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The Swinging Pendulum of Wildlife Conservation Policy

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**ABSTRACT**

*The last 20 months have seen a whirlwind of change from our Executive Branch in a variety of contexts. Federal wildlife conservation policy is no exception. Three areas exemplify the about-face that the Trump Administration has taken with respect to wildlife conservation. First, while the Obama Administration interpreted the scope of criminal liability under the Migratory Bird Treaty Act broadly, the Trump Administration has taken a rather narrow interpretation of such liability. Second, the Trump Administration has rolled back the expansive natural-resources mitigation policies espoused by the Obama Administration, eliminating the controversial goal of “net conservation gain.” Third, the Trump Administration is currently taking steps to modify the comprehensive land use plan amendments specific to the greater sage-grouse. This paper explains the significant shifts that have occurred in these three areas and their implications for the regulated community.*

# Introduction

No one can accuse the Trump Administration of being sedentary. At times, the rapid pace of the rollbacks, withdrawals, and about-faces can be breathtaking. Federal wildlife policy has not been immune to such changes. Three high-profile areas that have been the target of significant revisions are (1) the scope of liability under Migratory Bird Treaty Act (MBTA), (2) natural-resources mitigation policies, and (3) conservation of the greater sage-grouse through federal land use plan amendments. These changes, reminiscent of a swinging pendulum, have significant ramifications for regulated entities.

# Migratory Bird Treaty Act Liability

With considerable outcry and controversy, the pendulum of federal conservation policy has made a significant swing regarding the scope of actions that are subject to criminal liability under the MBTA. Consistent with the holdings of some federal courts, the Obama Administration took the position that the scope of the MBTA’s liability was very broad. Supported by the decisions of other federal courts, the Trump Administration has taken the exact opposite position.

**Statutory Prohibition**. The MBTA was adopted 100 years ago to protect migratory birds from unregulated hunting, spurred on by the extinction of the passenger pigeon through market-driven hunting. The statute carries out the United States’ commitment to four international conventions with Canada, Japan, Mexico, and Russia, respectively, which protect birds that migrate across international borders.[[1]](#footnote-1) The MBTA applies to over 1,000 species of migratory birds native to the United States or its territories that are specifically identified in the aforementioned treaties. Protected species include songbirds, waterfowl, shorebirds, seabirds, wading birds, and raptors.[[2]](#footnote-2)

The MBTA makes it unlawful to “pursue, hunt, take, capture, kill, attempt to take, capture or kill, [or] possess . . . any migratory bird or any part, nest, or egg of any such bird,” named in the four treaties, unless expressly permitted by federal regulations.[[3]](#footnote-3) The applicable regulations define “take” to mean to “pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to” do any of the foregoing acts.[[4]](#footnote-4) These prohibitions do not depend on the location of the action; they apply equally to actions on federal and non-federal land.

**Enforcement Provisions**. The MBTA imposes significant penalties on violators of the Act. Under the general misdemeanor provision of the MBTA, a violator may be subject to penalties of up to $15,000, imprisonment for up to six months for an unauthorized take of a protected bird, or both, regardless of intent.[[5]](#footnote-5) Under the felony provision of the MBTA, whoever knowingly takes a protected migratory bird with intent to sell such bird or whoever knowingly sells a protected migratory bird may be subject to fines of up to $250,000 ($500,000 for corporations), imprisonment for up to two years, or both.[[6]](#footnote-6) The statute’s take prohibitions and penalties for prohibited take are enforced by the Office of Law Enforcement of the U.S. Fish and Wildlife Service (USFWS) through criminal prosecution by the U.S. Department of Justice (DOJ) in federal court. There is no provision for civil liability under the MBTA, and the statute does not create a private right of action to enjoin activities that might violate its provisions.[[7]](#footnote-7)

**Permit Provisions**. Currently, permits may be obtained to, among other things, import migratory birds, collect migratory birds for scientific purposes, or destroy depredating (i.e., predatory or destructive) migratory birds.[[8]](#footnote-8) In addition, “special purpose” permits may be obtained for activities related to migratory birds, parts, nests, or eggs when there is “a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.”[[9]](#footnote-9) However, permits are not generally available to authorize the injury or death of migratory birds during otherwise lawful activities―such as mining, oil and gas exploration and development, and operation of wind power and solar facilities―which is commonly referred to as incidental take.[[10]](#footnote-10)

