

From: <Michael_Green@fws.gov>
To: <Tami_TateHall@r1.fws.gov>
Date: 8/4/05 11:02AM
Subject: Re: Fw: MBTA permit requirements

James,

There is no MOU that FWS has with BR in regard to MBTA. The only special arrangement under MBTA that any Federal Agency has currently is between FWS and DOD. There is an MOU between the FWS and BOR that is in draft form under the Executive Order 13186 (Responsibilities of Federal Agencies ... towards migratory birds), but that is far from being final, and the drafts are being carefully guarded so you would likely not be able to get a copy of it -- and it probably wouldn't be helpful in this case anyway.

Back to the basics of MBTA -- there is no kind of permit that we could issue under MBTA that covers you for incidental take of birds or their habitats that might be caused by your construction activities. Such a permit does not exist. We issue a lot of intentional take permits -- hunting, scientific collecting, tribal use of feathers, falconry, etc., but not for unintentional takes.

Second, as Tami points out, her permit authority only applies to acts within the US and territories, anyway.

I've gotten mixed messages on whether or not MBTA even covers habitats of birds, in contrast to the birds themselves.

The lawsuit could be an interesting one. There must be legal precedent here, what with other cross-border water issues such as at Nogales, AZ, and other issues that have arisen over the Lower Colorado River and the Gulf of California delta. DOI solicitors could help you with the applicability of MBTA across the border and in regard to our Treaty with Mexico (Convention for the Protection of Migratory Birds and Game Mammals -- 1936).

To sum up, there is no permit we can issue to cover you if you kill birds incidental to your construction activities, in the US or elsewhere. You are, nevertheless, still liable under MBTA in the US -- killing birds incidentally is a violation of the act. We therefore always recommend that work be done when it will have the least amount of impact, i.e. outside of the nesting season. As for disrupting habitats and therefore birds in Mexico as a result of your work -- that's a question best left to our solicitors.

There is nothing that would prevent BR from entertaining the notion of a mitigative agreement with Mexico, it would seem. The whole situation sounds entirely artificial, but if a very productive wetland will dry up as a result of your activity, why not consider sharing a bit of water to keep the wetland going? We have, after all, usurped a good deal of Colorado River water over the years.

Mike Green
Regional Landbird Biologist
USFWS, Pacific Region
911 NE 11th Ave

Portland, OR 97232-4181

Office: 503-872-2707; 503-231-6164
FAX: 503-231-2019 Cell: 503-805-0213
michael_green@fws.gov

Tami
TateHall/RO/R1/FW
S/DOI
08/04/2005 09:03
AM

To
Loren Hays/CFWO/R1/FWS/DOI@FWS
cc
Carol A
Roberts/CFWO/R1/FWS/DOI@FWS,
Michael Green/RO/R1/FWS/DOI@FWS
Subject
Re: Fw: MBTA permit requirements
(Document link: Michael Green)

I do not have authority to issue permits to/for a foreign country.

We might be involved in some of the review. I've copied Mike Green, our landbird biologist, on this. He might have some additional insight (or may have contributed to some international bio reviews).

Tami

Loren
Hays/CFWO/R1/FWS/
DOI
08/03/2005 04:30
PM

To
Tami TateHall/RO/R1/FWS/DOI
cc
Carol A Roberts/CFWO/R1/FWS/DOI@FWS
Subject
Fw: MBTA permit requirements