



OGMCOAL DNR <ogmcoal@utah.gov>

Fwd: [EXTERNAL] Re: Burrowing Owl Mitigation Guidance

Todd Miller <toddmiller@utah.gov>
To: OGMCOAL DNR <ogmcoal@utah.gov>

Mon, Apr 6, 2020 at 8:50 AM

Regarding Emery Deep's Full Extraction (Task #6063) burrowing owl information from the U.S. Fish & Wildlife Service:

----- Forwarded message -----

From: **Moore, Joseph D** <joseph_moore@fws.gov>
Date: Fri, Apr 3, 2020 at 1:05 PM
Subject: Re: [EXTERNAL] Re: Burrowing Owl Mitigation Guidance
To: Todd Miller <toddmiller@utah.gov>
Cc: Kritz, Kevin <kevin_kritz@fws.gov>

Hi Todd,

See the attached power point and the text below for input from Kevin Kritz, a biologist with our Migratory Bird Management Office in Denver, on the M-opinion. Kevin would also like to do a call alter this spring to discuss survey and mitigation work. I will follow up to set up a time/date.

Let me know if there are any updates.

Thank you,

Joe

Here are my edits and responses to the summary text that Todd Miller sent to you My input and comments, in response to what Todd wrote, are in red font as follows:

The M Opinion from the Dept. of the Interior has effectively changed the interpretation of "take" to the point that "incidental take" is no longer prohibited.

The M Opinion was a legal opinion from a Department of the Interior (DOI) Solicitor which concludes that only direct take of migratory birds, nests, eggs, young is prohibited under Migratory Bird Treaty Act (MBTA). Further DOI has decided to make the key finding from the M Opinion a DOI policy that applies to all DOI agencies, including U.S. Fish and Wildlife Service (USFWS). This is a DOI policy, it is not a law or regulation. Hence, other take of migratory birds, that has previously been referred to as incidental take, is no longer as a matter of policy, considered to be a prohibited form of take under MBTA by DOI.

As such, the incidental taking of burrowing owls by means of mining-induced subsidence, in this case, would not be a prohibited action and so no Take Permits could be needed in a case like this.

Yes per the DOI policy incidental take of burrowing owls, if that were to occur as a result of mining-induced subsidence would not be a prohibited act or a prohibited form of take under MBTA. This is because the mining is an otherwise legal action and the intent of the mine operation is to extract a resource and not to directly cause the take of any burrowing owls. It is not a matter of the mine needing a take permit for such "incidental take" as USFWS does not

issue such permits. Rather it means that if the mine goes forward with its plan and burrowing owls are taken incidental to its otherwise legal action that USFWS, Office of Law Enforcement would not open an investigation into this take, and they would not refer it to the U.S. Department of Justice for possible prosecution under MBTA.

You also mentioned that this definition of take does not change the law, merely the Dept. of Interior's interpretation of the law and is therefore subject to change under future administrations.

That is correct but to be more exact the DOI is as a matter of policy saying that incidental take is not a prohibited form of take under MBTA. Yes since the current DOI position is based on a policy call by DOI it does mean that in a future Presidential administration that this current DOI policy could be overturned or reversed.

Other federal departments may currently have other interpretations so any actions taken on lands administered by other departments (such as Forest Service land) could potentially have other consultation outcomes.

The M Opinion is a policy of the DOI and this policy would not apply to any other Executive Departments of the Federal Government, unless they were to make a decision for their Department to adopt the DOI policy as their own. Since U.S. Forest Service is in the U.S. Department of Agriculture (USDA) the DOI policy would not apply to anything the U.S. Forest Service does unless USDA were to adopt the DOI policy (and to date I am not aware of them having done that). For actions involving USDA lands we would recommend that the project proponent consult directly with USDA about this matter.

Finally, the USFWS can provide voluntary recommendations in the event mitigation is implemented.

This is not accurate as stated. USFWS is always free to work with any other party, agency, company, individual, proponent, etc. as long as they approached us on a voluntary basis and requested our USFWS input to conserve migratory birds. Given that USFWS is free to provide voluntary guidance, recommendations, suggestions, etc. to any outside party on anything related to migratory birds if requested. This would include migratory bird survey guidelines, conservation measures that could be implemented to reduce impacts or effects to migratory birds while completing some action or project, and input on voluntary offsets that a party wants to (strictly on a voluntary basis) implement given effects to migratory birds resulting from a project or action they are implementing.

Also, keep in mind that while the M Opinion applies generally to migratory birds protected under MBTA, it does not apply to certain migratory birds such as eagles (which are also protected separately under the Bald and Golden Eagle Protection Act) and any migratory birds that are federally listed under the Endangered Species Act.

Also I attached a short PowerPoint presentation on the MBTA and the M Opinion that I would like you to send forward to Todd Miller.

Last I think that sometime later this spring you and I should do a phone call with Todd Miller to further discuss ideas for BUOW survey and mitigation work.