**Circuit Split**. Over the last few decades, a circuit split has developed regarding the issue of whether incidental take falls within the scope of the MBTA’s take prohibition. On the one hand, the Second and Tenth circuits have held that entities can be held liable for take that occurs during otherwise lawful activities.[[11]](#footnote-11) The Fifth Circuit has reached the opposition conclusion, holding that “take” under the MBTA is limited to deliberate acts done directly and intentionally to migratory birds.[[12]](#footnote-12) The Fifth Circuit agreed with previous decisions from the Eighth and Ninth circuits, which had held that habitat destruction or modification that indirectly resulted in the death of migratory birds was not a violation of the MBTA.[[13]](#footnote-13) In particular, the Ninth Circuit stated that the definition of take “describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918. The statute and regulations promulgated under it make no mention of habitat modification or destruction.”[[14]](#footnote-14) The Eighth Circuit agreed with this language from the Ninth Circuit’s decision.[[15]](#footnote-15)

Note that this circuit split is sometimes framed as a disagreement as to whether the MBTA is a “strict liability” statute. But, as the Fifth Circuit noted, this is a non-sequitur.[[16]](#footnote-16) The Fifth Circuit expressly agreed with the other courts that the MBTA is a strict liability statute for which no criminal intent is required.[[17]](#footnote-17) The circuit split is about what acts fall under the take prohibition: any act that results in the death of a migratory bird or only those deliberate acts done directly and intentionally to migratory birds.[[18]](#footnote-18)

**Dueling Solicitor’s Opinions**. In the waning days of the Obama Administration, the then-Solicitor of the Interior Hilary Tompkins issued Solicitor’s Opinion M‑37041―*Incidental Take* *Prohibited Under the Migratory Bird Treaty Act*.[[19]](#footnote-19) This opinion concluded that “the MBTA’s broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing.”[[20]](#footnote-20) Less than a month later, the Trump Administration temporarily suspended and withdrew this M-Opinion, among others.[[21]](#footnote-21) On December 22, 2017, the Acting Solicitor of the Interior Daniel Jorjani issued Solicitor’s Opinion M-37050―*The Migratory Bird Treaty Act Does Not Prohibit Incidental Take*.[[22]](#footnote-22) This M-Opinion reached the exact opposite conclusion as M-37041, finding that the statute’s prohibitions apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs and do not apply to incidental take.[[23]](#footnote-23) Thus, at this time, the position of the Department of the Interior (DOI) is that any migratory bird injuries or mortalities that occur during the course of otherwise lawful activities is not a violation of the MBTA.

Not surprisingly, the new M-Opinion has already been challenged in court. On May 24, 2018, the National Audubon Society, American Bird Conservancy, Center for Biological Diversity, and Defenders of Wildlife filed a lawsuit in federal court in the Southern District of New York seeking declaratory and injunctive relief against DOI, U.S. Fish and Wildlife Service, and Acting Solicitor Jorjani, asserting that that the M-Opinion was arbitrary, capricious, and contrary to law.[[24]](#footnote-24) They have also alleged that DOI violated the notice-and-comment requirements of the Administrative Procedure Act and the requirements of the National Environmental Policy Act (NEPA) in issuing the M-Opinion. On the same day, Natural Resources Defense Council and National Wildlife Federation filed a similar challenge in the same court against the same parties, alleging that the M‑Opinion is arbitrary, capricious, and contrary to law.[[25]](#footnote-25) A few months later, on September 5, 2018, eight states filed a complaint in that court that makes similar allegations against the same parties.[[26]](#footnote-26) It is too early to tell whether or how those lawsuits may affect this issue.

**Practical Implications**. For the time being, one of the practical implications of M‑37050 is that the USFWS’s Office of Law Enforcement will not refer any incidental take of migratory birds to the Department of Justice for prosecution.[[27]](#footnote-27) While the Department of Justice is not bound by the M-Opinion, it is highly unlikely (especially under this Administration) that the Justice Department would independently pursue an MBTA prosecution for incidental take.

