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# **The Migratory Bird Treaty Act (MBTA): Selected Legal Issues**

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**Linda Tsang**  
Legislative Attorney

**Erin H. Ward**  
Legislative Attorney

## The Migratory Bird Treaty Act (MBTA): Selected Legal Issues

The Migratory Bird Treaty Act (MBTA) (16 U.S.C. §§ 703-712) was enacted in 1918 to implement a 1916 treaty signed by the United States and Great Britain (acting for Canada) aimed at protecting birds that migrate between the two countries. Since 1918, the MBTA has been used as a vehicle to implement other bilateral migratory bird treaties. Under the MBTA, the Department of the Interior (DOI), through the U.S. Fish and Wildlife Service (FWS or Service), administers a program that covers 1,093 species of migratory birds that are found in the United States and covered by the treaties.

The application and enforcement of the MBTA have been the subject of significant legal debate. The courts are divided on whether federal agencies are subject to the MBTA take prohibitions. In cases where federal agencies have been considered subject to the MBTA take prohibitions, some courts have declined to apply the MBTA to regulatory actions such as permit and project approvals, holding that agencies (1) have no affirmative duty to guarantee a third-party permit holder's future compliance with the MBTA and (2) are not subject to the MBTA when their regulatory actions do not directly take migratory birds.

A wide range of federal district and appellate court cases have addressed the nature and scope of takings prohibited under the MBTA. In general, the courts have looked at three different types of taking of migratory birds: (1) direct and intentional; (2) direct and unintentional; and (3) indirect and unintentional (incidental). Courts generally agree that the MBTA prohibits unpermitted direct and intentional actions that include hunting, shooting, wounding, killing, trapping, and capturing migratory birds. Cases that involve direct actions that violate the MBTA prohibitions but lack intention or "guilty knowledge" are generally viewed as strict liability crimes where proof of intent to take or knowledge of taking a migratory bird is not needed to establish a misdemeanor violation of the MBTA.

However, jurisprudence on the applicability of the MBTA to incidental taking of migratory birds is less clear. Examples of incidental takings include harm to migratory birds from the operation of facilities such as wastewater ponds or wind turbines. Federal Courts of Appeals for the Second and Tenth Circuits have agreed with FWS that the MBTA is a strict liability statute that applies to bird deaths that incidentally result from otherwise lawful activity. However, courts in the Fifth, Eighth, and Ninth Circuits have held that the statute only applies to purposeful actions directed against migratory birds, such as hunting and poaching. The legislative history of the MBTA supports differing interpretations of the nature and scope of the MBTA's taking prohibitions.

In the absence of direction or guidance from the Supreme Court or Congress on the scope of the MBTA's take prohibitions, DOI has issued several conflicting legal opinions over the course of several Administrations regarding whether the MBTA prohibits the incidental taking or killing of migratory birds. During the Biden Administration, DOI has issued a legal opinion that the MBTA prohibitions on taking and killing migratory birds by any means and in any manner include incidental taking and killing. In 2021, FWS issued guidance implementing its position on incidental take, and clarifying its related enforcement policies. The order announced plans to prioritize enforcement against incidental take from an otherwise illegal activity, or foreseeable incidental take from legal activities that occur because "beneficial practices" to avoid or minimize incidental take were not implemented. FWS has stated it plans to codify its interpretation of the MBTA as prohibiting incidental takings, instead of relying on enforcement discretion. FWS is also considering authorizing certain types of incidental takings using a combination of three regulatory tools: (1) exceptions to the MBTA's prohibition on incidental takings; (2) general permits for certain activity types; and (3) individual permits.

This report reviews the major provisions of the MBTA, examines the types of government action that are subject to the MBTA, analyzes the conflicting judicial interpretations of the MBTA's prohibition on taking or killing protected migratory birds, and outlines DOI's legal interpretation and enforcement of incidental taking under the MBTA.

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## Background

The Migratory Bird Treaty Act (MBTA)<sup>1</sup> was enacted in 1918 to implement a 1916 treaty signed by the United States and Great Britain (acting for Canada) aimed at protecting birds that migrate between the two countries.<sup>2</sup> Since 1918, the MBTA has been amended to implement subsequent bilateral migratory bird treaties between the United States and Mexico,<sup>3</sup> Japan,<sup>4</sup> and Russia.<sup>5</sup> Under the MBTA, the Department of the Interior (DOI), through the U.S. Fish and Wildlife Service (FWS or Service), administers a program that currently covers 1,093 species of migratory birds that are found in the United States and covered by the treaties.<sup>6</sup>

This report discusses two legal issues regarding the MBTA and its prohibition on certain taking and killing of migratory birds: the obligations of the federal government to comply with the MBTA and the scope of its criminal penalties.

## Major Provisions of the MBTA

The major provisions of the MBTA, summarized below, address taking of migratory birds, permitted takings, enforcement, and penalties for violations. Other statutory provisions concern unlawful transport or import of migratory birds;<sup>7</sup> arrests and search warrants;<sup>8</sup> state regulation;<sup>9</sup> authorization of appropriations;<sup>10</sup> breeding on farms and preserves;<sup>11</sup> regulations implementing the treaties and conventions;<sup>12</sup> and seasonal takings for needs of indigenous Alaskans.<sup>13</sup>

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<sup>1</sup> 16 U.S.C. §§ 703-712.

<sup>2</sup> Convention between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., August 16, 1916, 39 Stat. 1702 [hereinafter *U.S.-Canadian Treaty*]. In 1995, the United States and Canada negotiated a protocol that replaced the original treaty. Protocol Between the Government of the United States of America and the Government of Canada Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, U.S.-Can., December 14, 1995, S. Treaty Doc. No. 104-28, 2473 U.N.T.S. 329.

<sup>3</sup> Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., February 7, 1936, 50 Stat. 1311. *See also* U.S. DEP'T OF STATE, TREATIES IN FORCE 296 (2020) (listing subsequent amendments to the treaty). The MBTA was amended on June 20, 1936, to implement this treaty. 16 U.S.C. § 703.

<sup>4</sup> Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, March 4, 1972, 25 U.S.T. 3329. *See also* TREATIES IN FORCE at 238 (listing subsequent amendments to the treaty). The MBTA was amended on June 1, 1975, to implement this treaty. 16 U.S.C. § 703.

<sup>5</sup> Convention Between the United States of America and the Union of Soviet Socialist Republics [Russia] Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., November 26, 1976, 29 U.S.T. 4674. The MBTA was amended on November 8, 1978, to implement this treaty. 16 U.S.C. § 703.

<sup>6</sup> *See* 50 C.F.R. § 10.13. The list of migratory birds protected under the MBTA also can be accessed at FISH & WILDLIFE SERV., MIGRATORY BIRD TREATY ACT PROTECTED SPECIES (10.13 LIST) (2020), at <https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php> (last visited Dec. 8, 2021).

<sup>7</sup> 16 U.S.C. § 705.

<sup>8</sup> *Id.* § 706.

<sup>9</sup> *Id.* § 708.

<sup>10</sup> *Id.* § 709a.

<sup>11</sup> *Id.* § 711.

<sup>12</sup> *Id.* § 712(2).

<sup>13</sup> *Id.* § 712(1).

## MBTA Section 2: The Prohibition on Taking and Killing of Migratory Birds (16 U.S.C. § 703)

MBTA Section 2 prohibits several actions related to migratory birds, including taking and killing. MBTA Section 2(a) states that:

Unless and except as permitted by regulations . . . , *it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product . . .*<sup>14</sup>

The statute does not define the terms “hunt,” “take,” “capture,” or “kill,” and there is limited guidance on the terms’ scope and limitations.<sup>15</sup> The FWS regulations define the term “take” as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect” or to attempt to do so.<sup>16</sup>

## MBTA Section 3: Permitted Take of Migratory Birds (16 U.S.C. § 704)

MBTA Section 3 allows the Secretary of the Interior to permit the taking of migratory birds under certain circumstances.<sup>17</sup> Under this authority, DOI has promulgated regulations for prescribed migratory bird hunting and permits that allow taking of migratory birds for specific purposes.<sup>18</sup> FWS regulations establish permitting requirements for various purposes, such as import, export, banding or marking, scientific collecting, taxidermy, waterfowl sale and disposal, falconry, propagation, rehabilitation, depredation, and population control.<sup>19</sup> In addition, FWS has authorized incidental take by the Armed Forces during military-readiness activities after a bill was enacted in 2002 to permit this type of incidental taking of migratory birds.<sup>20</sup>

FWS may also issue special purpose permits for activities not covered by the other listed categories.<sup>21</sup> A special purpose permit is required before “any person” may lawfully take migratory birds and may be obtained by sufficiently showing the “benefit to the migratory bird

<sup>14</sup> 16 U.S.C. § 703(a) (emphasis added).

<sup>15</sup> The Secretary of the Interior may permit the take of migratory birds under certain circumstances. *See* 16 U.S.C. § 704(a) (authorizing DOI to “determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same”).

<sup>16</sup> 50 C.F.R. § 10.12.

<sup>17</sup> *See* 16 U.S.C. § 704(a) (authorizing DOI to “determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same”).

<sup>18</sup> 50 C.F.R. pt. 20 (hunting regulations), *id.* pt. 21 (migratory bird permits).

<sup>19</sup> 50 C.F.R. pt. 21, subpt. C (import and export, banding or marking, scientific collecting, taxidermy, waterfowl sale and disposal, special Canadian goose, falconry, raptor propagation, rehabilitation); subpt. D (depredation control); subpt. E (population control).

<sup>20</sup> 50 C.F.R. § 21.25; Bob Stump National Defense Authorization Act for FY2003. P.L. 107-314, 116 Stat. 2458.

