Removals of Access to Migratory Bird Treaty Act and Incidental Take Resources on the DOI’s U.S. Fish and Wildlife Service Website

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Removals of Access to Migratory Bird Treaty Act and Incidental Take Resources on the DOI's U.S. Fish and Wildlife Service Website

Overview
The U.S. Department of Interior’s (DOI) U.S. Fish and Wildlife Service (FWS) has removed links and content related to the Migratory Bird Treaty Act and to “Incidental Take” from three webpages in the FWS domain. The FWS “Incidental Take” page itself has also been removed. Additionally, a “public involvement initiative” website of FWS, birdregs.org, that focused on the incidental take of migratory birds, is no longer accessible. The website changes described in this report occurred between December 28, 2017 and April 6, 2018.

Description of Changes
The Migratory Bird Treaty Act of 1918 (MBTA) implemented the 1916 Convention between the U.S. and Great Britain (for Canada) for the protection of migratory birds. Later amendments implemented treaties between the U.S. and Mexico, the U.S. and Japan, and the U.S. and the Soviet Union (now Russia). The original statute established a Federal prohibition, unless permitted by regulations, to “pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird.” (16 U.S.C. § 703). The MBTA is administered by the Department of Interior, acting through the Fish and Wildlife Service.

Beginning in late December 2017 through early April 2018, webpages in the FWS domain associated with Energy Development, Habitat Conservation and Birds were altered to remove links to the Migratory Bird Treaty Act and to resource pages relating to “incidental take.” The FWS “Incidental Take” page itself has also been removed. In addition, all content, images and links were removed on the BirdRegs.org website--referenced in the webpage footer as a “public involvement initiative” of FWS and in the header as “An open public conversation about the incidental take of migratory birds”; the birdregs.org website was subsequently removed. While information on the Migratory Bird Treaty Act and Incidental Take still exists on the FWS website, access to them has been reduced.

1 A FWS online glossary [https://www.fws.gov/midwest/Endangered/glossary/index.html](https://www.fws.gov/midwest/Endangered/glossary/index.html) includes the following definitions of “Take” and “Incidental Take”: ‘Take - from Section 3(18) of the Federal Endangered Species Act: “The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” ‘Incidental Take: Take that results from, but is not the purpose of, carrying out an otherwise lawful activity.’
These changes are significant in light of Memorandum M-37050, issued by the DOI Solicitor's office on December 22, 2017 and titled “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take”, which concludes that the MBTA's “prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.” Memorandum M-37050 reversed the January 10, 2017 DOI Solicitor opinion, Memorandum M-37041, issued in the final days of the previous administration, which states “In sum, the MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing.” ² (See Appendix for additional information and actions related to these opinions.)

The notable changes to the five webpages are summarized here:

1. **Removed link text and links to Migratory Bird Treaty Act from two FWS Ecological Services website pages**
   a. Removed link text and link to “Migratory Bird Treaty Act” page from a page listing Energy Development Permits, Policies, and Authorities administered by the FWS (Page 1)
   b. Removed link text and link to “Migratory Bird Treaty Act” page from a page listing the authorities under which FWS biologists carry out conservation planning work (Page 2)

2. **Removed menu text, menu links, and webpage related to Incidental Take from FWS Birds website**
   a. Removed link text and links on the FWS Birds website to its “Incidental Take” page from the Management menu and the Procedures/Policies menu (Page 3)
   b. Removed “Incidental Take” webpage, subtitled “MIGRATORY BIRD PROGRAM PROVIDES VOLUNTARY GUIDANCE TO HELP PROJECT PROPONENTS REDUCE INCIDENTAL TAKE” (Page 4)

3. **Removed access to resources on Incidental Take from Birdregs.org website**
   a. Removed all content, links and images on BirdRegs.org webpage including the header “An open public conversation about the incidental take of migratory birds;” birdregs.org website subsequently was rendered unavailable. (Page 5)