Another practical implication is that the USFWS will not have the same leverage to negotiate commitments from project proponents to implement minimization or mitigation measures for migratory birds. In fact, the USFWS issued a guidance memo on April 11, 2018, regarding M-37050, which clarifies that the USFWS may not withhold a permit or request or require mitigation based upon incidental take concerns under the MBTA.[[28]](#footnote-28) It also confirms that the intent to take migratory birds is the determinative factor for liability, not the knowledge that migratory birds will be taken. However, the consideration of impacts to migratory birds will still be required in NEPA analyses, which will likely continue to result in some level of migratory bird conservation in actions authorized by federal agencies.

The reversal of position also has, not surprisingly, resulted in the USFWS no longer pursuing an incidental take permitting program under the MBTA. In May 2015, the USFWS issued a notice of intent to prepare a programmatic environmental impact statement (PEIS) to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds under the MBTA.[[29]](#footnote-29) The USFWS was considering a rulemaking to address various approaches to regulating incidental take of migratory birds. It does not appear that the USFWS made much progress on the PEIS or the proposed permit program in the three years since the notice of intent. In May 2018, in light of DOI’s new position on incidental take, as espoused in M‑37050, the USFWS announced that it is no longer pursuing the PEIS.[[30]](#footnote-30) Thus, if the pendulum swings back the other way in the future (due to successful lawsuits, a change in Administrations, or congressional action), and the scope of liability under the MBTA once again covers incidental take, there will still be no mechanism for the USFWS to authorize such take.

# Mitigation Policy Revocation

Natural-resources mitigation policy is another area in which the differences between the Obama Administration and the Trump Administration are very stark. The reach (some say “overreach”) of the federal agencies’ mitigation policies under President Obama has been significantly retracted by President Trump.

**Obama Administration Mitigation Policy**. From 2013 to 2016, the Obama Administration issued numerous policy directives related to mitigation of impacts to natural resources stemming from the activities of federal agencies. It began with Order 3330 from then-Secretary of the Interior Sally Jewell in October 2013 regarding “*Improving Mitigation Policies and Practices of the Department of the Interior*.” That Secretary’s Order outlined a mitigation strategy that included the following components: “(1) the use of a landscape-scale approach to identify and facilitate investment in key conservation priorities in a region; (2) early integration of mitigation considerations in project planning and design; (3) ensuring the durability of mitigation measures over time; (4) ensuring transparency and consistency in mitigation decisions; and (5) a focus on mitigation efforts that improve the resilience of our Nation’s resources in the face of climate change.”[[31]](#footnote-31)

Order 3330 also directed DOI’s Energy and Climate Change Task Force to develop a coordinated Department-wide, science-based strategy to strengthen mitigation practice and issue a report regarding those efforts within 90 days. Based on that direction, DOI issued a report in April 2014, titled “*A Strategy for Improving the Mitigation Policies and Practices of The Department of the Interior*,” which expanded on the elements of the strategy outlined in Order 3330*.*[[32]](#footnote-32)

On November 3, 2015, President Obama issued a Presidential Memorandum regarding “*Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*.”[[33]](#footnote-33) This memo required specific federal agencies, including DOI, to set a “net benefit goal or, at a minimum, a no net loss goal” for natural resources that are “important, scarce or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives.”[[34]](#footnote-34) The Presidential Memorandum also stated that if a particular resource is irreplaceable, impacts should be avoided altogether.[[35]](#footnote-35) It also directed the USFWS, the Forest Service, and the Bureau of Land Management (BLM) to issue new mitigation policies within a specified period.

In conjunction with the President’s action, DOI issued a new Departmental Manual section on the implementation of landscape-scale mitigation, which directed agency officials to use compensatory mitigation to offset impacts to public lands and to tailor mitigation actions to anticipate and address the impacts of climate change.[[36]](#footnote-36) The DOI manual section paralleled the Presidential Memorandum policy in most respects and added additional instructions to DOI’s bureaus and offices relating to landscape-scale approaches to mitigation and mitigation in the context of a changing climate.

