the FWS encourages the continued development and use of these planning tools to benefit Bald Eagles.

12. Promote this MOU within the Forest Service and the FWS to ensure its effective implementation and its inclusion in land use planning and other avian conservation activities.

D. <u>FOREST SERVICE SHALL</u>:

1. Address the conservation of migratory bird habitat and populations when developing, amending, or revising management plans for national forests and grasslands, consistent with NFMA, ESA, and other authorities listed above. When developing the list of species to be considered in the planning process, consult the current FWS *Birds of Conservation Concern* (updated 2002 and available at www.fws.gov/migratorybirds/reports/BCC2002.pdf), State lists, and comprehensive planning efforts for migratory birds (see Definitions for a list of comprehensive plans). Evaluate and consider management objectives and recommendations from conservation planning efforts for migratory birds. Acknowledge special designations that may apply to all or part of the planning area, such as Globally Important Bird Areas in the United States, and acknowledge such designations in the appropriate plan documents.

2. Participate in planning efforts of Bird Conservation Regions (BCRs) to facilitate development of conservation actions that benefit migratory bird species across multiple land ownerships, such as large-scale watersheds and coastal area restoration projects. Increase awareness within the agency of information contained within these plans and within other comprehensive planning efforts for migratory birds.

3. Within the NEPA process, evaluate the effects of agency actions on migratory birds, focusing first on species of management concern along with their priority habitats and key risk factors. To the extent practicable:

a. Evaluate and balance long-term benefits of projects against any short- or long-term adverse effects when analyzing, disclosing, and mitigating the effects of actions.

b. Pursue opportunities to restore or enhance the composition, structure, and juxtaposition of migratory bird habitats in the project area.

c. Consider approaches, to the extent practicable, for identifying and minimizing take that is incidental to otherwise lawful activities, including such approaches as:

   1. altering the season of activities to minimize disturbances during the breeding season;

   2. retaining snags for nesting structures where snags are underrepresented;

   3. retaining the integrity of breeding sites, especially those with long histories of use and;

   4. giving due consideration to key wintering areas, migration routes, and stop-overs.

   5. minimizing or preventing the pollution or detrimental alteration of the environments utilized by migratory birds whenever practical by assessing information on environmental contaminants and other stressors relevant to migratory bird conservation.

d. Coordinate with the appropriate FWS Ecological Services office when planning projects that are likely to have a negative effect on migratory bird populations. Cooperate in developing approaches to minimize negative impacts and maximize benefits to migratory birds.

4. For wind energy development projects, use existing Forest Service guidance and other relevant information for minimizing adverse effects to migratory birds and for monitoring.

5. Cooperate with willing landowners to conserve important migratory bird habitat on non-federal lands, using purchases, easements, contributions, exchanges, and other means.

6. Initiate and support management studies and research to identify the habitat conditions needed to conserve migratory birds, and to evaluate the effects of management activities on habitats and populations of migratory birds.

7. Recognize and promote the value of migratory birds to the public through support

of, and participation in, International Migratory Bird Day events; through development of Naturewatch viewing sites that focus on bird conservation; and by sponsoring bird watching and appreciation activities (e.g., bird festivals and celebrations) that draw visitors to the national forests and grasslands.

8. Promote international collaboration for migratory bird conservation through the Wings Across the Americas program.

9. Within the scope of its statutorily-designated authorities, control the import, export, and establishment on National Forest System lands of live exotic animals and plants that may be harmful to migratory bird resources.

10. Follow all migratory bird permitting requirements for activities subject to 50 CFR Part 21.

11. Advise the public of the availability of this MOU through a notice published in the *Federal Register*.

E. FISH AND WILDLIFE SERVICE SHALL:

1. Continue to maintain a permits web page that provides links to all offices responsible for issuing permits for take of migratory birds.

2. Provide essential background information to the Forest Service to guide sound management decisions. This may include, but is not limited to, migratory bird distributions, status, key habitats, conservation guidelines, and risk factors at appropriate landscape scales such as BCRs, rangewide or flyway-wide. This includes updating the FWS *Birds of Conservation Concern* at regular intervals so it is a reliable reference.

3. Work to identify special migratory bird habitats (migration corridors, stop-over habitats, ecological conditions important in nesting habitats, etc.) to aid in collaborative planning.

4. Provide technical assistance, at the request of the Forest Service, on migratory bird species, their habitats, and conservation.

F. DEFINITIONS:

Bird Conservation Region – a geographic unit used to facilitate bird conservation planning and actions under the North American Bird Conservation Initiative (http://www.nabci-us.org/bcrs.html).