Joe Moore
Fish & Wildlife Biologist

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Utah Field Office
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West Valley City, Utah 84119
(385) 285-7921

From: Todd Miller <toddmiller@utah.gov>
Sent: Tuesday, March 3, 2020 12:55 PM
To: Moore, Joseph D <joseph_moore@fws.gov>
Subject: Re: [EXTERNAL] Re: Burrowing Owl Mitigation Guidance

Thanks for the clarification Joe. Just to summarize and document what we talked about on the phone:

The M Opinion from the Dept. of the Interior has effectively changed the interpretation of "take" to the point that "incidental take" is no longer prohibited. As such, the incidental taking of burrowing owls by means of mining-induced subsidence, in this case, would not be a prohibited action and so no Take Permits could be needed in a case like this. You also mentioned that this definition of take does not change the law, merely the Dept. of Interior's interpretation of the law and is therefore subject to change under future administrations. Other federal departments may currently have other interpretations so any actions taken on lands administered by other departments (such as Forest Service land) could potentially have other consultation outcomes. Finally, the USFWS can provide voluntary recommendations in the event mitigation is implemented.

Does that sound about right? Did I miss anything? I appreciate your research into this and I will follow up with you when we have a plan finalized. If you do come across anything that can help us structure a mitigation plan (i.e. number of artificial burrows per acre of disturbed habitat), I would certainly appreciate the input.

Thanks!

On Mon, Mar 2, 2020 at 10:02 AM Todd Miller <toddmiller@utah.gov> wrote:

Hi Joe,

I do have a copy of what I think you're referring to and I've attached it to this email. However, I was expressly told that this plan was NOT mitigation, rather it was a study that was developed to see if subsidence would even impact the owls at all. Mitigation plans could then be implemented (or deemed unnecessary) based on the results of this study. However, after installing the boxes, the company changed its mine plan and never wound up undermining that area and subsidence never occurred. So they obviously didn't ever get any data relating to how subsidence would have impacted the owls and now we are basically back at square one. I know they are sending a biologist to do an owl survey in a few weeks and based on those results they will start mining the area later in the spring with subsidence likely to begin in early summer. Let me know what you think.

Thanks!

On Tue, Feb 25, 2020 at 3:15 PM Moore, Joseph D <joseph_moore@fws.gov> wrote:

Hi Todd,

I was looking through our records. When there was going to be possible subsidence at Emery , we have this note from December 2009:

Site visit and meeting to discuss mitigation options for burrowing owl (BUOW). Patrick will draft mitigation plan and send to team for review.

Do you know if this mitigation plan was completed and do you have a copy of it?

Thanks,

Joe

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Fish & Wildlife Biologist

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From: Todd Miller <toddmiller@utah.gov>
Sent: Thursday, February 6, 2020 2:51 PM
To: Moore, Joseph D <joseph_moore@fws.gov>
Subject: Re: [EXTERNAL] Re: Burrowing Owl Mitigation Guidance

Hey Joe,

I'm just checking in on this to see if you've got any information for me about what burrowing owl mitigation would look like. Or would a take permit that the company can have in-hand be a better route to go?

Thanks!

On Wed, Jan 22, 2020 at 4:04 PM Todd Miller <toddmiller@utah.gov> wrote:

The more immediate project area covers roughly 1,200 acres of land, most of which would potentially subside. We have data from circa 2008 showing prairie dog habitat in about 30 acres of that area but it has not been surveyed since then. The area will be surveyed for prairie dogs and owls this spring in anticipation of subsidence mining starting thereafter. Because it covers so much land, they obviously won't be mining it all in one year so that's why I'm wanting to continue the monitoring/surveying each year moving forward. No owls have been seen at this location but they have been seen in a different section of the mine about 10 years ago, so we know they have been in the general area. The latter project is about 2,900 acres and has not been surveyed yet as far as I know.

On Wed, Jan 22, 2020 at 1:58 PM Moore, Joseph <joseph_moore@fws.gov> wrote:

Thanks for the information. Have these areas been surveyed before? Do you have an estimate of how many owls, burrows, or acres of habitat may be affected?

Thanks,

Joe

On Wed, Jan 22, 2020 at 9:50 AM Todd Miller <toddmiller@utah.gov> wrote:

Hi Joe,

Thank you for your response. Right now we don't have a concrete plan to work off of but the company is currently working toward permitting two projects in burrowing owl habitat. One they hope to have permitted this spring for work to begin immediately, with subsidence occurring later this year. The other is a much larger area that they are currently working through the NEPA process with the BLM. That project wouldn't see subsidence for probably about 10 years. I'd like to get a monitoring plan implemented this spring that could be carried over and applied to both projects as necessary. We have discussed multiple potential monitoring plans and the one I am leaning towards right now involves a baseline survey every five years for the entire project area as well as annual surveys done 12 months in advance of specific areas that are to be subsided. If active prairie dog habitat is found during those surveys in an area that is to be subsided during a nesting season, then mitigation would be completed prior to any subsidence mining taking place there. The company seemed fine with that but was a bit hesitant to agree to it without knowing what the mitigation would entail.