Following the direction of the Presidential Memorandum, the USFWS issued its mitigation policy in November 2016,[[37]](#footnote-37) followed by a compensatory mitigation policy specific to the Endangered Species Act (ESA) in December 2016.[[38]](#footnote-38) Both of these policies embraced the landscape-scale approach to mitigation and the goal of ‘‘net conservation gain.’’ In December 2016, BLM likewise released a manual section and a handbook that provided policy guidance to implement DOI’s Mitigation Policy and echoed the themes of landscape-scale mitigation and net conservation gain (or at a minimum, no net loss).[[39]](#footnote-39) These policy documents were accompanied by an opinion from the Solicitor of the Interior, M-37039, which addressed BLM’s authority under the Federal Land Policy and Management Act to require mitigation when issuing various authorizations for use of the public lands.[[40]](#footnote-40)

**Trump Administration Withdrawal Actions**. The Trump Administration’s actions to dismantle the Obama Administration’s mitigation policy were swift and decisive. On March 28, 2017, President Trump issued Executive Order 13783, “*Promoting Energy Independence and Economic Growth*,” which, among other things, revoked the November 3, 2015 Presidential Memorandum.[[41]](#footnote-41) That Executive Order also directed all agencies to identify agency actions arising from the November 3 Presidential Memorandum and, as appropriate and as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions.[[42]](#footnote-42)

Likewise, on March 29, 2017, Secretary Zinke issued Secretary’s Order 3349, “*American Energy Independence*,” which revoked Secretary’s Order 3330 and directed that all actions taken pursuant to Order 3330 be reviewed for possible reconsideration, modification, or rescission, as appropriate. In response, the USFWS issued a notice in the Federal Register requesting public comment on portions of the agency’s Mitigation Policy and ESA Compensatory Mitigation Policy.[[43]](#footnote-43) After considering the public comments, on July 30, 2018, the USFWS issued notices withdrawing both policies.[[44]](#footnote-44) Acting Solicitor Jorjani also issued a Solicitor’s Opinion, M-37046, withdrawing Opinion M-37039 regarding BLM’s mitigation authority.[[45]](#footnote-45)

On December 22, 2017, Secretary Zinke issued Order 3360, “*Rescinding Authorities Inconsistent with Secretary's Order 3349, ‘American Energy Independence,’*” which represented the next step in implementing Executive Order 13783 and Secretary’s Order 3349. Order 3360 rescinded, among other things, (1) the October 23, 2015 Departmental Manual Part 600, Chapter 6: Landscape-Scale Mitigation Policy (2) the December 22, 2016 BLM manual section on mitigation; and (3) the December 22, 2016 BLM Mitigation Handbook. More recently, BLM issued an Instruction Memorandum, IM 2018-093, which expressly prohibits BLM from requiring compensatory mitigation as a condition of any agency authorization and, even when a project proponent voluntarily offers compensatory mitigation, forbids BLM from accepting monetary payment for such mitigation.

**Practical Implications**. It remains to be seen how this complete about-face on federal mitigation policies will play out. For the most part, the outcome of the Trump Administration’s actions to nullify the Obama Administration’s directives is that mitigation policy will largely revert to the *status quo ante*. Mitigation requirements will largely be defined by relevant statutory regimes and the specific situation of any individual permit or project, with seemingly more leverage provided to the applicant than under the prior policies. However, the BLM Instruction Memorandum seems to go further than just reverting to pre-2013 status by prohibiting BLM from requiring compensatory mitigation, which had become a fairly common practice, or accepting financial contributions as a form of compensatory mitigation. BLM and project proponents will likely struggle to define the appropriate use and extent of compensatory mitigation under IM 2018-093.

# Sage-Grouse Land Use Plan Amendments

**History of the Amendments**. The contentious history of efforts to conserve the greater sage-grouse provides another example a considerable shift in federal wildlife conservation policy. In 2010, USFWS published its listing decision for the greater sage-grouse, indicating that the listing was “warranted but precluded” due to higher listing priorities inside the agency.[[46]](#footnote-46) Although some species have remained on the list of candidate species for decades, that was not the fate of the sage-grouse. In 2011, the U.S. District Court for the District of Columbia approved two settlements between the USFWS and two conservation groups that resolved litigation brought by those groups seeking to expedite USFWS’s final listing determinations for certain candidate and petitioned species.[[47]](#footnote-47) Pursuant to one of the settlements, USFWS agreed to issue a decision on whether to list the greater sage-grouse by the end of Fiscal Year 2015.[[48]](#footnote-48)