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² Memorandum M-37041, along with three other Solicitor opinions, was suspended and temporarily withdrawn by the Acting Secretary of the Interior on February 6, 2017, pending review by agency officials, until the issuance of M-37050 on December 22, 2017. The DOI “Solicitor's Opinions” webpage https://www.doi.gov/solicitor/opinions/ now includes only the brief suspension memo under its M-37041 listing, not the M-37041 Opinion itself.
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**Appendix: Summary of Recent Actions Relating to the Migratory Bird Treaty Act**
Detailed Description of Changes

Page 1: Energy Development Laws and Policies

- **URL:**
  [https://www.fws.gov/ecological-services/energy-development/laws-policies.html](https://www.fws.gov/ecological-services/energy-development/laws-policies.html)
- Side-by-side View: 11/7/18 - 2/27/18
- Change occurred between **February 26, 2018 8:38 PM ET** and **February 27, 2018 8:47 PM ET**

**Screenshot 1.1**


**Internet Archive’s Wayback Machine:** previous version from [February 27, 2018](https://web.archive.org/web/20180227004514/https://www.fws.gov/ecological-services/energy-development/laws-policies.html) (UTC) and current version from [February 28, 2018](https://www.fws.gov/ecological-services/energy-development/laws-policies.html) (UTC)
Page 2: Conservation Planning

- **URL:** [https://www.fws.gov/ecological-services/habitat-conservation/cp.html](https://www.fws.gov/ecological-services/habitat-conservation/cp.html)
- **Side-by-side View:** 11/7/2017 - 2/28/2018
- **Change occurred between February 26, 2018 8:38 PM ET and February 27, 2018 8:47 PM ET**

**Screenshot 2.1**


**Internet Archive’s Wayback Machine:** previous version from **February 27, 2018** (UTC) and current version from **February 28, 2018** (UTC)
Page 3: Birds

- URL: https://www.fws.gov/birds/
- Changes occurred between December 28, 2017 5:45 PM ET and March 28, 2018 7:33 PM ET

Screenshot 3.1
(3.1a) Removed “Managing Incidental Take” link text and link URL from “Management” dropdown menu. Not pictured: removed “Managing Incidental Take” link text and link URL from the sidebar of the “Management” page of the FWS Birds website. The links had directed to the “Incidental Take” webpage of the FWS Policies & Regulations subdomain of the FWS Birds website (see Page 4 of this report).
Internet Archive's Wayback Machine: previous version from December 28, 2017 (UTC) and current version from March 28, 2018 (UTC)

Screenshot 3.2
(3.2a) Removed “Incidental Take” link text and link URL from “Policies and Regulations” dropdown menu. Not pictured: removed “Incidental Take” link text and link URL from the sidebar of the “Policies and Regulations” page of the FWS Birds website. The links had directed to the “Incidental Take” webpage of the FWS Policies & Regulations subdomain of the FWS Birds website (see Page 4 of this report).
Internet Archive’s Wayback Machine: previous version from December 28, 2017 (UTC) and current version from March 28, 2018 (UTC)
Page 4: Incidental Take

- URL: [https://www.fws.gov/birds/policies-and-regulations/incidental-take.php](https://www.fws.gov/birds/policies-and-regulations/incidental-take.php)
- Change occurred between December 28, 2017 5:45 PM ET and January 29, 2018 9:23 PM ET

**Screenshot 4.1**

(4.1a) Removed webpage titled “Incidental Take” and subtitled “MIGRATORY BIRD PROGRAM PROVIDES VOLUNTARY GUIDANCE TO HELP PROJECT PROPONENTS REDUCE INCIDENTAL TAKE”; URL now leads to a page with the notice “404 Error/Page not found.” Internet Archive Wayback Machine links to last available Incidental Take page on December 28, 2017.
Internet Archive’s Wayback Machine: previous version from December 28, 2017 (UTC) and current version from January 30, 2018 (UTC)
Page 5: Birdregs.org

- URL: http://birdregs.org/

**Screenshot 5.1**
(5.1a) Removed all content, links and images on BirdRegs.org webpage including the header “An open public conversation about the incidental take of migratory birds” along with three boxes with text and links labeled “The Issue,” “The Conversation,” and “The Process” respectively. As of March 3, 2017 through April 6, 2018, URL opens to blank page with the words “BirdRegs.org is currently inaccessible while undergoing maintenance.”
BirdRegs.org is currently inaccessible while undergoing maintenance.