Birds of Conservation Concern – the list of migratory and non-migratory birds of the United States and its territories that are of conservation concern. The list is published and

maintained by the Fish and Wildlife Service, Division of Migratory Bird Management. The current version of the list (2002) is available at http://migratorybirds.fws.gov/reports/bcc2002.pdf.

Comprehensive planning efforts for migratory birds – National and regional conservation plans developed by bird initiatives, Joint Ventures, or BCR partnerships. Bird initiatives include Partners in Flight, North American Waterfowl Management Plan, U.S. Shorebird Conservation Plan, Waterbird Conservation for the Americas, and the North American Bird Conservation Initiative. Other efforts include Important Bird Areas, Western Hemisphere Shorebird Reserve Network, and Wings Across the Americas.

Council for the Conservation of Migratory Birds - Interagency council established by the Secretary of the Interior to oversee the implementation of Executive Order 13186.

Disturb (Bald and Golden Eagle Protection Act) – to bother or agitate 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 its normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, 50 CFR 22.3, by substantially interfering with its normal breeding, feeding, or sheltering behavior.

Ecological condition - Components of the biological and physical environment that can affect diversity of plant and animal communities and the productive capacity of ecological systems. These components could include the abundance and distribution of aquatic and terrestrial habitats, road and other structural developments, human uses, and invasive, exotic species (FSM 219.16).

Effect (adverse or beneficial) - The result of a management action on migratory bird populations, habitats, ecological conditions, and/or significant bird conservation sites. Effects and impacts are synonymous in this MOU. Effects may be direct, indirect, or cumulative.

Federal agency - an executive department or agency of the U.S. government, including its employees while acting in their official capacity. It does not include non-Federal entities, regardless of Federal funding, involvement, or authorization.

Important Bird Areas (IBAs) – a network of sites that provides essential habitat for the long-term conservation of birds. In the United States, the IBA network is a cooperative venture of the American Bird Conservancy and the National Audubon Society.

Joint Venture – an ecoregional, self-directed partnership of Federal, State and local agencies, Tribes, non-government organizations, corporations and individuals that has formed to deliver the objectives of national or international bird conservation initiatives.

Management action - an activity by a Federal government agency that could result in a positive or negative impact on migratory bird populations or habitats. Conservation

measures should be considered to mitigate negative impacts of management actions on migratory bird populations.

Migratory bird - an individual of any species protected by the Migratory Bird Treaty Act; a list of migratory birds can be found in 50 CFR § 10.13 at http://www.gpoaccess.gov/cfr/retrieve.html

Waterbird Conservation for the Americas (WCA) - a coalition of Federal and State government agencies, non-governmental organizations, and private interests focusing on the conservation of waterbirds (http://www.waterbirdconservation.org/).

North American Waterfowl Management Plan (NAWMP) - a coalition of Federal and State government agencies, non-governmental organizations, and private interests focusing on the conservation of waterfowl (http://www.fws.gov/birdhabitat/NAWMP/Planstrategy.shtm).

North American Bird Conservation Initiative (NABCI) - an effort to align the avian conservation community to implement bird conservation through regionally-based, biologically-driven, landscape-oriented partnerships across the North American continent. NABCI includes Federal agencies of Canada, Mexico and the United States, as well as most landbird, shorebird, waterbird, and waterfowl conservation initiatives (www.nabci-us.org).

Partners in Flight (PIF) - a coalition of more than 300 partners including Federal and State government agencies, non-governmental organizations, conservation groups, foundations, universities, and industry that focus on the conservation of landbirds (www.partnersinflight.org).

Take – take in this MOU has the same meaning as defined in 50 CFR § 10.12 and means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.

U.S. Shorebird Conservation Plan (USSCP) - an effort undertaken by a partnership of Federal and State government agencies, non-governmental organizations, and private groups to ensure that stable and self-sustaining populations of all shorebird species are restored and protected (http://www.fws.gov/shorebirdplan/).

Western Hemisphere Shorebird Reserve Network (WHSRN) - a coalition of private and public organizations in seven countries working together to study and conserve shorebirds through conservation, restoration, and management of critical shorebird habitats throughout the Americas (http://www.whsrn.org/).

Wings Across the Americas – a collaborative effort by the Forest Service International Programs and partners in Central America and the Caribbean to conserve the wintering grounds of migratory birds (http://www.fs.fed.us/global/wings/birds/welcome.htm).