<sup>21</sup> 50 C.F.R. § 21.27.

resource, important research reasons, reasons of human concern for individual birds, or other compelling justification” of the activity.<sup>22</sup>

## **MBTA Section 5: Enforcement (16 U.S.C. § 706)**

FWS has statutory authority and responsibility for enforcing the MBTA.<sup>23</sup> Unlike the Endangered Species Act, the MBTA does not include a citizen suit provision that allows “any person” to enforce the MBTA provisions in court.<sup>24</sup> However, citizen suits have been brought under the Administrative Procedure Act’s (APA’s) prohibition against unlawful agency action.<sup>25</sup> Section 702 of the APA “entitle[s]” a “person” who is “adversely affected or aggrieved by agency action” to have a court review the challenged action.<sup>26</sup> The U.S. Courts of Appeals for the District of Columbia and Ninth Circuits have allowed civil suits seeking to enjoin government actions that take or have the potential to take birds protected to proceed under the APA.<sup>27</sup>

## **MBTA Section 6: Penalty Provisions (16 U.S.C. § 707)**

Failure to comply with the MBTA may result in either felony or misdemeanor penalties, depending on the type of violation.<sup>28</sup> Under MBTA Section 6(a), “any person, association, partnership, or corporation” who violates the Act or its regulations is guilty of a misdemeanor and can be fined no more than \$15,000 and/or a maximum jail sentence of six months.<sup>29</sup>

The felony provision in MBTA Section 6(b) applies only to entities that *knowingly* take migratory birds and sell or barter them, or have intent to do so.<sup>30</sup> For felony violations, the punishment is a fine of no more than \$2,000 and/or a maximum jail sentence of two years.<sup>31</sup>

## **Government Actions Affecting Migratory Birds**

Various government actions may affect birds that are protected under the MBTA. For example, a federal agency could potentially implicate the MBTA by intentionally killing migratory birds in an effort to control overpopulation or indirectly harm birds when their habitats are disturbed as

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<sup>22</sup> *Id.* § 21.27(a).

<sup>23</sup> 16 U.S.C. § 706.

<sup>24</sup> *Compare id.* § 706 (authorizing DOI to enforce MBTA provisions), *with* 16 U.S.C. § 1540(g) (allowing “any person” to file a lawsuit to enforce the ESA).

<sup>25</sup> *See* 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g.,* *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1203, 1204 (9th Cir. 2004) (holding that “anyone who is ‘adversely affected or aggrieved’ by an agency action alleged to have violated the MBTA has standing to seek judicial review of that action”); *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 886 (D.C. Cir. 2000) (citing 5 U.S.C. § 702 of the APA, *Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), and *Noble v. Union River Logging Co.*, 147 U.S. 165 (1893), as authority allowing for judicial review of government actions regarding compliance with the MBTA).

<sup>28</sup> 16 U.S.C. § 707(a)–(b).

<sup>29</sup> *Id.* § 707(a).

<sup>30</sup> *Id.* § 707(b).

<sup>31</sup> *Id.* § 707(b).

part of managing federal lands and property.<sup>32</sup> Whether these actions violate the MBTA take prohibitions depends on whether federal agencies are subject to the MBTA.

The courts have differing opinions on the applicability of the MBTA to federal agencies. U.S. Courts of Appeals for the Eighth and Eleventh Circuits<sup>33</sup> have held that the MBTA can be enforced only through its MBTA Section 6 penalty provisions, which courts have agreed do not apply to federal agencies. However, where there is a separate enforcement authority such as the APA that provides a civil remedy, courts following the D.C. Circuit’s precedent would require the federal government to comply with the MBTA take prohibitions.

### ***Cases Holding That Federal Agency Actions Are Not Subject to MBTA Take Prohibitions***

Several courts have concluded that the MBTA take provisions do not apply to federal agencies. In *Sierra Club v. Martin*, Sierra Club challenged the U.S. Forest Service’s (USFS’s) timber-cutting and road-building activities as violating the MBTA by relying on Section 706 of the APA, a provision that requires reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>34</sup> Specifically, in *Martin*, Sierra Club claimed that the USFS activities would disturb the nesting season of certain migratory birds and result in the illegal taking of between 2,000 and 9,000 migratory birds.<sup>35</sup>

The Eleventh Circuit denied review under the APA, explaining that, under the APA, an “agency’s actions could only fail to be ‘in accordance with law’ when that agency’s actions are *subject to that law*.”<sup>36</sup> The Eleventh Circuit reversed an injunction issued by the district court, holding that the federal government and its officials were not subject to the MBTA according to the plain meaning of the statute and the legislative intent.<sup>37</sup> The court concluded that, in reading the statute as a whole, the MBTA is a “criminal statute making it unlawful *only* for persons, associations, partnerships, and corporations to ‘take’ or ‘kill’ migratory birds,” and the MBTA “does not subject the federal government to its prohibitions.”<sup>38</sup>

To support its conclusion, the court determined that there was “no congressional intent” that “person,” as used in Section 6(a) regarding misdemeanor penalties, includes the “federal government[,] . . . federal agency, or a federal official acting in his official capacity.”<sup>39</sup> The court emphasized the MBTA’s historical context, explaining that the application of the MBTA to the

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<sup>32</sup> See, e.g., *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 883-84 (D.C. Cir. 2000) (addressing whether the MBTA prohibits federal agencies from killing or taking migratory birds without a permit to address geese overpopulation in Virginia); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1203-04 (9th Cir. 2004) (addressing whether rehabilitation of a former military base that may result in the “foreseeable deaths” of migratory birds because of disturbance to migratory birds and their nests violated the MBTA).

<sup>33</sup> This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Fifth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

<sup>34</sup> *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997); 16 U.S.C. § 706(2)(A).

<sup>35</sup> *Martin*, 110 F.3d at 1553.

<sup>36</sup> *Id.* at 1555.

<sup>37</sup> *Id.* at 1554-55. The U.S. District Court for the Northern District of Georgia issued the preliminary injunction. 933 F. Supp. 1559 (N.D. Ga. 1996).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

federal government would “severely impair” the USFS’s obligation “to furnish a continuous supply of timber” for the country, a duty that would “inevitably” result in deaths of birds and destruction of nests.<sup>40</sup> The court explained that Congress intended that regulatory programs developed under the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA)—both enacted after the MBTA—would ensure that the USFS considers the impact of federal land management on migratory birds.<sup>41</sup>

Soon after the Eleventh Circuit’s decision in *Sierra Club v. Martin*, the Eighth Circuit addressed similar issues in *Newton County Wildlife Association v. U.S. Forest Service*.<sup>42</sup> In this case, nongovernmental organizations (NGOs) alleged that the USFS violated the MBTA by failing to obtain “special permits” from the FWS for timber sales that would disrupt nesting of migratory birds and result in the death of some birds.<sup>43</sup> After concluding that jurisdiction to review the timber sales fell under the NFMA, and not the APA, the court narrowed the issue to whether the USFS’s actions under the NFMA were arbitrary and capricious because the agency “ignored or violated” its obligations under the MBTA.<sup>44</sup> Similar to the Eleventh Circuit’s reasoning in *Sierra Club v. Martin*, the court determined that the term “person” under Section 6 penalty provisions did not apply to sovereign governments based on common usage.<sup>45</sup> The court rejected the NGOs’ arguments that the MBTA must cover federal agencies if the U.S. government were to maintain its 1916 treaty obligations, concluding that the government’s obligation to comply with the treaty came from the treaty itself.<sup>46</sup> The parties’ obligations under the treaty, the court explained, are to execute the treaty, which the United States did by enacting a statute that applies to private parties.<sup>47</sup> The Eighth and Eleventh Circuits did not address whether the MBTA Section 2 take prohibitions apply to federal agencies independent from the Section 6 penalty provisions.

### ***Cases Holding That Federal Agency Actions Are Subject to MBTA Take Prohibitions***

Other courts have held that the MBTA does apply to the federal government by focusing on who is subject to the MBTA Section 2 prohibitions as opposed to who is subject to the Section 6 penalties. For example, in *Humane Society of the United States v. Glickman*, the D.C. Circuit addressed whether the MBTA prohibits federal agencies from killing or taking migratory birds without a permit from DOI.<sup>48</sup> In this case, the Department of Agriculture planned to capture and kill Canadian geese without a FWS depredation permit to address the negative impacts to crops and water quality from geese overpopulation in Virginia.<sup>49</sup>

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<sup>40</sup> *Id.* at 1556.

<sup>41</sup> *Id.* The National Forest Management Act was enacted in 1960. P.L. 86-517, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 1600-1614). The National Environmental Policy Act was enacted in 1970. P.L. 90-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4355).

<sup>42</sup> 113 F.3d 110 (8th Cir. 1997). The *Martin* decision, *supra* note 34, was published on April 29, 1997, and the *Newton County* decision was published on May 6, 1997.

<sup>43</sup> *Id.* at 115.

<sup>44</sup> *Id.* at 114.

<sup>45</sup> *See id.* (concluding that “the sovereign” is necessarily excluded from the definition of “person”). The court did not address whether the “sovereign” included federal officers acting in their official capacity. *Id.*

<sup>46</sup> *Id.* at 115.

<sup>47</sup> *Id.*

<sup>48</sup> 217 F.3d 882 (D.C. Cir. 2000).

<sup>49</sup> *Id.* at 883-84.