With this deadline looming, fears regarding the highly disruptive ramifications of a sage-grouse listing were significant. However, in its “warranted but precluded” decision, the USFWS indicated that the principal regulatory mechanism to assure adequate conservation of the species was the addition of conservation measures in BLM and Forest Service land use plans.[[49]](#footnote-49) Thus, after a multi-year effort, BLM and the Forest Service developed comprehensive amendments to 98 land use plans (78 BLM plans and 20 Forest Service plans) across ten states to incorporate sage-grouse conservation measures into those plans in advance of the USFWS decision.[[50]](#footnote-50) These land use plan amendments successfully resulted in the USFWS not listing the sage-grouse under the ESA.[[51]](#footnote-51) However, they were highly controversial and almost immediately challenged in court.[[52]](#footnote-52)

**Review of the Amendments**. On June 7, 2017, Secretary Zinke issued Secretary’s Order 3353, “*Greater Sage-Grouse Conservation and Cooperation with Western States*.” The purpose of this order was to enhance cooperation between DOI and the states with sage-grouse habitat and to establish a team to review the sage-grouse land use plan amendments and revisions completed on or before September 2015. The DOI Review Team convened pursuant to Secretary’s Order 3353 worked with representatives of Western states to develop recommendations for revisions to various procedures, policies and management plans for sage-grouse conservation and issued a “*Report in Response to Secretarial Order 3353*” on August 4, 2017.[[53]](#footnote-53) That report recommended further investigation of potential plan amendments to best balance sage-grouse conservation and economic development and to make the land use plans more consistent with state sage-grouse plans.

In October and November 2017, the Trump Administration issued notices of intent to further amend the BLM and Forest Service land use plans, respectively, regarding greater sage-grouse conservation.[[54]](#footnote-54) On May 4, 2018, BLM issued notices of availability for draft environmental impact statements (DEISs) and associated resource management plan amendments for six regions: Nevada and Northeastern California, Idaho, Utah, Oregon, Colorado, and Wyoming.[[55]](#footnote-55) The state-by-state approach, which is in contrast to the more uniform approach taken in 2015, reflects the differing level of consistency between the existing sage-grouse amendments and state sage-grouse plans and the desire to tailor the plans to the local conditions and needs. For instance, the Colorado proposed amendments focus on oil and gas development, while the Oregon proposed amendments focus on livestock grazing. The proposed amendments in the other states covered a broader range of topics. The public comment period on BLM’s DEISs and proposed amendments closed on August 2, 2018.

On October 5, 2018, the Forest Service issued its notice of availability of a DEIS and proposed land management plan amendments for the Intermountain and Rocky Mountain regions.[[56]](#footnote-56) While analyzed in a single DEIS, the Forest Service’s proposed amendments are also tailored to the states affected, identifying revisions to certain aspects of the plans on a state-by-state basis. The comment period for the DEIS and proposed amendments ends January 3, 2019.

**Implications**. Assuming that they are finalized as proposed, the revised land use plan amendments will include certain relaxed restrictions on sage-grouse conservation to facilitate increased energy development on and other uses of public lands and provisions that more closely align with the relevant state plans. However, with the specter of a potential ESA listing if the pendulum swings too far, the Trump Administration’s ability to completely undo the prior Administration’s efforts is more limited in the context of the sage-grouse than in other areas. While some of the proposed amendments that allow considerable relief from the stringent requirements of the 2015 plan amendments will undoubtedly garner significant public comment, several areas of the original plan amendments remain unchanged. Whether the ultimate change in direction will be too severe to continue to justify a “not warranted” finding under the ESA remains to be seen.

# Conclusion

Federal wildlife conservation policy is considerably different than it was just two years ago. The Trump Administration’s modifications to DOI’s interpretation of the MBTA, federal mitigation policy, and sage-grouse land use plan amendments are just a few of the examples of how the landscape has changed in this area. The regulated community may benefit from relaxed requirements and restrictions, but these changes also create considerable uncertainty, especially considering that the pendulum will likely swing back the other way at some point in the future.

