



United States Department of the Interior



BUREAU OF LAND MANAGEMENT

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To: District Managers and Deputy State Directors

From: State Director

Subject: Interim Management Guidance for Migratory Bird Conservation Policy on Wyoming Bureau of Land Management (BLM) Administered Public Lands Including the Federal Mineral Estate

This Instruction Memorandum (IM) provides guidance to Wyoming Bureau of Land Management (BLM) Field Offices for meeting the purpose and intent of the Migratory Bird Treaty Act (MBTA), Presidential Executive Order (EO) 13186 (attachment 1) and the recent Memorandum of Understanding (MOU) between the U. S. Fish and Wildlife Service (USFWS) and the BLM related to the conservation and strategic management of migratory birds on BLM managed public lands and management of Federal mineral estate on split estate lands. The 2010 MOU (attachment 2) provides direction for BLM to develop an Implementation Strategy for meeting the purpose and intent of both the MBTA and EO 13186. This strategy is currently under development, but is not expected to be completed until later 2012 or 2013 and may not be incorporated into BLM policy and guidance until sometime after that. Prior to MOU development and signatures, interim guidance for how BLM should ensure compliance with MBTA and EO 13186 was provided by BLM Washington Office (WO) IM-2008-50 (attachment 3). That IM has expired and, until the national strategic plan and guidance is finalized statewide consistency in applying migratory bird conservation and protection measures into land use and activity level planning and analysis is needed. Implementation of this Wyoming IM is intended to ensure Field Offices are consistent in applying conservation and protection measures for BLM authorized activities affecting migratory birds and their habitats.

Policy/Action:

This guidance is to be implemented in conjunction with existing program-specific policies, Best Management Practices, and current Resource Management Plan (RMP) direction. For Wyoming

Field Offices where RMPs have been recently revised and conservation and protection measures for migratory birds were addressed in those plans, the RMPs will provide direction for BLM activities and actions. RMP direction is to fulfill the purpose and intent of the MBTA and EO 13186, and will be the primary Field Office guide for addressing migratory bird issues or concerns. For Field Offices with existing RMPs that do not contain current and specific conservation and protection measures, activity level planning will need to ensure that migratory birds are addressed in the National Environmental Policy Act (NEPA) analysis process and appropriate protection and conservation measures are considered to comply with MBTA and BLM national policies.

For activities or actions where possible affects to migratory birds or their habitats are identified or when adverse impacts will or are likely to occur, **then mitigation or conservation and protection measures shall be included** in NEPA alternatives. This NEPA analysis consideration is directed by EO 13186, the recent Migratory Bird MOU with USFWS, and the expired WO IM-2008-050 (see attachments). RMPs that do not contain migratory bird discussion with associated goals or objectives for management of migratory birds and habitats should be revised, amended, or maintained to insure that management guidance has been addressed. That direction was provided in the BLM WO IM 2008-050.

Measures that are more restrictive or that would constrain activities more than land use planning decisions should be reviewed for RMP conformance and should be modified to be compliant with RMP direction if possible. If RMP decisions do not provide adequate direction, measures necessary to ensure compliance with the MBTA and EO 13186 shall be applied but should be the least restrictive needed to ensure compliance with Federal law. Design features, applicant committed BMPs and conservation actions should be considered before mandatory Conditions of Approval (COAs), or stipulations are applied. Such measures can provide protection required by MBTA and also encourage conservation actions to be included in activities that might otherwise adversely impact habitats. In many cases protective stipulations or COAs being applied for other species will also provide migratory bird protections. Special Status Species (see BLM manual 6840) which would include Migratory Birds of Conservation Concern listed by USFWS and BLM sensitive species birds, can be identified for particular conservation or protection measures during NEPA analysis for any BLM activities or actions. For permitted activities, if voluntary or applicant committed measures are not adequate to insure that known risks can be mitigated or minimized and MBTA violations are likely to occur, then BLM shall apply stipulations or conditions of approval that would ensure that actions are in compliance with MBTA, EO 13186, and the MOU between BLM and USFWS.

Since 2008, a Conditional Surface Use stipulation for all special status species has been applied to all oil and gas leases. This stipulation provides BLM the ability to apply conservation and protection measures to lease development activities that are necessary to minimize adverse impacts to migratory bird special status species that could contribute toward a need for listing for any of these species. Also, Federal oil and gas lease operations are subject to surface use rights described in 43 CFR 3101.1-2 which provides that “(a) lessee shall have the right to use so much of the leased lands as is necessary, (to conduct lease operations), subject to: stipulations attached to the lease: restrictions deriving from specific nondiscretionary statutes (such as MBTA); and such reasonable measures as the BLM may require.”

In any case, Wyoming Field Offices are expected to review all actions and activities to ensure these are conducted in a manner that complies with the MBTA, Department of the Interior (DOI) regulations, and policies and to coordinate and communicate with the Wyoming U.S. Fish & Wildlife Ecological Services office as needed to address compliance concerns. Coordination and communication with USFWS should be conducted for large scale projects which include habitat removal or disturbance, projects where “take” of migratory birds may occur, or in cases where potential impacts are uncertain but are likely to be adverse and conservation/mitigation measures cannot be readily identified. Examples would include oil and gas activities at field or multi-well unit development levels, any large (> 20 acres) surface mining operations, large transmission or wind projects, and disturbance activities in migratory bird habitats (forest, shrub, weed, or insect treatments or prescribed burns) that could impact the habitat. Field Offices may find it helpful to prepare a list of migratory birds that occur in their administrative area or a list of all Migratory Bird Species of Conservation Concern. This list would include T&E listed or Candidate species and BLM special status species that should be addressed in any activity level NEPA analysis.