Although the court agreed with the agency that the misdemeanor penalty provisions in MBTA Section 6(a) do not apply to federal agencies,<sup>50</sup> the court turned to Section 2 to determine if the agency was separately subject to its prohibition on killings and takings of migratory birds without a permit.<sup>51</sup> The court held that the MBTA Section 2 prohibitions do apply to federal agencies based primarily on the plain meaning of the statute.<sup>52</sup> The court explained that Section 2 does not restrict its prohibition to private parties and provides no exemption for federal agencies.<sup>53</sup> In addition, the court rejected the agency's argument that Congress did not intend for Section 2 to apply to federal agencies because there is no means to enforce the restrictions if the Section 6(a) misdemeanor penalties do not apply, and there is no provision for injunctive relief in the statute.<sup>54</sup> In disagreeing with the *Sierra Club v. Martin* decision from the Eleventh Circuit and the *Newton County Wildlife Association* decision from the Eighth Circuit discussed above, the court concluded that both decisions rest on the "mistaken idea that in 1918, [Section 2] could be enforced *only* through the criminal penalty provision in [Section 6](a)."<sup>55</sup> The court cited the APA and other Supreme Court cases that allow equitable or injunctive relief for suits against federal officers for failing to comply with a specific statute.<sup>56</sup> Ultimately, the court held that the agency did violate the MBTA by failing to obtain a permit to take the geese.<sup>57</sup>

The *Humane Society* court, in disagreement with the Eleventh Circuit decision in *Sierra Club v. Martin*, concluded that it would be "odd" if federal agencies were exempt from the Section 2 prohibitions because the U.S.-Canadian treaty underlying the MBTA "binds the contracting parties" to its terms.<sup>58</sup> Article II of the treaty prohibits hunting of specific types of migratory birds during certain seasons, and Article V prohibits takings of nest or eggs of migratory birds at all times.<sup>59</sup> The court stated that "the fact that the [MBTA] enforced a treaty between our country and Canada reinforces our conclusion that the broad language of §703 [MBTA Section 2] applies to actions of the federal government."<sup>60</sup>

### ***Scope of Federal Actions Subject to the MBTA***

Among the courts that have applied the MBTA to federal agency actions, some courts have distinguished between (1) government actions that are directed at migratory birds, and

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<sup>50</sup> The agency argued, and the court agreed, that "person" as identified in the MBTA Section 2 prohibition on take does not ordinarily include the sovereign. *See id.* at 886 (citing *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 780 (2000)). The court pointed out that the agency did not discuss whether federal officers carrying out the take of migratory birds would be considered "persons" under MBTA Section 6, and the court did not address it. *Id.* However, as discussed above, the court determined that even if the sovereign was not subject to the Section 6 penalties, federal agencies are still subject to the Section 2 take prohibitions and civil suits. *Id.*

<sup>51</sup> *Id.* at 883-84.

<sup>52</sup> *Id.* at 883.

<sup>53</sup> *Id.* at 885.

<sup>54</sup> *Id.* at 886.

<sup>55</sup> *Id.* at 888 (emphasis added).

<sup>56</sup> *See id.* at 886 (citing 5 U.S.C. § 702 of the APA and *Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902)).

<sup>57</sup> *Id.* at 888.

<sup>58</sup> *Id.* at 887. *See U.S.-Canadian Treaty*, *supra* note 2 (citing the closing proclamation in the treaty where President Woodrow Wilson states that "the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof").

<sup>59</sup> *See U.S.-Canadian Treaty*, *supra* note 2 (explaining that exceptions for take are allowed for "scientific or propagating purposes").

<sup>60</sup> *Id.* at 887.

(2) regulatory actions (e.g., approving projects or granting permits) relating to third-party projects that take or could take migratory birds. In cases where the government intentionally kills migratory birds, courts require federal agencies to comply with the MBTA and obtain the necessary permits under Section 3.<sup>61</sup> However, courts have declined to apply the MBTA to regulatory actions related to third-party projects based on two main principles: (1) agencies are not subject to the MBTA when their regulatory actions do not directly take migratory birds; and (2) agencies have no affirmative duty to guarantee a third-party's future compliance with the MBTA.

These principles are best illustrated in *Protect Our Communities Foundation v. Jewell*, a Ninth Circuit case decided in June 2016.<sup>62</sup> Environmental groups claimed, among other things, that the U.S. Bureau of Land Management (BLM) (1) violated the MBTA by granting a right-of-way on public lands to a private company to develop and operate a wind energy facility that would incidentally take migratory birds; or (2) in the alternative, violated the APA because the BLM failed to require the facility to secure an MBTA take permit prior to granting the right-of-way.<sup>63</sup> In affirming summary judgment for BLM, the Ninth Circuit rejected both claims, holding that the MBTA does not contemplate “secondary” liability of agencies that act in a purely regulatory capacity where those regulatory actions do not “directly or proximately cause the ‘take’ of migratory birds.”<sup>64</sup> The court concluded that the APA and MBTA place no “affirmative duty” on BLM to guarantee a grantee’s future compliance with the MBTA or prevent future unlawful action by a grantee.<sup>65</sup>

Similarly, the U.S. District Court for the District of Maine rejected a challenge of U.S. Army Corps of Engineers’ (Corps’) issuance of a Clean Water Act Section 404 permit as a violation of the MBTA.<sup>66</sup> In granting summary judgment for the Corps, the court held the “relationship between the Corps’ regulatory permitting activity and any potential harm to migratory birds appears to be too attenuated to support a direct action against the Corps to enforce the MBTA’s prohibition on ‘takes.’”<sup>67</sup>

The issue of whether a federal agency is subject to the MBTA when approving permits under separate regulatory programs arises often in litigation over energy infrastructure projects. For example, in *Public Employees for Environmental Responsibility v. Beaudreau*, the U.S. District Court for the District of Columbia rejected the plaintiffs’ claim that the Bureau of Ocean Energy Management (BOEM) violated the MBTA by approving the Cape Wind energy project without first obtaining a permit from FWS for the taking of migratory birds.<sup>68</sup> In granting summary judgment to the agency, the court held that BOEM did not violate the MBTA by merely approving a project that, if ultimately constructed, might result in the taking of migratory birds by the wind

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<sup>61</sup> See, e.g., *Pub. Emps. for Env’t Responsibility v. FWS*, No. 14-1807, 2016 U.S. Dist. LEXIS 40935, at \*2-3 (D.D.C. March 29, 2016) (requiring the FWS to issue a depredation permit to kill double-crested cormorants when they threaten to eat commercially raised fish stock); *Glickman*, 217 F.3d at 888 (holding that the proposed federal actions that included intentional and direct take of migratory geese to control overpopulation were subject to the MBTA).

<sup>62</sup> 825 F.3d 571 (9th Cir. 2016).

<sup>63</sup> *Id.* at 585-86.

<sup>64</sup> *Id.* at 585.

<sup>65</sup> *Id.* at 586-88.

<sup>66</sup> *Friends of the Boundary Mountains v. U.S. Army Corps of Eng’rs*, 24 F. Supp. 3d 105, 113-15 (D. Me. 2014).

<sup>67</sup> *Id.* at 114.

<sup>68</sup> *Pub. Emps. for Env’t Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 117-18 (D.D.C. 2014), *rev’d on other grounds*, 827 F.3d 1077 (D.C. Cir. 2016).

turbines.<sup>69</sup> The court concluded that even if BOEM is required to obtain a permit, it is unclear whether it is required to do so prior to when the project is operational or at least after construction has commenced when a potential take is “more imminent.”<sup>70</sup> On appeal, the D.C. Circuit did not address the MBTA issue because BOEM conceded that an MBTA take permit was required and that Cape Wind intended to apply for one.<sup>71</sup>

Similarly, in *Protect Our Communities Foundation v. Chu*, the U.S. District Court for the Southern District of California dismissed a claim that the Department of Energy was required to obtain a permit under the MBTA prior to issuing a permit approving the construction of a cross-border electric transmission line that would connect a wind power project to the electricity grid.<sup>72</sup> The court determined that the agency is not required to obtain an MBTA permit “for an unintentional, third party killing of migratory birds incident to construction of a project.”<sup>73</sup>

Accordingly, the courts appear reluctant to place responsibility on federal agencies for the actions of third parties that will likely take migratory birds as a result of federal approval of the underlying action. In 2015, FWS appeared to agree with the courts by stating that “the agencies themselves are not subject to the prohibitions of the MBTA when acting in their regulatory capacities.”<sup>74</sup> Nonetheless, even if a federal agency is not required to obtain an MBTA permit, the third party may need to obtain a permit for incidental take related to the project.<sup>75</sup>

## Scope of Takings Prohibited Under the MBTA

As discussed above, MBTA Section 2(a) makes it unlawful to, among other things, “kill” or “take” a migratory bird (or its nest or eggs), acts that are punishable under Section 6(a) as misdemeanor crimes.<sup>76</sup> Courts have been faced with defining what constitutes a “taking” of migratory birds under the MBTA. As described above, although the statute itself does not define the term “take,” the MBTA regulations define the term “take” as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect.”<sup>77</sup>

In general, the courts have looked at three different types of actions or omissions that result in the taking of migratory birds:

1. direct and intentional acts or omissions;
2. direct and unintentional acts or omissions; and

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<sup>69</sup> *Id.* at 117-18, 130.

<sup>70</sup> *Id.* at 118.

<sup>71</sup> *Pub. Emps. for Env’t Responsibility v. Hopper*, 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016).

<sup>72</sup> *Protect Our Cmty. Found. v. Chu*, No. 12 Civ. 3062, 2014 U.S. Dist. LEXIS 42410, at \*25-26 (S.D. Cal. March 27, 2014).

<sup>73</sup> *Id.* at 26. *See also* *Protect Our Cmty. Found. v. Salazar*, No. 12 civ. 2211, 2013 U.S. Dist. LEXIS 159281, at \*51-55 (S.D. Cal. 2013) (holding that project opponents failed to demonstrate that a permit was required under the MBTA when the BLM approved a wind power project in Southern California).