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1. 16 U.S.C.§ 703(a). [↑](#footnote-ref-1)
2. 50 C.F.R. § 10.13. [↑](#footnote-ref-2)
3. 16 U.S.C. § 703(a). [↑](#footnote-ref-3)
4. 50 C.F.R. §§ 10.2, 10.12. [↑](#footnote-ref-4)
5. 16 U.S.C. § 707(a). [↑](#footnote-ref-5)
6. *Id.* § 707(b). While the statute provides that the fine for knowing violations is $2,000, the Criminal Fines Improvement Act of 1987 increased the potential fines for individuals and corporations. 18 U.S.C. §§ 3559(a), 3571(b)(3), 3571(c)(3). [↑](#footnote-ref-6)
7. *See Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301-02 (8th Cir. 1989). However, citizen plaintiffs may be able to sue the federal government under the Administrative Procedure Act for its failure to comply with the MBTA in federal land management or project permitting activities. *Humane Soc’y of the United States v. Glickman*, 217 F.3d 882, 886 (D.C. Cir. 2000) (citizens can sue a federal agency under the APA for violations of the MBTA); *but see Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (MBTA does not apply to the federal government). [↑](#footnote-ref-7)
8. *See* 50 C.F.R. Part 21. [↑](#footnote-ref-8)
9. *Id.* § 21.27. [↑](#footnote-ref-9)
10. The Service’s regulations authorize take of migratory birds by the Armed Forces that occurs incidental to military readiness activities. 50 C.F.R. § 21.15. [↑](#footnote-ref-10)
11. *See, e.g., United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684-85 (10th Cir. 2010) (oil and gas development); *United States v. FMC Corp.*, 572 F.2d 902, 906-07 (2d Cir. 1978) (pesticide manufacturing). The Tenth Circuit clarified that, to satisfy due-process concerns, the take had to be proximately caused by the conduct of the defendant and that the defendant had to have notice that such conduct could result in a violation of the act. *Apollo Energies*, 611 F.3d at 669. [↑](#footnote-ref-11)
12. *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 488-89 (5th Cir. 2015). [↑](#footnote-ref-12)
13. *Id.* (discussing *Newton Cnty. Wildlife Ass’n v. U.S. Forest Serv.,* [113 F.3d 110, 115 (8th Cir. 1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&SerialNum=1997103657) and *Seattle* *Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991)). [↑](#footnote-ref-13)
14. *Seattle Audubon Soc’y*, 952 F.2d at 302. [↑](#footnote-ref-14)
15. *Newton Cnty. Wildlife Ass’n*, [113 F.3d at 115](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&SerialNum=1997103657). [↑](#footnote-ref-15)
16. *Citgo Petroleum*, 801 F.3d at 493. [↑](#footnote-ref-16)
17. *Id*. at 492. [↑](#footnote-ref-17)
18. *Id*. at 488-89. [↑](#footnote-ref-18)
19. Solicitor’s Opinion M-37041―*Incidental Take* *Prohibited Under the Migratory Bird Treaty Act* (Jan. 12, 2017), available at https://www.eenews.net/assets/2017/02/21/document\_ew\_01.pdf (last visited Sept. 28, 2018) . [↑](#footnote-ref-19)
20. *Id.* at 2. [↑](#footnote-ref-20)
21. Temporary Suspension of Certain Solicitor M-Opinions Pending Review (Feb. 6, 2017), available at https://www.doi.gov/solicitor/opinions/ (last visited Sept. 28, 2018). [↑](#footnote-ref-21)
22. Solicitor’s Opinion M-37050―*The Migratory Bird Treaty Act Does Not Prohibit Incidental Take* (Dec. 22, 2017), available at https://www.doi.gov/solicitor/opinions/ (last visited Sept. 28, 2018). [↑](#footnote-ref-22)
23. *Id.* at 2. [↑](#footnote-ref-23)
24. Complaint for Declaratory and Injunctive Relief, *Nat’l Audubon Soc’y v. U.S. Dep’t of Interior*, No. 1:18-cv-04601 (S.D.N.Y. May 24, 2018). [↑](#footnote-ref-24)
25. Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. Dep’t of Interior*, No. 1:18-cv-04596 (S.D.N.Y. May 24, 2018). [↑](#footnote-ref-25)
26. Complaint for Declaratory and Injunctive Relief, *New York v. U.S. Dep’t of Interior*, No. 1:18-cv-08084 (S.D.N.Y. Sept. 5, 2018). The eight states are New York, California, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, and Oregon. [↑](#footnote-ref-26)
27. The M-Opinion does not change the protections that migratory birds listed under the Endangered Species Act or the Bald and Golden Eagle Protection Act receive, so unauthorized incidental take of those species may still be the subject of a prosecution under those acts. [↑](#footnote-ref-27)
28. U.S. Fish and Wildlife Service, Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act at 1 (April 11, 2018), *available at* https://theiwrc.org/wp-content/uploads/2018/05/m-opinion-memo.pdf (last visited Sept. 28, 2018). [↑](#footnote-ref-28)
29. Notice of Intent, Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032 (May 26, 2015). [↑](#footnote-ref-29)
30. Announcement, Migratory Bird Permits; Programmatic Environmental Impact Statement, 83 Fed. Reg. 24,080 (May 24, 2018). [↑](#footnote-ref-30)