Timeframe: Effective immediately.

Budget Impact: There may be some effect on the budget by requiring additional work on NEPA analysis, but this would not be expected to have any significant increases in work requirements.

Background: The Migratory Bird Treaty Act is a Federal law that has been in effect since first signed in 1918 and remains valid along with subsequent modifications today. This act specifically prohibits the “Take” of migratory birds through individual or agency actions. “Take” under the MBTA includes “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture or collect a migratory bird” (50 CFR 10.12). This act applies to the DOI agencies including BLM. As an agency, BLM can be prosecuted and fined for violations of the provisions of MBTA as a result of agency actions and indirectly can be cited for agency authorized actions which violate MBTA when BLM knowingly authorizes actions without identifying and taking steps to prevent violations of the MBTA. Violations occur when actions result in a take regardless of whether the take was intentional or unintentional. The MBTA as amended does allow for take when special permits are obtained from the USFWS. Those permits are issued when unavoidable take is likely to occur from specific actions outlined in the permit. Because take permits involve a lengthy application process and are limited in scope to actions where alternatives to take are not feasible or reasonable, BLM does not plan activities with expectations of obtaining any special take permits for migratory birds. BLM agency activities should always be planned to avoid any take of migratory birds to ensure compliance with the MBTA.

Presidential EO 13186 was signed by then President Clinton in 2001, and directs all Federal agencies to ensure that agency actions and authorized actions are in compliance with the MBTA, include adequate protection measures to support the intent of the MBTA, and to conserve migratory bird populations and their habitats. This EO also directs agencies to develop and implement MOUs with the USFWS that promote conservation of migratory birds and ensure that any agency activities avoid or minimize adverse impacts to migratory birds and associated habitats. The BLM has developed an MOU with USFWS that was signed in April 2010. EO

13186 and the accompanying MOU provide specific responsibilities and commitments that BLM is obligated to follow. See attached copies of both EO 13186 and the BLM-USFWS MOU for an understanding of those responsibilities and commitments.

Because Wyoming has a wide variety of migratory bird species, and many of which occur on public lands and include species of conservation concern, most surface disturbing activities are likely to have some impact to migratory birds or their habitats. Direct impacts to migratory bird species or their nests/eggs/young can often be avoided by requiring pre-disturbance clearance surveys or using seasonal timing windows and nesting buffers to avoid disturbance during occupancy periods and minimizing habitat loss. Pre-disturbance clearances should be conducted within 7 days prior to the disturbances in order to detect any newly arriving nesting birds. Delays would require new clearance surveys. Seasonal timing limitations should be adjusted to match the habitat types and species of concern for proposed activities and yearly climatic variation that could change nesting periods. For Wyoming, the USFWS identifies migratory bird nesting periods occur between February 1 and August 31 for species protected by MBTA. However, unless a project proposal is very large and would potentially affect many habitat types and a wide variety of bird species, seasonal timing limitations should be adjusted to shorter periods to match the habitat, species and conditions of the project site. Migratory bird mortalities can also be avoided by including or requiring designs that exclude migratory birds from all facilities that are known to pose a preventable mortality risk (for example see section 3(a) and 3(h) of WY IM No. 2012-007) and marking of structures that have known collision risks.

Indirect affects to migratory birds and their habitats are more difficult to identify, but can be significantly reduced or avoided by sound conservation practices such as: avoiding disturbance in known high quality habitats (especially concentrated nesting areas); limiting disturbances to minimum necessary; planning disturbances to avoid USFWS Species of Greatest Conservation Need habitats or habitats that are unique, rare, or in limited supply; avoid new disturbances in large intact un-fragmented habitat blocks; or planning activities seasonally to minimize disturbance or disruption to nesting and breeding periods based on species potentially affected. If active nests with eggs or young are located with a project disturbance area, disturbance restrictive buffers around those nests should be implemented or projects should be delayed until all young have fledged. Buffer distances for bird species should be developed in coordination with USFWS. There are several publications which contain many conservation measures and best management practices that can be used to avoid or minimize adverse impacts to migratory birds and their habitats or promote beneficial actions. These should be considered during activity level NEPA analyses if potential impacts are identified. A list of some of these publications is attached (attachment 4).

Manual/Handbook Sections affected: none

Coordination: this IM was coordinated through Field Offices with comment period and through WSO Minerals Division (WY-920) and Planning and Resources Policy Division (WY-930). Comments and review were also coordinated with USFW Wyoming Ecological Services Office and the Wyoming Game and Fish Department, Wildlife Division nongame wildlife section.

Signed by:
Donald A. Simpson
State Director

Authenticated by
Sherry Dixon
Secretary

4 Attachments:

- 1 - Copy of Presidential Executive Order 13186 (4 pp)
- 2 - Copy 2010 BLM/USFWS MOU (13 pp)
- 3 - WO IM-2008-050 (4 pp)
- 4 - List of Migratory Bird Conservation Publications (1 p)

Distribution

Director (210), Room 1050, LS	1 (w/o atch.)
Director (230), Room 204, 2nd Floor	1 (w/o atch.)
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