<sup>74</sup> *Migratory Bird Permits; Programmatic Environmental Impact Statement; Notice of Intent*, 80 Fed. Reg. 30,032, 30,034 (May 26, 2015).

<sup>75</sup> *See, e.g., Hopper*, 827 F.3d at 1089 n.11 (noting that the agency conceded that the wind energy developer was required to obtain a permit for incidental take of migratory birds from wind turbines).

<sup>76</sup> 16 U.S.C. §§ 703(a), 707(a). Knowingly taking a migratory bird to sell or with the intention of selling it is a felony crime under § 707(b).

<sup>77</sup> 50 C.F.R. § 10.12.

3. indirect and unintentional acts or omissions (incidental take).

In examining these different types of takings of migratory birds, courts have reviewed the plain meaning, statutory construction, legislative history, and the constitutionality of the MBTA to determine whether the actions or omissions violate the statute. There is a wide range of federal district and appellate court cases that have addressed this issue. Below is a review of selected cases that provide examples of the major issues that courts have faced when determining the reach of the MBTA.

## Direct and Intentional Take

Courts generally agree that FWS’s regulatory definition of “take” prohibits unpermitted direct and intentional actions that include hunting, shooting, wounding, killing, trapping, and capturing migratory birds.<sup>78</sup> Direct actions refer to actions that kill a migratory bird, whereas intentional acts are those actions that intend to kill a bird for a specific purpose. For example, in the D.C. Circuit decision, *United States v. Glickman*, discussed above, the Department of Agriculture’s planned actions to capture and kill Canadian geese to prevent overpopulation was viewed as being intentional and directed at protected migratory birds.<sup>79</sup> The D.C. Circuit held that the agency violated the MBTA by failing to obtain a depredation permit prior to taking the geese.<sup>80</sup>

## Direct and Unintentional Take

Several cases involve direct actions that violate the MBTA prohibitions but lacked intention or “guilty knowledge.” Generally, a criminal offense consists of both a prohibited act (the *actus reus*) and a guilty mind (the *mens rea*, also known as the “scienter” requirement).<sup>81</sup> A criminal offense that does not require the *mens rea* element is viewed as a strict liability crime.<sup>82</sup> In the context of the MBTA, the prohibitions under Section 2(a) are generally viewed as strict liability crimes, and proof of intent to take or knowledge of taking a migratory bird is not needed to establish a misdemeanor violation of the Act.

For example, in 1997, the Tenth Circuit decision in *United States v. Corrow* affirmed a criminal conviction for possession of eagle feathers in violation of Section 2’s prohibition against possessing any part of a migratory bird.<sup>83</sup> For the court, no *mens rea* was needed for a conviction: “Simply stated, . . . ‘it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge.’”<sup>84</sup> The court concluded that the “plain language of §703 [MBTA Section 2] renders simple possession of protected feathers unlawful.”<sup>85</sup>

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<sup>78</sup> See 50 C.F.R. § 10.12 (defining “take” as to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect” migratory birds).

<sup>79</sup> *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 883 (D.C. Cir. 2000). See “Cases Holding That Federal Agency Actions Are Subject to MBTA Take Prohibitions” section, *supra*, for discussion of this case.

<sup>80</sup> *Id.* at 888.

<sup>81</sup> For background on the *mens rea* requirement in criminal law, see CRS Report R46836, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, by Michael A. Foster.

<sup>82</sup> *Id.* at 8.

<sup>83</sup> *United States v. Corrow*, 119 F.3d 796, 798 (10th Cir. 1997).

<sup>84</sup> See *id.* at 805 (quoting *United States v. Manning*, 787 F.2d 431, 435 n.4 (8th Cir. 1986)).

<sup>85</sup> *Id.*

Other situations that involve direct but unintentional deaths of migratory birds generally involve MBTA Section 3(b)'s prohibition on taking birds by baiting.<sup>86</sup> Prior to the MBTA amendments in 1998, courts held that there was no need to prove that the defendant intentionally baited a field to attract migratory birds or had knowledge that the field was baited to violate Section 704(b)'s prohibition because it was a strict liability crime.<sup>87</sup> Congress amended the MBTA in 1998 to remove the strict liability standard making it unlawful to take migratory birds by aid of baiting if the person “knows or reasonably should know” that an area is baited.<sup>88</sup>

## Indirect and Unintentional (Incidental) Take

Various DOI legal opinions define “incidental take” as “take that results from an activity, but is not the purpose of that activity.”<sup>89</sup> Courts have addressed what types of incidental take trigger the MBTA's strict liability for misdemeanor offences, resulting in conflicting interpretations. Courts are split on whether the MBTA's prohibition on taking of migratory birds includes incidental bird deaths that result from, but are not the purpose of, another lawful activity (e.g., industrial operations that inadvertently cause a migratory bird death, or destruction or modification of a bird habitat that will likely result in migratory bird deaths).

### *Broad Application of the Take Prohibitions in the Second and Tenth Circuits*

Courts in the Second and Tenth Circuits view the taking of birds protected under the MBTA as strict liability crimes with varying limitations. For example, in a 1978 case involving preventable incidental deaths of migratory birds, the Second Circuit focused on the hazardous nature of pesticide manufacturing in evaluating the scope of the MBTA. In *United States v. FMC Corp.*, the Second Circuit affirmed the conviction of a manufacturer of pesticides for killing migratory birds as a result of storing wastewater in a retaining pond frequented by migratory birds.<sup>90</sup> The court analogized the migratory bird injuries resulting from FMC's “affirmative act” of manufacturing “highly toxic” pesticides manufacturing to claims based on strict liability torts.<sup>91</sup> The court concluded that lack of a statutory requirement of intention as an element of the MBTA Section 2 takings prohibition, the relatively minor fines imposed, congressional recognition of the public policy to protect migratory birds, and FMC's failure to prevent lethal amounts of the chemicals in the wastewater from the pond were sufficient reasons to impose strict liability.<sup>92</sup>

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<sup>86</sup> MBTA regulations define “baiting” as “direct or indirect placing, exposing, depositing, distributing, or scattering of salt, grain, or other feed that could serve as a lure or attraction for migratory game birds to, on, or over any areas where hunters are attempting to take them.” 50 C.F.R. § 20.11(g).

<sup>87</sup> See *United States v. Catlett*, 747 F.2d 1102, 1104 (6th Cir. 1984) (affirming conviction for a dove hunt in a field nine days after authorities had discovered that the field had been baited). See also *United States v. Hogan*, 89 F.3d 403, 404 (7th Cir. 1996) (“The offense is a strict liability crime; a defendant is responsible whether or not he knew the area was baited.”).

<sup>88</sup> Migratory Bird Treaty Reform Act of 1998, P.L. 105-312, 112 Stat. 2956 (codified as amended at 16 U.S.C. § 704(b)).

<sup>89</sup> Memorandum M-37041 from Solicitor at 1, DOI, to Dir., FWS (Jan. 10, 2017), *withdrawn and replaced by* Memorandum M-37050 from Principal Deputy Solicitor, DOI, to Sec'y. DOI (Dec. 22, 2017) [hereinafter *Opinion M-37041*]; Memorandum M-37050 from Principal Deputy Solicitor, DOI, to Sec'y DOI (Dec. 22, 2017), *vacated* Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469 (S.D.N.Y. 2020) [hereinafter *Opinion M-37050*].

<sup>90</sup> *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).

<sup>91</sup> *Id.* at 908.

<sup>92</sup> *Id.*

Since *FMC Corp.*, several federal courts have limited the application of strict liability in the context of the MBTA by requiring that the acts or omissions must be the proximate cause of the incidental migratory bird taking (i.e., the injury caused must have been reasonably anticipated or foreseen as a natural consequence of the activity).<sup>93</sup> Similar to *FMC Corp.*, some courts view the failure to take preventive or corrective measures in hazardous activities that result in foreseeable incidental takings of migratory birds as a strict liability offense. For instance, in *United States v. Corbin Farm Service*, a federal district court in California held that the MBTA applied to defendants that accidentally poisoned migratory ducks by applying pesticide to an alfalfa field, noting that Section 2 made it illegal to kill migratory birds “by any means or in any manner.”<sup>94</sup> In imposing strict liability for the accidental poisoning, the court concluded that the “guilty act alone is sufficient to make out the crime.”<sup>95</sup> The court also noted that a person applying pesticides might be able to foresee the danger to migratory birds and prevent it, unlike a car driver who is not in a reasonable position to prevent the bird’s death.<sup>96</sup>

Similarly, in 1999, in *United States v. Moon Lake Electric Association*, the U.S. District Court for the District of Colorado held that Moon Lake Inc., a rural electrical distribution cooperative, violated the MBTA by failing to take protective measures to prevent migratory birds from being electrocuted by its power lines.<sup>97</sup> The court rejected the plaintiff’s arguments that it did not violate the MBTA because the electrocutions were unintentional and that Congress intended to target only intentional harmful acts such as hunting and poaching.<sup>98</sup> The court recognized that the plain text of Section 2 made it illegal to kill migratory birds “at any time, by any means or in any manner.”<sup>99</sup> In addition, the court concluded that “[by] prohibiting the act of ‘killing’ in addition to the acts of hunting, capturing, shooting, and trapping, the MBTA’s language and regulations suggest that Congress intended to prohibit conduct beyond that normally exhibited by hunters and poachers. Indeed, the MBTA does not seem overly concerned with how captivity, injury, or death occurs.”<sup>100</sup> However, the court did acknowledge that “[a]lthough section 707(a) of the MBTA imposes strict liability, . . . the government must prove that Moon Lake’s power lines constitute the cause in fact, as well as the proximate cause, of death” of the birds, meaning that there are limits on the scope of criminal liability under the MBTA for incidental takings.<sup>101</sup>

Another Tenth Circuit case recognizing but restricting the scope of strict liability offenses under the MBTA was *United States v. Apollo Energies, Inc.*<sup>102</sup> In 2010, 13 years after its decision in *United States v. Corrow* that held that violating Section 2’s prohibition against possessing any part of a migratory bird was a strict liability offense, the Tenth Circuit emphasized that constitutional constraints require that application of strict liability to incidental takings of

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<sup>93</sup> See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 690 (10th Cir. 2010) (citing BLACK’S LAW DICTIONARY (6th ed. 1990)).