31. Secretary’s Order 3330, Improving Mitigation Policies and Practices of the Department of the Interior at 1 (October 31, 2013). [↑](#footnote-ref-31)
32. Available at https://www.doi.gov/news/upload/Mitigation-Report-to-the-Secretary\_FINAL\_04\_08\_14.pdf (last visited Sept. 28, 2018). [↑](#footnote-ref-32)
33. Available at https://obamawhitehouse.archives.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related (last visited Sept. 28, 2018). [↑](#footnote-ref-33)
34. Presidential Memorandum § 3(b). [↑](#footnote-ref-34)
35. *Id*. [↑](#footnote-ref-35)
36. Part 600, Chapter 6: Landscape-Scale Mitigation Policy (Oct. 23, 2015). [↑](#footnote-ref-36)
37. U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 83,440 (Nov. 21, 2016). [↑](#footnote-ref-37)
38. Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. 95,316 (Dec. 27, 2016). [↑](#footnote-ref-38)
39. Manual MS-1794 – Mitigation (P) (Rel. 1-1782), available at https://edit.blm.gov/sites/blm.gov/files/uploads/BLM\_MS-1794%20Mitigation%20FINAL.docx (last visited Sept. 28, 2018); Handbook H-1794-1 Mitigation (P) (Rel. 1-1783), available at https://www.blm.gov/sites/blm.gov/files/uploads/BLM%20H-1794-1%20Mitigation%20FINAL.docx (last visited Sept. 28, 2018). Despite the direction in the Presidential Memorandum, the Forest Service did not finalize any mitigation policy; it only proceeded as far as requesting information for developing its policy. *See* Mitigation of Adverse Impacts, Request for Information, 81 Fed. Reg. 17,136 (March 28, 2016). [↑](#footnote-ref-39)
40. Solicitor’s Opinion, M-37039―*The Bureau of Land Management’s Authority to Address Impacts of its Land Use Authorizations through Mitigation*, available at https://www.eenews.net/assets/2017/02/21/document\_ew\_02.pdf (last visited Sept. 28, 2018). [↑](#footnote-ref-40)
41. Available at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/ (last visited Sept. 28, 2018). [↑](#footnote-ref-41)
42. Executive Order 13783 § 3(d). [↑](#footnote-ref-42)
43. 82 Fed. Reg. 51,382 (Nov. 6, 2017). [↑](#footnote-ref-43)
44. U.S. Fish and Wildlife Service Mitigation Policy, Withdrawal, 83 Fed. Reg. 36,472 (July 30, 2018); Endangered Species Act Compensatory Mitigation Policy, Withdrawal, 83 Fed. Reg. 36,469 (July 30, 2018). [↑](#footnote-ref-44)
45. Solicitor’s Opinion M-37046―*Withdrawal of M-37039, “The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations Through Mitigation”* (June 30, 2017), available at https://www.doi.gov/solicitor/opinions (last visited Sept. 28, 2018). [↑](#footnote-ref-45)
46. *See* 12-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,910 (Mar. 23, 2010). [↑](#footnote-ref-46)
47. *See* *In re Endangered Species Act Section 4 Deadline Litigation-MDL No. 2165*, 704 F.3d 972, 975 (D.C. Cir. 2013). [↑](#footnote-ref-47)
48. *See Order Granting Joint Motion for Approval of Settlement Agreement, In re Endangered Species Act Section 4 Deadline Litigation*, No. 1:10-mc-00377-EGS (D.D.C. Sept. 9, 2011). [↑](#footnote-ref-48)
49. 75 Fed. Reg. at 13,979-80. [↑](#footnote-ref-49)
50. *See, e.g.,* Notice of Availability of the Record of Decision and Approved Resource Management Plan Amendments for the Great Basin Region Greater Sage-Grouse Sub-Regions of Idaho and Southwestern Montana; Nevada and Northeastern California; Oregon; and Utah, 80 Fed. Reg. 57,633 (Sept. 24, 2015). [↑](#footnote-ref-50)
51. Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Greater Sage-Grouse (Centrocercus urophasianus) as an Endangered or Threatened Species, 80 Fed. Reg. 59, 858 (Oct. 2, 2015). [↑](#footnote-ref-51)
52. *See, e.g.*, *Western Exploration LLC v. U.S. Dep’t of the Interior*, 250 F. Supp. 3d 718 (D. Nev. 2017) (holding that Interior failed to comply with the National Environmental Policy Act in preparation of the land use plans, but declining to issue an injunction pending remand); *Otter v. Jewell*, 227 F. Supp. 3d 117 (D.D.C. 2017) (dismissing challenge for lack of subject matter jurisdiction); *Herbert v. Jewell*, No. 2:16-cv-00101-DAK (D. Utah filed Feb. 4, 2016); *Western Watersheds Project v. Schneider*, No. 1:16-cv-83 (D. Idaho filed Feb. 25, 2016). [↑](#footnote-ref-52)
53. *Available at* https://www.doi.gov/pressreleases/secretary-interior-ryan-zinke-statement-sage-grouse-report (last visited Sept. 28, 2018). [↑](#footnote-ref-53)
54. Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments, 82 Fed. Reg. 47,248 (Oct. 11, 2017) (BLM land use plans); Amendments to Land Management Plans for Greater Sage-Grouse Conservation, Notice of Intent to Prepare an Environmental Impact Statement, 82 Fed. Reg. 55,346 (Nov. 21, 2017) (Forest Service land use plans). [↑](#footnote-ref-54)
55. Notice of Availability of the Nevada

