Migratory Bird Treaty Act Guidance for Projects in the USFS Intermountain Region

Summary Points

- Law (Migratory Bird Treaty Act) and policy (Executive Order) require incorporating design features that lessen harm to birds by avoiding and minimizing negative effects to individual birds and populations.
- Various design features should be considered and incorporated into project design early.
- Design features must be practicable in that they must be reasonable and allow the completion of the project.
- The choice of design features and degree of impact reduction (e.g., extent of restrictions on activities) is at the discretion of the deciding official, given input from subject matter experts.

Background

Executive Order and the USFS-USFWS MOU

Executive Order 13186 (EO, signed in 2001) and the USFS-USFWS MOU (2008, under indefinite extension since 2022) outline agency instructions regarding the Migratory Bird Treaty Act (MBTA). Rules about prohibitions on unintentional take have been in flux and legal uncertainty remains about the definition of and enforcement for unintentional take, but the EO explicitly requires practicable measures to avoid and minimize adverse impacts and lessen the amount of take (on individuals and nests) when conducting agency actions.

Definitions from EO 13186 and the 2008 MOU with USFWS

"Take" – take 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.

''Intentional take'' means take that is the purpose of the activity in question.

''Unintentional take'' means take that results from, but is not the purpose of, the activity in question. Only actions that may result in unintentional take are the subject of this document. Note - may also be referred to as incidental take.

''Birds of Conservation Concern'' refers to those species listed in periodic reports from the US Fish and Wildlife Service (USFWS Birds of Conservation Concern 2021), and those species listed in 50 C.F.R. 17.11 and other USFWS web sites.

Recommended Process for Compliance with the MBTA/EO in NEPA Documents

I. During Development of Purpose and Need and formal Proposed Action:

Design features to avoid and minimize adverse impacts and incidental take should be incorporated into the proposal before NEPA analysis. Identifying appropriate measures for the project as early as possible enables more efficient analysis for MBTA compliance and NEPA effects disclosure.

1. Identify Species Impacted. At a minimum, upload the project polygon to the US Fish and Wildlife Service Information for Planning and Consultation site (IPAC, https://ipac.ecosphere.fws.gov) to obtain the list of Birds of Conservation Concern and other birds that may warrant special attention at the site. Other databases, such as The Rapid Avian Information Locator (https://data.pointblue.org/apps/rail/) may also be useful. A site survey is not required or necessary.

2. Identify Proposed Actions and Incorporate Design Features. Within the Interdisciplinary Team and incorporating line officer intent, collaboratively identify the actions that may impact birds in the area and propose practicable design features (i.e., measures that avoid and minimize adverse impacts or incidental take). Design features can originate from forest plan direction, best management practices, agreed upon changes to the project design, and/or other sources. Consider "practicable" to mean "effective" and "feasible" for avoiding and minimizing effects and incidental take while still accomplishing the purpose of the project. No specific design feature is required for any project. The line officer retains authority to determine which, and extent of, design features to use, but additional steps are needed if there will be measurable negative effects to bird populations (see #3 below). Examples of design features that may be used are:

a. Alter the season of activities to minimize disturbances during the breeding season, generally excluding work during some or all parts of March-July as practicable.
b. Alter project area to lessen impact to habitats by reducing boundary of area treated, staging treatments to be spread out over multiple years, and/or by treating in a mosaic pattern, leaving pockets of untreated vegetation.
c. Retain snags, downed logs, and other habitat elements for feeding, cover, roosting, and/or nesting structures (such guidance may already exist in plan components).
d. Buffer riparian areas and/or modify treatments in riparian areas.
e. Avoid and buffer around known nest locations (surveys are discretionary unless required by the forest plan).
f. Limit ground disturbance by limiting skid trails, utilizing low-ground pressure equipment, cut-to-length logging systems, or other systems to minimize the amount of ground disturbed.
g. Employ Best Management Practices that reduce impacts to habitats and soils (modifying activities based on slope, riparian areas, etc.).
h. Employ methods that minimize or prevent the pollution or detrimental alteration of the environment.

3. Determine if measurable negative effects on populations are expected. Consider referencing Region 4 Bird Monitoring Reports (https://www.fs.usda.gov/detail/r4/plants-animals/wildlife/?cid=FSEPRD940029), forest Biennial Monitoring Evaluation Reports, Regional Larger-scale Monitoring Reports, the Rapid Avian Information Locator (RAIL - Rapid Avian Information Locator (pointblue.org)), and forest plan direction. If measurable negative effects at the population level will occur, contact and coordinate with the appropriate FWS Ecological Services office to identify additional measures that will lessen the amount of take. These measures must be incorporated into the project design features.

II. Within NEPA analysis:

Describe (e.g., in Biological Evaluation/Specialist Report or Biological Impact Report), how design features satisfy MBTA/EO by avoiding and minimizing adverse impacts as practicable and identify if the project would have measurable negative effects to populations. A site survey is not required or necessary unless scoping identifies issues needing additional information. Evaluate and disclose the potential beneficial, short-term, long-term, and cumulative effects of the project (with the incorporated design features and conservation measures) on, at a minimum, Birds of Conservation Concern.