<sup>94</sup> *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978).

<sup>95</sup> *Id.* at 536.

<sup>96</sup> *Id.*

<sup>97</sup> *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999).

<sup>98</sup> *Id.* at 1072.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1074.

<sup>101</sup> *Id.* at 1077. “Cause in fact” is generally defined as the “cause without which the event could not have occurred.” BLACK’S LAW DICTIONARY (10th ed. 2014)

<sup>102</sup> 611 F.3d 679 (10th Cir. 2010).

migratory birds be limited to actions or omissions that proximately caused the bird deaths.<sup>103</sup> In *United States v. Apollo Energies, Inc.*, the Tenth Circuit affirmed the conviction of oil drilling operators as violating the MBTA when dead migratory birds were discovered lodged in pieces of their oil drilling equipment.<sup>104</sup> First, the court held that “[a]s a matter of statutory construction, the ‘take’ provision of the Act does not contain a scienter requirement,” acknowledging that it was bound by its holding in *Corrow* that addressed this issue.<sup>105</sup>

Second, the court rejected the operators’ argument that application of the MBTA would be unconstitutional because the statute fails to provide adequate notice of what conduct constitutes a crime, requiring the statute to require prosecutors to prove proximate causation.<sup>106</sup> The court explained that the MBTA is not unconstitutionally vague because it “criminalizes a range of conduct that will lead to the death or captivity of protected migratory birds. . . . The actions criminalized by the MBTA may be legion, but they are not vague.”<sup>107</sup> The court further concluded that because due process requires that criminal defendants have adequate notice that their conduct is a violation of the law, “a strict liability interpretation of the MBTA for the conduct charged here satisfies due process only if defendants proximately caused the harm to protected birds.”<sup>108</sup> The court explained the following:

Questions abound regarding what types of predicate acts—acts which lead to the MBTA’s specifically prohibited acts—can constitute a crime. Conceptually, the constitutional challenge to the criminalization of these predicate acts can be placed under the rubric of notice or causation. The inquiries regarding whether a defendant was *on notice* that an innocuous predicate act would lead to a crime, and whether a defendant *caused* a crime in a legally meaningful sense, are analytically indistinct, and go to the heart of due process constraints on criminal statutes. . . . When the MBTA is stretched to criminalize predicate acts that could not have been reasonably foreseen to result in a proscribed effect on birds, the statute reaches its constitutional breaking point.<sup>109</sup>

The court agreed with the lower court’s assessment of proximate cause in concluding that “proximate cause is an ‘important and inherent limiting feature’ to the MBTA, and that liability would attach where the injury ‘might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.’”<sup>110</sup> In affirming the convictions, the court held that the record showed that it was reasonably foreseeable that protected birds could be trapped in the operators’

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<sup>103</sup> *United States v. Corrow*, 119 F.3d 796, 798 (10th Cir. 1997). See “Direct and Unintentional Take” section, *supra*, for discussion of this case.

<sup>104</sup> *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010). In this case, migratory birds were attempting to nest in the oil drilling operator’s cylindrical heaters and then died when they could not escape. *Id.* In 2005, FWS initiated an educational campaign to alert oil producers and suggest protective measures to prevent migratory bird deaths. *Id.* at 682-83. During the campaign, FWS also chose not to recommend prosecution for MBTA violations related to heaters through the end of 2006. *Id.* at 683. After the grace period ended, FWS agents searched a heater belonging to Apollo Energies Inc. and Dale Walker. *Id.* Defendant Apollo was later convicted after dead migratory birds were found in 2007, and Defendant Walker was convicted after dead birds were found during inspections in April 2007 and April 2008. *Id.*

<sup>105</sup> *Id.* at 686.

<sup>106</sup> *Id.* at 689-690.

<sup>107</sup> *Id.* at 689.

<sup>108</sup> *Id.* at 682.

<sup>109</sup> *Id.* at 689-90.

<sup>110</sup> *Id.* at 690 (citing *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999)).

equipment because the operators had knowledge and notice from FWS that its equipment had the potential to trap and kill protected birds for nearly a year and a half before the bird deaths.<sup>111</sup>

### *Narrow Application of the Take Prohibitions in the Eighth and Ninth Circuits*

Courts in the Eighth and Ninth Circuits have taken a more narrow view by limiting the MBTA's take prohibitions to deliberate and intentional conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths, such as federal activities that modify or disturb bird habitats or accidental deaths from commercial activity.<sup>112</sup> In so holding, these courts have focused on the common law meaning of the term "take" as used and defined in the MBTA and other statutes to conclude that the MBTA prohibition is limited to intentional and direct action.<sup>113</sup> In addition, these courts have compared the MBTA to the Endangered Species Act (ESA) that specifically addresses incidental take of endangered species.<sup>114</sup> The ESA's definition of a "take" includes activities that "harm" or "harass" threatened or endangered wildlife.<sup>115</sup> For the ESA, FWS defined "harm" to include wildlife deaths that are proximately caused by "habitat modification."<sup>116</sup> In 1982, Congress amended the ESA, authorizing FWS to issue incidental take permits under certain circumstances.<sup>117</sup> "Incidental take" is defined in the ESA as a wildlife take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."<sup>118</sup>

The Ninth Circuit relied on the different definitions of "take" adopted in the ESA and the MBTA in *Seattle Audubon Society v. Evans* to limit the scope of the MBTA taking prohibition to direct and intentional action.<sup>119</sup> In that case, the court held that the MBTA does not prohibit the USFS and the BLM from selling and logging timber from lands within areas that may provide suitable habitat for the northern spotted owl.<sup>120</sup> The court stated the MBTA's use of "take" refers to "physical conduct 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."<sup>121</sup> The court noted that unlike the MBTA regulatory definition of "take," the ESA's definition of "take" includes the term "harm," which encompasses habit modification or degradation.<sup>122</sup> In relying on this distinction, the court concluded that the agencies' logging and sale of timber, which was viewed as being likely to

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<sup>111</sup> *See id.* at 691 (affirming two of the convictions where the operators received notice of the equipment's potential to trap and kill migratory birds prior to the birds' deaths and vacating one conviction because there was no evidence that the operator was aware of problems with heater-treaters in the oil industry or in his specific operations prior to the FWS educational campaign).

<sup>112</sup> *See, e.g.,* United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012); Newton Cty. Wildlife Ass'n v. U.S. Forest Ser. 113 F.3d 110 (8th Cir. 1997), *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

<sup>113</sup> *See id.*

<sup>114</sup> 16 U.S.C. § 1539(a). *See, e.g.,* *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

<sup>115</sup> 16 U.S.C. § 1532(19).

<sup>116</sup> 50 C.F.R. § 17.3.

<sup>117</sup> Endangered Species Act Amendments of 1982, P.L. 97-304, 96 Stat. 1411 (codified as amended at 16 U.S.C. § 1539(a)).

<sup>118</sup> 16 U.S.C. § 1539(a).

<sup>119</sup> *Seattle Audubon Soc'y*, 952 F.2d at 302.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 303.

destroy migratory birds' habitat, did not violate the MBTA.<sup>123</sup> In distinguishing the *United States v. FMC Corp.* and *United States v. Corbin Farm Service* decisions discussed above, the court explained that those cases (which addressed unintentional deaths of migratory birds through pesticide manufacturing and use) “do not suggest that habitat destruction, leading indirectly to bird deaths, amounts to the ‘taking’ of migratory birds within the meaning of the MBTA.”<sup>124</sup> The court concluded that “[h]abitat destruction causes ‘harm’ to the owls under the ESA but does not ‘take’ them within the meaning of the MBTA.”<sup>125</sup>

In *Newton County Wildlife Association v. U.S. Forest Service*, the Eighth Circuit joined the Ninth Circuit, holding that the USFS did not violate the MBTA by failing to obtain “special permits” from the FWS for timber sales that would disrupt nesting of migratory birds and result in the death of some birds.<sup>126</sup> As noted above, the court determined that the MBTA did not apply to the government.<sup>127</sup> The court further concluded that the death of birds as a result of timber harvesting did not constitute a take under MBTA Section 2, explaining that “[s]trict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds.”<sup>128</sup>

Following *Newton County Wildlife Association*, a federal district court in North Dakota dismissed misdemeanor MBTA criminal charges against three oil and gas companies for the incidental death of migratory birds through contact with oil reserve pits operated by the defendants.<sup>129</sup> In *United States v. Brigham Oil & Gas, L.P.*, the district court examined the plain language of the statute and found that the word “take” was an “action word” that “involves deliberate, not accidental, conduct. It refers to a purposeful attempt to possess wildlife through capture, not incidental or accidental taking through lawful commercial activity.”<sup>130</sup> The court concluded that the

use of reserve pits in commercial oil development is legal, commercially-useful activity that stands outside the reach of the [MBTA]. Like timber harvesting, oil development and production activities are not the sort of physical conduct engaged in by hunters and poachers, and such activities do not fall under the prohibitions of the Migratory Bird Treaty Act.<sup>131</sup>

The court also noted that “[i]f there is a desire on the part of Congress to criminalize commercial activity that incidentally injures migratory birds protected under the Migratory Bird Treaty Act, it may certainly do so—but the criminal laws should be clear and certain.”<sup>132</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* See “Broad Application of the Take Prohibitions in the Second and Tenth Circuits” section, *supra*, for discussion of the Second Circuit cases.