and Northeastern California Draft Resource Management Plan Amendment and Draft Environmental

Impact Statement for Greater Sage-Grouse Conservation, 83 Fed. Reg. 19800 (May 4, 2018); Notice of Availability of the Idaho Draft Resource Management Plan Amendment and Draft Environmental Impact Statement for Greater Sage-Grouse Conservation, 83 Fed. Reg. 19801 (May 4, 2018); Notice of Availability of the Utah Draft Resource Management Plan Amendment and Draft Environmental Impact Statement for Greater Sage-Grouse Conservation, 83 Fed. Reg. 19803 (May 4, 2018); Notice of Availability of the Oregon Draft Resource Management Plan Amendment and Draft Environmental Impact Statement for Greater Sage-Grouse Conservation, 83 Fed. Reg. 19804 (May 4, 2018); Notice of Availability of the Colorado Draft Resource Management Plan Amendment and Draft Environmental Impact Statement for Greater Sage-Grouse Conservation, 83 Fed. Reg. 19808 (May 4, 2018); Notice of Availability of the Wyoming Draft Resource Management Plan Amendment and Draft Environmental Impact Statement for Greater Sage-Grouse Conservation, 83 Fed. Reg. 19810 (May 4, 2018). [↑](#footnote-ref-55)
56. Notice of Availability of the Draft Greater Sage-grouse Proposed Land Management Plan Amendments and Draft Environmental Impact Statement for the Intermountain and Rocky Mountain Regions, 83 Fed. Reg. 50331 (Oct. 5, 2018). [↑](#footnote-ref-56)