G. IT IS MUTUALLY UNDERSTOOD AND AGREED BY AND BETWEEN THE PARTIES THAT:

1. Species Conservation Process. The MOU will not change or alter species conservation process and procedure requirements associated with the Endangered Species Act or process and procedure requirements associated with agency-defined priority species. Each agency's responsibilities towards such species remain unchanged.

2. Ongoing Activities. Proposed actions that are nearing the completion of the NEPA process following the date this MOU is signed would not be subject to the MOU. This would include projects that are between the end of the final comment period and the signing of the Record of Decision. Each agency is encouraged to immediately begin implementing the conservation measures set forth in this MOU as appropriate and practicable.

3. National Environmental Policy Act (NEPA) Requirements. This instrument in no way diminishes or takes the place of the respective Party's requirements for conducting environmental analysis, including NEPA requirements. NEPA requirements will continue with or without the MOU.

4. Dispute Resolution. In the event of a dispute between the Parties regarding a particular practice or activity, the Parties shall first attempt to resolve the dispute with the Forest Service unit management and the appropriate FWS office. If there is no resolution at this level within 30 days, either Party may elevate the issue to the appropriate officials at Forest Service or FWS Regional offices. In the event that there is no resolution at the Regional offices within 30 days, the dispute may be elevated by either Party to the Washington office of each agency.

5. Current Contracts and Agreements. This MOU does not require changes to current contracts, permits, or other third party agreements.

6. Budgetary Limits. This MOU shall be implemented to the extent permitted by law and subject to the availability of appropriations and within Administration budgetary limits, and in harmony with agency missions.

7. Freedom of Information Act (FOIA). Any information furnished to the Forest Service under this instrument is subject to the Freedom of Information Act (5 U.S.C. 552).

8. Participation in Similar Activities. This instrument in no way restricts the Forest Service or the Cooperator(s) from participating in similar activities with other public or private agencies, organizations, and individuals.

9. Commencement/Expiration/Termination. This MOU takes effect upon the signature of the Forest Service and Fish and Wildlife Service and shall remain in

effect for five years from the date of execution. This MOU may be extended or amended upon written request of either the Forest Service or the Fish and Wildlife Service and the subsequent written concurrence of the other(s). Either the Forest Service or the FWS may terminate this MOU with a 60-day written notice to the other(s).

10. Responsibilities of Parties. The Forest Service and the Fish and Wildlife Service will handle their own activities and utilize their own resources, including the expenditure of their own funds, in pursuing these objectives. Each party will carry out its separate activities in a coordinated and mutually beneficial manner.

11. Nothing in this MOU creates any right in any non-party to this agreement and no non-party has the right to enter the terms hereof.

12. Principal Contacts. The principal contacts for this instrument are:

Forest Service Contact	*Fish and Wildlife Service Contact*
Anne Zimmermann, Director	Dr. Robert Blohm, Chief
Watershed, Fish, Wildlife, Air and Rare Plants USDA Forest Service 1400 Independence Ave., SW Washington, DC 20250-1121 Phone: (202) 205-1671 FAX: (202) 205-1599 E-Mail: azimmermann@fs.fed.us	Division of Migratory Bird Management US Fish and Wildlife Service 4401 N. Fairfax Drive, MS 4107 Arlington, VA 22203 Phone: (703)-358-1966 FAX: (703) 358-1714 E-Mail: Robert_Blohm@fws.gov

13. Non-fund Obligating Document. Nothing in this MOU shall obligate either the Forest Service or the Fish and Wildlife Service to obligate or transfer any funds. Specific work projects or activities that involve the transfer of funds, services, or property among the various agencies and offices of the Forest Service and the Fish and Wildlife Service will require execution of separate agreements and be contingent upon the availability of appropriated funds. Such activities must be independently authorized by appropriate statutory authority. This MOU does not provide such authority. Negotiation, execution, and administration of each such agreement must comply with all applicable statutes and regulations.

14. Establishment of Responsibility. This MOU is not intended to, and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any person.

15. Authorized Representatives. By signature below, the cooperator certifies that the individuals listed in this document as representatives of the cooperator are authorized to act in their respective areas for matters related to this agreement.

THE PARTIES HERETO have executed this instrument.

Abigail Kimbell
Chief
USDA FOREST SERVICE

12/8/08
DATE

H. Dale Hall
Director
US FISH AND WILDLIFE SERVICE

9/23/08
DATE

The authority and format of this instrument has been reviewed and approved for signature.

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DATE

FS Agreements Coordinator