<sup>126</sup> *Newton Cty. Wildlife Ass’n v. U.S. Forest Ser.* 113 F.3d 110 (8th Cir. 1997). See “Cases Holding That Federal Agency Actions Are Not Subject to MBTA Take Prohibitions” section, *supra*, for more information about this case.

<sup>127</sup> *Id.* at 115.

<sup>128</sup> *Id.*

<sup>129</sup> *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1208 (D.N.D. 2012).

<sup>130</sup> *Id.* at 1209.

<sup>131</sup> *Id.* at 1211.

<sup>132</sup> *Id.*

### *Fifth Circuit Approach Limiting Strict Liability of the Takings Prohibition*

The Fifth Circuit has sought to bridge the gap between the Second and Tenth Circuit courts that hold that incidental takings violate the MBTA as a strict liability offense, and the Eighth and Ninth Circuit courts that hold that only direct and intentional takings, such as hunting and poaching, violate the taking prohibition. In 2015, the Fifth Circuit in *United States v. CITGO Petroleum Corp.* limited the scope of strict liability offenses under the MBTA by requiring that takings of migratory birds be the result of an “affirmative action”—deliberate acts done directly and intentionally to migratory birds—before being subject to the MBTA.<sup>133</sup> In so doing, the court reversed a criminal conviction for the death of migratory birds that flew into and died in oil production-related tanks.<sup>134</sup>

The Fifth Circuit first confined its analysis to discerning the common law definition of “take,” explaining that, absent other indications, Congress intends to adopt the common law definition of statutory terms.<sup>135</sup> The court embraced Justice Scalia’s definition of “take” as interpreted in *Babbitt v. Sweet Home Chapter Communities for Greater Oregon*.<sup>136</sup> In that case, Justice Scalia, dissenting from the court’s holding that the prohibition on “take” under the ESA extends to preserve habit, explained that “to ‘take,’ when applied to wild animals, means to reduce those animals, by killing or capturing, to human control.’ . . . One does not reduce an animal to human control accidentally or by omission; he does so affirmatively.”<sup>137</sup> Similar to the approach of the Eighth and Ninth Circuits, the court relied heavily on the distinction between the ESA and the MBTA, concluding that “[h]arm and harass are the terms Congress uses when it wishes to include negligent and unintentional acts within the definition of ‘take.’ Without these words, ‘take’ assumes its common law definition.”<sup>138</sup>

Although the court agreed with the Eighth and Ninth Circuits that “a ‘taking’ is limited to deliberate acts done directly and intentionally to migratory birds,” the Fifth Circuit distinguished between two types of “intent”: (1) the intentional and deliberate act (*actus reus*) that is fundamental to the common law meaning of “take” and (2) the guilty mind (*mens rea*) element that requires an intent to violate the MBTA.<sup>139</sup> While acknowledging that the MBTA imposes strict liability that does not require a *mens rea* element, the court explained that the

act is “to take” which, even without a *mens rea*, is not something that is done unknowingly or involuntarily. Accordingly, requiring [that] defendants as an element of an MBTA misdemeanor crime, to take an affirmative action to cause migratory bird deaths is consistent with the imposition of strict liability.<sup>140</sup>

The court explained that a defendant must commit an “intentional and deliberate act toward the bird” (the *actus reus* element) to be strictly liable under the MBTA even if the defendant has no

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<sup>133</sup> 801 F.3d 477 (5th Cir. 2015).

<sup>134</sup> *Id.* at 494.

<sup>135</sup> *See id.* at 499 (citing *United States v. Shabani*, 513 U.S. 10, 13 (1995)).

<sup>136</sup> *See id.* (citing *Babbitt v. Sweet Home Chapter Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting)).

<sup>137</sup> *See Babbitt*, 515 U.S. at 717 (citing OXFORD ENGLISH DICTIONARY (1933); WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1949); *Geer v. Connecticut*, 161 U.S. 519, 523 (1896); 2 WILLIAM BLACKSTONE, COMMENTARIES 411 (1766)).

<sup>138</sup> *Babbitt*, 515 U.S. at 491.

<sup>139</sup> *Id.* at 488-89.

<sup>140</sup> *Id.* at 492.

intention to violate the MBTA.<sup>141</sup> The court compared a hunter who shoots a migratory bird without a permit under the mistaken belief that the bird is not protected under the MBTA and a person whose car accidentally collides with a bird.<sup>142</sup> The hunter, the court explained, would be strictly liable even though he did not intend to violate the MBTA because he engaged in an “intentional and deliberate act toward the bird” whereas the driver’s act was not intentional and deliberate.<sup>143</sup>

### *Accidental Takings of Migratory Birds*

Although the courts have taken different positions on whether the incidental takings of migratory birds are subject to the MBTA, courts have tried to exclude wholly accidental, human-related deaths of birds—such as those caused by collisions with man-made structures, vehicles, and communication towers—from the reach of the MBTA.<sup>144</sup> These accidental takings differ from other types of incidental takings (e.g., takings caused by birds flying into wind turbines) because accidental takings are generally unforeseeable and unpreventable accidents. Although the courts agree that the MBTA should exclude these types of accidental bird deaths, they disagree on how to interpret the statute to limit the application of the MBTA.

In courts that hold a more expansive view of the MBTA’s taking prohibition to include incidental takings, wholly accidental deaths still are not subject to the strict liability standard. For example, the Second Circuit in *United States v. FMC Corp.* acknowledged the potentiality that a broader interpretation of the MBTA that “would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows into which birds fly, would offend reason and common sense,” but nonetheless concluded that such situations could be handled through the “sound discretion of prosecutors and the courts.”<sup>145</sup> The court reasoned that a “nominal fine” and prosecutorial discretion would address such situations.<sup>146</sup>

Other courts have criticized the reasoning in *United States v. FMC Corp.*, explaining that “prosecutorial discretion is not a limiting principle of statutory interpretation”<sup>147</sup> and that “proper construction of a criminal statute cannot depend upon the good will of those who must enforce it.”<sup>148</sup> The U.S. District Court for the District of Colorado in *United States v. Moon Lake Electric Association* suggested that requiring that an act or omission be the proximate cause of a taking is an “important and inherent limiting feature of the MBTA’s misdemeanor provision.”<sup>149</sup>

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<sup>141</sup> *Id.* at 491-92.

<sup>142</sup> *Id.* at 492.

<sup>143</sup> *Id.*

<sup>144</sup> See FISH & WILDLIFE SERV., THREATS TO BIRDS: MIGRATORY BIRDS MORTALITY – QUESTIONS AND ANSWERS (2016), <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php> (listing the most common, human-caused sources of bird mortality in North America).

<sup>145</sup> *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978) (applying strict liability for incidental bird deaths related to pesticide manufacturing). See “Broad Application of the Take Prohibitions in the Second and Tenth Circuits” section, *supra*, for discussion of this case.

<sup>146</sup> *Id.* at 905.

<sup>147</sup> See *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1583 (S.D. Ind. 1996) (holding that the MBTA did not apply to USFS’s planned logging during migratory nesting season because the MBTA did not apply to activities that resulted in unintended deaths of migratory birds).

<sup>148</sup> See *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1084 (D. Colo. 1999) (holding that application of the MBTA strict liability standard is limited by proximate causation and not prosecutorial discretion).

<sup>149</sup> *Id.* at 1085.

The Fifth Circuit in *United States v. CITGO Petroleum Corp.* disagreed that proximate cause was a sufficient limitation on the strict liability standard of the MBTA, however, reasoning that under such an interpretation of the MBTA the government could still prosecute for these types of accidental deaths and expand the scope of the MBTA to “absurd results.”<sup>150</sup> This expansion, the court explained, would subject owners of glass windows, communication towers, wind turbines, cars, cats, and “even church steeples” to the MBTA penalties upon a finding of guilt for killing a migratory bird.<sup>151</sup> As a result, the Fifth Circuit held that requiring an “affirmative action to cause migratory bird deaths is consistent with the imposition of strict liability” such that a “person whose car accidentally collided with the bird . . . has committed no act ‘taking’ the bird for which he could be held strictly liable.”<sup>152</sup>

## Judicial Interpretation of Congressional Intent

The legislative history of the MBTA supports differing interpretations of the nature and scope of takings prohibited and types of migratory birds protected by the MBTA. The courts that have limited the scope of the MBTA prohibitions to direct and intentional actions have interpreted the legislative history to indicate that Congress was primarily concerned with illegal hunting and poaching of migratory birds when it enacted the MBTA.<sup>153</sup> Other courts have interpreted the legislative history and statutory text to cover other types of activities that affect songbirds and insectivorous migratory birds that are not typically hunted.<sup>154</sup>

Other courts have focused on amendments to the MBTA that added *mens rea* requirements for certain types of violations. For example, the felony penalty provision in MBTA Section 6(b) regarding the prohibition of selling migratory birds was amended in 1986 to limit application to entities that *knowingly* take migratory birds to sell or barter them, or have intent to do so.<sup>155</sup> Congress proposed this amendment to address a court decision in which the U.S. Court of Appeals for the Sixth Circuit upheld the dismissal of a felony indictment on constitutional grounds. Specifically, the Sixth Circuit held that strict liability application of the MBTA to the sale of migratory birds violates the Fifth Amendment’s Due Process Clause because without a *mens rea* requirement, “a person acting with a completely innocent state of mind could be

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<sup>150</sup> *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 493-94 (5th Cir. 2015).

