



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/ARW99-00369

Aug 17, 1999

Memorandum

To: Regional Directors, Regions 1-7
Assistant Director - Refuges and Wildlife

From: Acting Director /s/ John G. Rogers, Jr.

Subject: Migratory Bird Permits for Intentional Take by Federal Agencies

In response to recent court action (Humane Society v. Glickman), we must update and modify our policies and procedures relative to the issuance of migratory bird permits for intentional take of migratory birds by Federal agencies, including any take by the Fish and Wildlife Service. The attached memorandum from the Acting Assistant Solicitor provides the details on this interim guidance. Please read the third paragraph very carefully and ensure that your permit offices are in compliance. As you can see, it is important that any take under the Migratory Bird Treaty Act conducted by the Fish and Wildlife Service be authorized by a permit. In addition, you should process requests for such permits from other Federal agencies.

Keep in mind this is a dynamic issue and further guidance on this may be forthcoming in the weeks and months ahead.

Attachment



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240



AUG 13 1999

Memorandum

To: Director, U.S. Fish and Wildlife Service

From: Acting Assistant Solicitor, Fish, Wildlife and Environmental Protection

Subject: Advice regarding Humane Society v. Glickman

As you know, the District Court for the District of Columbia on July 6, 1999 enjoined the defendants in Humane Society v. Glickman, No. 98-1510 (CKK), from "taking, hunting, capturing, or killing Canada Geese until such time as the Defendants shall obtain valid permits to conduct such activities pursuant to the Migratory Bird Treaty Act [MBTA]." There is, however, significant uncertainty about the scope of the order. On the one hand, the order itself limits to whom it applies ("Defendants," i.e., DOI and USDA) and to what species it applies ("Canada Geese"). In addition, the conclusion of the memorandum opinion accompanying the Court's order suggested that the scope of the order was limited to the particular activities at issue in the suit, i.e., APHIS' goose control program in Virginia. On the other hand, in its opinion, the Court flatly rejected the government's legal theory that the MBTA does not apply to federal agencies. The Court's reasoning would apply equally without regard to distinctions between the federal agency, the species, or the state at issue. To confuse matters further, the analysis of two circuit courts (the decisions of which are binding in their respective circuits) and several district courts in prior cases is diametrically opposed to that of the Court in this case. See *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997); *Newton County Wildlife Association v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997).

The Department of Justice believes that a reasonable argument can be made that the Court's order should be interpreted as applying only to the taking of geese in Virginia by the USDA or DOI. Plaintiffs, however, are seeking to have the Court find the defendants to be in contempt of court due to the subsequent take of geese by the Air Force at Langley Air Force Base in Virginia. Given the current legal uncertainty, and until such time as that uncertainty is resolved, we believe that the Service should adopt an extremely cautious position with respect to the intentional take of migratory birds by federal agencies. Therefore, we recommend that the Service adopt the following position until the District Court provides clarification itself, or until any appeal is resolved.

First, the Service itself should not take, hunt, capture, or kill any migratory bird in any location without a permit or regulatory authorization under the MBTA. Second, the Service should not assert in any communication or correspondence that federal agencies are not covered by the prohibitions of the MBTA. If asked, the Service should decline to take a position, and refer those inquiring to the cases cited above. The Service may explain that in those cases the government with mixed success, argued that the prohibitions of the MBTA do not apply to federal agencies.

In addition, the Service should inform those inquiring that if a federal agency applies for a permit under the MBTA to authorize the intentional take of migratory birds, the Service will process the application and, if appropriate under the standards of the MBTA and its implementing regulations, issue a permit. The Service may point out that these positions are temporary, pending clarification or overruling of the decision in *Human Society v. Glickman* (D.D.C.), or until the case is definitively resolved through appeal or otherwise.

We have coordinated with the Department of Justice in crafting this advice, and we understand that they are in agreement as to its substance. We will provide further advice once we receive clarification from the courts. If you have any questions regarding this case, please contact Alan Palisoul, Ben Jesup, or me at (202) 208-6172.

/s/ W. Michael Young