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Sent via e-mail

RE: Miller Park Restoration Project

Ladies and Gentlemen:

Great Salt Lake Audubon (“GSLA”) has a longstanding mission to **“protect and enhance habitat for wild birds, animals and plants, and to maintain healthy and diverse environments for wildlife and people throughout the State.”** With this mission in mind, we are writing to express serious concerns about the upcoming Miller Park restoration project (“Project”), which will result in the removal of up to 275 trees during the breeding season for migratory birds.

GSLA supports habitat restoration projects across Utah; however, GSLA and its members are concerned about several aspects of the Project. Per communications with Salt Lake City employees, we understand that the Project is scheduled to begin construction in April of this year and continue through September, 2014. April coincides with the breeding season for migratory birds in Utah, especially for early-breeding raptors and owls. Several species of raptor breed in suburban and urban areas throughout the Salt Lake Valley, including the western screech owl and American kestrel. GSLA members have confirmed the presence of

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breeding birds in Miller Park in previous breeding seasons and records on eBird¹ confirm the current presence of breeding migratory birds.

Should the Project begin in April as is currently planned, birds will not only be displaced from their habitats, but they will be “taken” (*i.e.*, killed) when trees containing brooding birds and nestlings are removed, in violation of the Migratory Bird Treaty Act (“MBTA”), 16 U.S.C §§ 703-712. The MBTA is a strict liability statute that broadly prevents any person, “in any manner” from, among other things, “taking” a migratory bird, its nest, or its eggs without a permit. *Id.* at §§ 703, 704. The take prohibition applies to actions that will directly result in the killing of migratory birds and nests, and federal courts have found that the removal of trees during nesting season constitutes a prohibited “take” under the MBTA. *See, e.g., Sierra Club v. Martin*, 933 F. Supp. 1559, 1565 (N.D. Ga. 1996) (“taking or killing does not occur simply because of habitat destruction or modification . . . however, a killing of young migratory birds occurs because of tree cutting and logging during nesting season”), *rev’d on other grounds*, 110 F.3d 1551 (11th Cir. 1997); *Sierra Club v. USDA*, No. 94–CV–4061–JPG, (S.D.Ill. Sept. 25, 1995) (finding that logging during nesting season created a logical assumption that migratory birds would be killed and, thus, violated the MBTA).

Additionally, GSLA is very concerned that during Project planning, Salt Lake City was not aware of—and did not consider—the direct and indirect impacts Project construction would have on migratory birds. Our review of the planning documents, including the City’s Army Corps of Engineers permit application and Utah stream restoration permit application, did not disclose any consideration of the impacts the Project would have on birds. For example, the City’s stream restoration permit discussed only whether the Project would impact “fish” in the affected reach of Red Butte Creek, but did not discuss impacts to any other species or their habitats. This is not only contrary to the spirit and goals of the Salt Lake City Parks Program, but also the City’s internal planning guidance.

GSLA is not opposed to the Project *per se*, but suggests that the Project construction phase occur during non-breeding seasons for migratory birds. Non-breeding seasons in Utah are generally after August and through January. Therefore, we ask that you reschedule the construction phase of the Project to occur during this period. Additionally, GSLA questions whether the disturbance to avian habitats would be best accomplished in smaller phases instead of one large effort (*i.e.*, removing trees from the riparian area over the course of several years or seasons). Please contact me if you have any questions or would like to schedule a meeting to discuss this issue in more detail.

Best Regards,



Heather Dove
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¹ Ebird is a website and mobile application designed and maintained by the Cornell Lab of Ornithology that is utilized as a method for tracking real time bird locations.