<sup>151</sup> *Id.* at 494.

<sup>152</sup> *Id.*

<sup>153</sup> *See, e.g., Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991) (“The definition [of take under the MBTA] 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.”). *See also* *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (“Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds. Thus, we agree with the Ninth Circuit that the ambiguous terms ‘take’ and ‘kill’ in 16 U.S.C. § 703 mean ‘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.’”) (internal citations omitted).

<sup>154</sup> *See, e.g., United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978) (“The use of the broad language ‘by any means or in any manner’ [in § 703] belies the contention that Congress intended to limit the imposition of criminal penalties to those who hunted or captured migratory birds. Moreover, a number of songbirds and other birds not commonly hunted are protected by the conventions and so by the Act; Congress imposed criminal penalties on those who killed these birds as well as on persons who hunted game birds. The legislative history of the Act reveals no intention to limit the Act so that it would not apply to poisoning.”).

<sup>155</sup> Emergency Wetlands Resources Act of 1986, P.L. 99-645, 100 Stat. 3582 (codified as amended at 16 U.S.C. § 707(b)).

subjected to a severe penalty and grave damage to his reputation.”<sup>156</sup> A Senate report stated that “[n]othing in this amendment is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions under 16 U.S.C. 707(a), a standard which has been upheld in many Federal court decisions.”<sup>157</sup>

Similarly, in 1998, Congress eliminated strict liability for taking of migratory birds by baiting in Section 704(b) by requiring that a “person knows or reasonably should know that the area is a baited area.”<sup>158</sup> A Senate report explained the following:

This legislation modifies the standard of liability applicable to hunting with bait or over baited areas. Specifically, the standard is changed from one of strict liability to one requiring a degree of knowledge . . . . The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA [for misdemeanor offenses]. Since the MBTA was enacted in 1918, offenses under the statute have been strict liability crimes. The only deviation from this standard was in 1986, when Congress required scienter for felonies under the Act.<sup>159</sup>

Some courts have pointed to these amendments of the MBTA to support their determination that MBTA prohibitions on takings are strict liability offenses. For example, in *United States v. Morgan*, the Fifth Circuit upheld the conviction of a hunter who exceeded the daily bag limit of birds allowed under applicable hunting regulations, holding that misdemeanor offenses under the MBTA are strict liability offenses.<sup>160</sup> In so doing, the court noted that Congress has consistently referred to misdemeanor offenses under the MBTA as strict liability offenses.<sup>161</sup> Similar, the Tenth Circuit in *Apollo Energies, Inc.* cited the legislative history of these amendments as “further evidence the legislative scheme invokes a lesser mental state for misdemeanor violations.”<sup>162</sup>

Congress has attempted to limit the penalty provisions of the MBTA. In June 2015, the House of Representatives passed the FY2016 Commerce, Justice, Science, and Related Agencies Appropriations Bill, which included an amendment sponsored by Representative Jeff Duncan that would prohibit the use of Department of Justice funds to prosecute or hold liable any person or corporation for a violation of the MBTA.<sup>163</sup> The House appropriations bill was reported in the Senate but was not brought to the floor for consideration.<sup>164</sup>

## FWS Enforcement and DOI Legal Opinions on Incidental Take

Before 2017, DOI interpreted the MBTA to prohibit incidental take and kills, imposing strict liability for activities and hazards that led to the deaths of protected migratory birds.<sup>165</sup>

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<sup>156</sup> See S. REPT. 99-645, at 16 (citing *United States v. Wulff*, 758 F.2d 1121 (1985)) (1986).

<sup>157</sup> *Id.*

<sup>158</sup> Migratory Bird Treaty Reform Act of 1998, P.L. 105-312, 112 Stat. 2956 (codified as amended at 16 U.S.C. § 704(b)).

<sup>159</sup> S.Rept. 105-366, at 2-3 (1998).

<sup>160</sup> *United States v. Morgan*, 311 F.3d 611, 616 (5th Cir. 2002).

<sup>161</sup> *Id.* at 615.

<sup>162</sup> *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010). See “Broad Application of the Take Prohibitions in the Second and Tenth Circuits” section for discussion of this case.

<sup>163</sup> H.R. 2578, 114th Cong. § 564 (2015).

<sup>164</sup> See S.Rept. 114-66 (2015).

<sup>165</sup> *Natural Res. Def. Council v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469, 473 (S.D.N.Y. 2020) [hereinafter

FWS enforced the prohibition on incidental take through various strategies.<sup>166</sup> It aimed first at achieving voluntary compliance through industry best practices guidance to minimize incidental take of migratory birds.<sup>167</sup>

In certain instances when entities did not implement such best practices, FWS pursued prosecution and issued fines. For example, FWS took enforcement actions against wind energy developers to reinforce the Service's broad interpretation that the MBTA prohibitions on taking migratory birds extend to actions that unintentionally result in bird deaths.<sup>168</sup> In November 2013, Duke Energy Renewables Inc. pled guilty to violating the MBTA for the deaths of golden eagles and other migratory birds at two wind projects that included 176 wind turbines on private land in Wyoming.<sup>169</sup> A year later, in December 2013, PacifiCorp Energy agreed to pay \$2.5 million in fines, restitution, and community service after pleading guilty to charges arising from 38 golden eagle deaths and 336 other protected bird deaths at two of its wind farms in Wyoming.<sup>170</sup>

Since 2017, DOI Solicitors have issued several conflicting legal opinions regarding whether the MBTA prohibits the incidental taking or killing of migratory birds.

During the Obama Administration in January 2017, then-DOI Solicitor Hilary Tompkins issued a legal opinion, M-37041 (the Tompkins Opinion), concluding that:

[The] MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing. . . . The MBTA imposes strict liability

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NRDC].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* See also FWS, BEST PRACTICES, at <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/guidance-documents.php> (last visited Jan. 20, 2022) (listing activity-specific voluntary best practices to reduce impacts to migratory birds).

<sup>168</sup> FWS estimates that wind turbines may kill half a million birds a year. FISH & WILDLIFE SERV., WILDLIFE CONCERNS ASSOCIATED WITH WIND ENERGY DEVELOPMENT (2015), at <https://www.fws.gov/Midwest/wind/wildlifeimpacts/index.html> [hereinafter WILDLIFE CONCERNS]. In an effort to reduce these deaths, FWS issued the Land-Based Wind Energy Guidelines on March 23, 2012. FISH & WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE LAND-BASED WIND ENERGY GUIDELINES (2012), at [https://www.fws.gov/ecological-services/es-library/pdfs/WEG\\_final.pdf](https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf). However, the Service makes clear that adherence to the guidance does not "absolve" individuals or companies from MBTA violations for taking or killing protected migratory birds. WILDLIFE CONCERNS. FWS indicates that it would use its enforcement discretion to focus on investigating and prosecuting those who harm or kill migratory birds without taking steps to avoid the take (i.e., those who do not adhere to the guidance). *Id.*

<sup>169</sup> Press Release, Dept. of Justice, Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (November 22, 2013), at <https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects>. According to the charges presented in court, Duke Energy Renewables Inc. failed to make all reasonable efforts to build the projects in a way that would avoid the risk of avian deaths by collision with turbine blades, despite prior warnings about this issue from FWS. *Id.* Under a plea agreement with the government, the company agreed to pay fines, restitution, and community service totaling \$1 million and was placed on probation for five years. *Id.* The Department of Justice stated that this "case represents the first criminal conviction under the Migratory Bird Treaty Act for unlawful avian takings at wind projects." *Id.*

<sup>170</sup> Press Release, Dept. of Justice, Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (December 19, 2014), at <https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects-0>. PacifiCorp pled guilty to two misdemeanor violations of the MBTA and was sentenced to five years' probation. *Id.* The company also agreed to institute a compliance program to prevent bird deaths at the utility's four commercial wind farms in Wyoming. *Id.* Similar to Duke Energy case, the charges alleged that the company failed to make all reasonable efforts to build projects in a way that would avoid risk of bird deaths by collision with turbine blades consistent with the guidance finalized by the FWS in 2012. *Id.* Wyoming, where these enforcement cases were filed, is within the Tenth Circuit. It may be more difficult to prosecute wind energy developers for incidental take in the Fifth, Eighth, and Ninth Circuits, where the courts have held that the MBTA applies to actions (like hunting) directed against migratory birds, and not to the unintended effects of commercial activities, such as wind energy projects. See discussions, *infra*.