**Internet Archive’s Wayback Machine:** previous version from January 22, 2017 (UTC) and above version from March 3, 2017 (UTC) through April 6, 2018 (UTC).
Screenshot 5.2
(5.2a) Sometime between April 6, 2018 and August 28, 2018, the birdregs.org website itself became unavailable. An August 28, 2018 realtime snapshot returned a message “This site can’t be reached” and “birdregs.org’s server IP address could not be found.”

Internet Archive's Wayback Machine: previous version from April 6, 2018, no captures since.
Real-time capture: since August 28, 2018 returns “This site can’t be reached” message.
Appendix: Summary of Recent Actions Relating to the Migratory Bird Treaty Act

The Migratory Bird Treaty Act of 1918 (MBTA) implemented the 1916 Convention between the U.S. and Great Britain (for Canada) for the protection of migratory birds. Later amendments implemented treaties between the U.S. and Mexico, Japan and the Soviet Union (now Russia). The original statute established a Federal prohibition, unless permitted by regulations, to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird." (16 U.S.C. § 703)

On January 10, 2017, in the final days of the Obama Administration, the DOI Solicitor released Memorandum M-37041 detailing “... the Department of the Interior’s legal analysis supporting FWS’s long-standing interpretation that the MBTA prohibits incidental take.” Memorandum M-37041, along with three other Solicitor opinions, was suspended and temporarily withdrawn by the Acting Secretary of the Interior on February 6, 2017, pending review by agency officials. (Of note, the “DOI Solicitor's Opinions” webpage includes only the brief suspension memo under its M-37041 listing, not the M-37041 Opinion itself.) On December 22, 2017, the DOI Solicitor's office released Memorandum M-37050, titled “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take”, an opinion reversing the conclusion of the January 2017 memo, stating that the Migratory Bird Treaty Act only prohibits those activities that “have as their purpose the taking or killing of migratory birds, their nests, or their eggs.” On April 11, 2018, the FWS issued a follow-up guidance document consistent with M-37050 with regard to incidental take under the MBTA, while stating that “Migratory bird conservation remains an integral part of our mission,” and pointing to provisions of other acts and environmental review processes that separately address impacts on bird populations.

Responses to the issuance of Memorandum M-37050 have included the following:

- On January 10, 2018, seventeen former DOI officials sent a letter to Secretary Zinke, stating “We are, each and all, very concerned by the Interior Department’s December 22, 2017 announcement of a new legal memorandum (M-37050) reinterpreting the Migratory Bird Treaty Act.”

- On February 8, 2018, a letter from 513 national, regional and state conservation and other groups was presented to Congress urging defense of the MBTA and opposition to “any effort that undermines the ability to address the incidental take of birds under the MBTA.”
On April 4, 2018, ten members of the Senate sent a letter urging Secretary Zinke to “reconsider” the December 2017 opinion and to “cease any corresponding efforts to change agency rules or guidance under the MBTA.”

On April 19, 2018, sixty-two members of the House of Representatives sent a letter to Secretary Zinke closely matching that of the senators’.

On May 24, 2018, these four conservation organizations as well as the NRDC and National Wildlife Federation filed challenges to the December 2017 opinion.

On September 5, 2018, eight state Attorneys General filed suit against the DOI seeking to vacate the December 2017 opinion, which “harms the States by depriving them of the MBTA’s protections of migratory birds that engage in breeding, feeding, and sheltering activities as those birds migrate within and through their territories.”