In short, due to the changing nature of mine plans, it's hard to predict when subsidence will occur exactly so I'd like to have a plan in place to address all possibilities. They are planning to send out a biologist to do an owl survey this spring with a project proposal likely to immediately follow for the first project. So we're looking at initial approval and start up being sometime in April or May, I'd guess. Subsidence would probably begin during the later part of the 2020 nesting season and continue into the offseason, but that would be dependent on the results of the owl survey. Any thoughts you have would be appreciated.

Thanks!

On Tue, Jan 21, 2020 at 12:07 PM Moore, Joseph <joseph_moore@fws.gov> wrote:

Hi Todd,

Thanks for contacting us about burrowing owl mitigation. Could you provide more details on when you would like to have your mitigation and monitoring plan completed and when approximately when you expect the subsidence, if it happens, to occur?

Thank you,

Joe

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Joe Moore

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MBTA and M Opinion April 1 2020.pptx
72K

Migratory Bird Treaty Act (MBTA) and the DOI M Opinion

**Kevin Kritz
Wildlife Biologist
U.S. Fish and Wildlife Service
Region 6, Migratory Bird Management Office
Denver, CO 80225**



Migratory Bird Treaty Act (MBTA)

- ◆ 16 USC 703-712; enacted in 1918
 - ◆ Implements 4 treaties signed between U.S., Great Britain (on behalf of Canada), Mexico, Japan, and Russia
 - ◆ Administered by U.S. Fish and Wildlife Service (USFWS)
 - ◆ Affords protection to all migratory, native North American birds
 - ◆ Only criminal penalties; no civil provisions
- 

Migratory Bird Treaty Act (MBTA)

◆ Protects 1027 species including:

- Waterfowl, shorebirds, songbirds, raptors, wading birds, seabirds, etc.
- Applies to adults, eggs, young, active nests, and parts
- List of federally protected migratory birds is in 50 CFR Part 10.13
- Species not protected under MBTA include:
 - introduced/exotic bird species such as house sparrow, European starling, rock dove, Eurasian collared-dove
 - Non-migratory upland game birds (e.g. grouse, turkey)

Migratory Bird Treaty Act (MBTA)

◆ Prohibitions (16 USC Section 703)

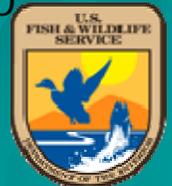
*Unless and except as permitted by regulation, it shall be unlawful to pursue, hunt, take, capture, kill, attempt to **take**, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such bird...*

Migratory Bird Treaty Act (MBTA)

- Prohibits the “take” of bird species protected under MBTA (unless permitted by USFWS)
- Definition of “take”:
 - ◆ *To pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt any of these acts*
- No civil penalty provisions (criminal penalties only)

M Opinion (2017) – The MBTA does not Prohibit Incidental Take

- ◆ Memorandum M-37050- issued by Department of the Interior (DOI) on December 22, 2017
- ◆ M-37050 states that -MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to intentional actions that have as their purpose the taking or killing of migratory birds, their nests, or eggs
- ◆ M-37050 overturned the previous DOI Solicitors Opinion (M-37041)- *Incidental Take Prohibited under the MBTA*- issued January 10, 2017- which concluded that the MBTA's broad prohibition on taking and killing of migratory birds by any means or in any manner includes incidental taking and killing
- ◆ M-37041 was suspended on February 6, 2017 by DOI- Hence, M-37050 permanently withdraws and replaces M-37041



M Opinion – The MBTA does not Prohibit Incidental Take (cont.)

- ◆ U.S. Fish and Wildlife Service (USFWS) Principal Deputy Director Greg Sheehan issued a memo directed to USFWS on April 11, 2018:

We interpret the M Opinion to mean that the MBTA's prohibitions on take apply when the purpose of an action is to take migratory birds, their eggs, or nests. Conversely the take of birds, eggs, or nests occurring as the result of an activity, the purpose of which is not to take birds, eggs, or nests, is not prohibited by MBTA.

- ◆ The Service mission is to work with others to conserve, protect, and enhance fish, wildlife, and plants, and their habitats- Migratory bird conservation remains an integral part of our mission
- ◆ Voluntary Conservation – the Service will continue to work with any partner that is interested in voluntarily reducing impacts to migratory birds and their habitats



M Opinion – The MBTA does not Prohibit Incidental Take (cont.)

- ◆ The M Opinion (M-37050) is not a regulation or law, it is a DOI Solicitors opinion that has become DOI policy
- ◆ At present as a matter of DOI policy the take prohibition under MBTA does not apply to incidental take of migratory birds, eggs, nests
- ◆ This DOI policy only applies directly to DOI and agencies under DOI
- ◆ It does not apply to the other 14 Executive Departments of the U.S. Government- unless they separately and formally adopt the DOI policy