(with narrow exceptions) for misdemeanor violations resulting from unauthorized take, incidental or otherwise. Therefore, the government need not show that a defendant willfully or intentionally took or killed birds to prove a violation of the MBTA.<sup>171</sup>

The opinion asserted that the statutory terms “take” and “kill” “by any means or matter” in the MBTA Section 2(a) prohibitions are “sufficiently broad to encompass actions performed knowingly, negligently, or without any knowledge of wrongdoing.”<sup>172</sup> This interpretation noted that “take that is incidental to industrial or commercial activities” would violate the MBTA.<sup>173</sup>

To reach this conclusion, the Tompkins Opinion relied, in part, on the legislative history of amendments that added *mens rea* requirements for violations of other MBTA provisions discussed above. The Tompkins Opinion asserted that the legislative history of these amendments to the MBTA “demonstrates that multiple subsequent Congresses understood, and reaffirmed, that the MBTA was a strict-liability statute,” meaning that no “particular mental state is required for a [misdemeanor] violation to occur.”<sup>174</sup> The opinion also highlighted the Tenth Circuit’s opinion in *Apollo Energies*, the Second Circuit’s opinion in *FMC Corp.*, and other similar cases that held that the “prohibitions of ‘take’ and ‘kill’ unambiguously apply on a strict-liability basis (except in the context of felony prosecutions and baiting cases) and to incidental take.”<sup>175</sup>

During the Trump Administration, DOI issued a different legal interpretation of the MBTA’s application to incidental takings. In December 2017, then-Principal Deputy Solicitor, Daniel Jorjani, replaced the Tompkins Opinion with a new legal opinion, M-37050 (the Jorjani Opinion).<sup>176</sup> That opinion concluded that the MBTA “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.”<sup>177</sup> The Jorjani Opinion explained that the MBTA’s strict liability provisions are not triggered until there is a deliberate act (the *actus reus*) to take a migratory bird.<sup>178</sup> To support its conclusion, the Jorjani Opinion relied, in part, on the Fifth Circuit in *CITGO*, discussed above, and other similar cases. The opinion also noted that the legislative history of amendments that added *mens rea* requirements for violations were not related to MBTA Section 2(a) take prohibitions. On February 3, 2020, FWS proposed regulations to codify its interpretation on incidental take.<sup>179</sup>

The Trump Administration’s interpretation spawned further judicial and regulatory actions. On August 11, 2020, a federal district court in *Natural Resources Defense Council v. DOI (NRDC)* vacated the Jorjani Opinion.<sup>180</sup> The court held that the plain language of the MBTA’s prohibition on taking protected migratory birds “at any time, by any means, and in any manner” means that the MBTA prohibits incidental killing of the birds.<sup>181</sup> The court rejected DOI’s argument that the

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<sup>171</sup> *Opinion M-37041* at 2.

<sup>172</sup> *Opinion M-37041* at 8.

<sup>173</sup> *Opinion M-37041*.

<sup>174</sup> *Opinion M-37041* at 9, 12.

<sup>175</sup> *Opinion M-37041* at 23-30.

<sup>176</sup> *Opinion M-37050*.

<sup>177</sup> *Opinion M-37050* at 2.

<sup>178</sup> See *Opinion M-37050* at 22-23 (asserting that the deliberate acts (e.g., to take or kill) prohibited by the MBTA “are purposeful and voluntary affirmative acts directed at reducing an animal to human control, such as when a hunter shoots a protected bird causing its death”).

<sup>179</sup> Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5915 (Feb. 3, 2020).

<sup>180</sup> *Natural Res. Def. Council v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020) [hereinafter *NRDC*].

<sup>181</sup> *Id.* at 481.

Jorjani Opinion interprets only the *actus reus* of the take prohibitions by limiting its coverage to activities that are “directed at” birds, and thus does not impose a *mens rea* requirement. The court concluded that “[t]here is nothing in the text of the MBTA that suggests that in order to fall within its prohibition, activity must be directed specifically at birds.”<sup>182</sup> Despite the court’s decision, FWS finalized its proposed rule on January 7, 2021, codifying its interpretation of incidental take from M-37050.<sup>183</sup> In the preamble, FWS explained that it disagreed with the district court’s decision in *NRDC* and that the Jorjani Opinion is consistent with the Fifth Circuit’s decision in *CITGO*.<sup>184</sup> The final rule was to go into effect on February 8, 2021.<sup>185</sup>

Since the beginning of the Biden Administration, FWS proceeded with multiple actions to reverse the Trump Administration’s interpretation and regulations regarding incidental take of migratory birds. After delaying the effective date of the January 7, 2021 rule,<sup>186</sup> FWS revoked it in a rule published on October 4, 2021, effectively reinstating its prior interpretation that the MBTA prohibits incidental take.<sup>187</sup> FWS explained that its interpretation is consistent with the *NRDC* decision and its previous practice of applying enforcement discretion in incidental take circumstances.<sup>188</sup>

Soon after, FWS issued Director’s Order No. 225 to the Service on how to implement its current position on incidental take, and to clarify its related enforcement policies.<sup>189</sup> The order announced plans to prioritize enforcement against incidental take from an otherwise illegal activity, or foreseeable incidental take from legal activities that occur because regulated entities did not implement “beneficial practices” to avoid or minimize incidental take.<sup>190</sup> The order referenced best practices that FWS has developed for specific structures (e.g., communication towers and electric utility lines) and industries (e.g., oil and gas and wind energy).<sup>191</sup> The order also directs Service employees to avoid or minimize take in their own activities.<sup>192</sup> The order went in to effect on December 3, 2021.

FWS also published an advanced noticed of proposed rulemaking (ANPR) to gather comments and information for future rulemakings on incidental take prohibitions under the MBTA.<sup>193</sup> FWS plans to codify its interpretation of the MBTA as prohibiting incidental take, instead of relying on enforcement discretion.<sup>194</sup> FWS is also considering authorizing certain types of incidental take

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<sup>182</sup> *Id.* at 487-88.

<sup>183</sup> Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134 (Jan. 7, 2021).

<sup>184</sup> 86 Fed. Reg. at 1134.

<sup>185</sup> *Id.* The decision in *NRDC* to vacate the Jorjani Opinion did not directly affect DOI’s proposed rule, even though the subject matter was related, because the rule was a different agency action. When the rule became final on January 7, 2021, it also became subject to separate judicial review. As this section discusses, however, it appears that the January 7, 2021, rule may be superseded by subsequent agency action.

<sup>186</sup> Regulations Governing Take of Migratory Birds; Delay of Effective Date, 86 Fed. Reg. 8715 (Feb. 9, 2021).

<sup>187</sup> Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642 (Oct. 4, 2021).

<sup>188</sup> *Id.*

<sup>189</sup> FWS, Director’s Order No. 225, Incidental Take of Migratory Birds (Oct. 5, 2021), at [https://www.fws.gov/regulations/mbta/sites/default/files/2021-09/Final\\_MBTA\\_Directors\\_Order.pdf](https://www.fws.gov/regulations/mbta/sites/default/files/2021-09/Final_MBTA_Directors_Order.pdf).

<sup>190</sup> *Id.* at 2-3.

<sup>191</sup> *Id.* at 3.

<sup>192</sup> *Id.*

<sup>193</sup> Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds; Advance Notice of Proposed Rulemaking; Notice of Intent to Prepare a National Environmental Policy Act Document, 86 Fed. Reg. 54,667 (Oct. 4, 2021).

<sup>194</sup> 86 Fed. Reg. at 54,668-69.

using a combination of three regulatory tools: (1) exceptions to the MBTA's prohibition on incidental take; (2) general permits for certain activity types; and (3) individual permits.<sup>195</sup> Exceptions could include noncommercial activities by individuals (e.g., homeowner activities that take birds) and certain commercial activities where beneficial practices or technologies sufficiently avoid and minimize incidental take.<sup>196</sup> FWS could also authorize general permit programs for specific activities through a registration system, which would not require a separate environmental review for each registration.<sup>197</sup> By contrast, individual permits would be similar to current depredation permit regulations and would include customized permit conditions.<sup>198</sup> FWS noted that it plans to use the information gathered from the ANPR to help prepare a draft environmental review as required by the National Environmental Policy Act.<sup>199</sup> FWS received over 11,000 comments on its ANPR by the close of the comment period on December 3, 2021.<sup>200</sup>

## Considerations for Congress

FWS has recognized what some view as the importance of providing regulatory certainty to regulated entities while balancing statutory and treaty obligations for the long-term conservation of migratory birds.<sup>201</sup> For example, wind-energy developers often desire direction on how to address incidental taking of migratory birds protected under the MBTA as wind energy continues to be a fast-growing source of new electric power generation.<sup>202</sup>

The legal debate regarding the scope of the MBTA's take prohibitions and its application to incidental take will likely continue absent direction from the Supreme Court or Congress. Some Members of Congress have introduced legislation in the 117th Congress to clarify that the MBTA prohibitions apply to incidental take. H.R. 4833 would amend MBTA Section 2(a) to prohibit incidental take of migratory birds.<sup>203</sup> The bill would also establish a new section of the MBTA to clarify that any person who incidentally takes a migratory bird as a result of a commercial activity would violate the MBTA unless authorized by a general permit or other listed exceptions in the bill.<sup>204</sup>

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<sup>195</sup> *Id.* at 54,669.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See id.* (referring to depredation permitting regulations in 50 C.F.R. part 21, subpart C).

<sup>199</sup> *Id.* at 54,670. In 2015, FWS published a notice of intent to establish an incidental take permit program for the MBTA, but it was never finalized. *See* Migratory Bird Permits; Programmatic Environmental Impact Statement; Notice of Intent, 80 Fed. Reg. 30,032 (May 26, 2015).

<sup>200</sup> *See* Docket FWS-HQ-MB-2021-0105, at <https://www.regulations.gov/docket/FWS-HQ-MB-2021-0105/comments>.

<sup>201</sup> 86 Fed. Reg. at 54,668.

<sup>202</sup> For information regarding the development of wind energy sources, see CRS Report R40175, *Wind Energy: Offshore Permitting*, by Adam Vann and CRS Report R46970, *Offshore Wind Energy: Federal Leasing, Permitting, Deployment, and Revenues*, by Laura B. Comay and Corrie E. Clark.

<sup>203</sup> H.R. 4833, 117th Cong. (2021).

<sup>204</sup> H.R. 4833, 117th Cong. § 2(b) (2021).

## **Author Information**

Linda Tsang  
Legislative Attorney

Erin H. Ward  
Legislative Attorney

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