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THE MIGRATORY BIRD TREATY ACT: AN OVERVIEW

NOVEMBER 15, 2016

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The Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 701-12, was first enacted in 1918. Part of the first generation of federal wildlife laws, the MBTA merits increased attention today because broad interpretations of the Act have the potential to criminalize everyday behavior.

The MBTA implements the United States' obligations under several international treaties and conventions for the protection of migratory birds. The Treaty Power provided the basis for sustaining the constitutionality of the MBTA in *Missouri v. Holland*, 252 U.S. 416 (1920), in an era when the scope of federal powers under the Commerce Clause was seen as more limited. The MBTA is administered by the U.S. Department of the Interior, acting through the U.S. Fish and Wildlife Service ("FWS"). *See* 16 U.S.C. § 701.

This paper provides an overview of the MBTA starting with its coverage, then discussing the widening circuit split on the scope of the MBTA's criminal "take" prohibition, and then addressing a recent FWS initiative on potential solutions for companies concerned about MBTA liability.

Almost All Bird Species In The U.S. Are Covered By The MBTA – FWS regulations include most native birds found in the United States as species protected by the MBTA – including species that do not migrate internationally, and even species that do not migrate at all. *See* 50 C.F.R. § 10.13. "The MBTA now protects nearly all native birds in the country, of which there are millions if not billions, so there is no end to the possibilities for an arguable violation." Coggins & Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. Colo. L. Rev. 165, 190 (1979).

It Is A Crime To "Take" A Migratory Bird Or Its Nest, Except As Authorized By Regulation – The MBTA is a criminal statute. One section of the MBTA makes it unlawful to "kill" or "take" a migratory bird, nest, or egg, except as permitted under regulations.

> Unless and except as permitted by regulations as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . [or transport] any migratory bird, any part, nest, or egg of any such bird.

16 U.S.C. § 703.

The criminal penalties for MBTA violations are described in 16 U.S.C. § 707, as amended by 18 U.S.C. §§ 3559, 3571. Under these provisions, a "knowing" violation of the MBTA is a felony, while other violations are misdemeanors.

The MBTA allows FWS to adopt regulations to permit some types of migratory bird "take." This supplies the legal authority for rules like migratory bird hunting regulations.

The Unsettled Law on Private Enforcement of the MBTA – The MBTA, on its face, provides only for criminal enforcement by the United States. Unlike statutes such as the ESA, the MBTA contains no private right of action or citizen suit provision allowing an environmental non-governmental organization ("ENGO") to sue a private party directly for an alleged MBTA violation.

Nonetheless, the D.C. Circuit has held that ENGOs can enforce MBTA limitations against federal agencies through civil injunctions in suits brought under the Administrative Procedure Act ("APA"). *Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000); *but see Public Employees for Envt'l Responsibility v. Hopper*, 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016) (declining to reach question of whether agency violated MBTA by not requiring MBTA permit when issuing offshore wind lease because lessee, Cape Wind, stated intent to obtain a permit). Accordingly, in courts following the D.C. Circuit's view, ENGOs may use the MBTA and the APA to attempt to enjoin a federal agency from conducting its activities until MBTA compliance is achieved. *See Center for Biological Diversity v. Pirie*, 91 F. Supp. 2d 161 (D.D.C. 2002), and 201 F. Supp. 2d 113 (D.D.C. 2002), *vacated as moot*, 2003 WL 179848 (D.C. Cir. 2003) (suit to enjoin live-fire training exercises by the military); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004) (City had standing to bring MBTA

challenge regarding redevelopment plan but did not establish substantive MBTA violation).

The question of whether an agency would be subject to an APA challenge for issuing a permit to a private party was recently addressed by the Ninth Circuit, which held that neither the MBTA itself nor the APA provided the basis for such a challenge. *Protect Our Communities Foundation v. Jewell*, 825 F.3d 571, 585-86 (9th Cir. 2016). The court held that "the MBTA does not contemplate attenuated secondary liability on agencies like the [Bureau of Land Management] that act in a purely regulatory capacity, and whose regulatory acts do not directly or proximately cause the 'take' of migratory birds, within the meaning of 16 U.S.C. § 703(a)." *Id.* at 585. The Ninth Circuit distinguished *Glickman* because in that case the agency was "responsible for instituting a plan that would intentionally capture and kill migratory geese" and thus "the agency itself was implicated in the killing of migratory birds without a permit, in violation of the MBTA." *Id.* Other courts have also found either that the MBTA does not apply to federal agencies or that the APA does not authorize MBTA suits against federal agencies. *See Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 114 (8th Cir. 1997); *Sierra Club v. Martin*, 110 F.3d 1551, 1556 (11th Cir. 1997); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1302 (8th Cir. 1989).

The ESA Concepts Of "Take" And "Incidental Take" – The 1973 Endangered Species Act ("ESA") broadened the definition of a wildlife "take" to include activities which "harm" or "harass" threatened or endangered wildlife. 16 U.S.C. § 1532(19). FWS defined "harm" to include wildlife deaths that are proximately caused by a land-use or "habitat modification" activity. 50 C.F.R. § 17.3. The Supreme Court ultimately sustained the "harm" regulation in *Babbitt v. Sweet Home Chapt. of Commtys. for a Great Oregon*, 515 U.S. 687 (1995).[1]

Based in part on the assumed legality of FWS's broad 1978 definition of "harm," the 1982 ESA amendments introduced the concept of "incidental take" of imperiled wildlife, and provided that FWS could issue incidental take permits to make such takes lawful. 16 U.S.C. § 1539(a). Incidental take is defined there to be a wildlife take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* Thus, under the ESA: (1) "incidental take" is a subset of "take"; (2) incidental take includes an unintended wildlife death caused by land-use and other activities not directed against wildlife; and (3) Congress expressly provided for issuance of permits to render lawful some activities causing incidental take.

In contrast, the 1918 MBTA and its amendments do not refer to "incidental take" as being within the scope of the MBTA's criminal penalties. Nor does FWS's definition of MBTA "take" include activities that unintentionally "harm" or "harass" wildlife. The conflict among the circuits (discussed below) on the scope of MBTA "take" can be described as involving: (1) whether the MBTA concept of criminal "take" includes what the ESA would call the incidental take of wildlife; and (2) whether the broader, modern concept of "take" under some post-1970 wildlife statutes should be read into the 1918 MBTA.

The Circuit Split On The Scope Of The MBTA's "Take" And "Kill" Prohibitions – As described above, the MBTA makes it unlawful to "take" a migratory bird (or its nest or eggs). FWS's rules define "take" for MBTA purposes to mean to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12. This definition clearly covers activities directed against wildlife, such as hunting or killing a migratory bird.

But do the terms "take" and "kill" in the 1918 MBTA extend beyond such affirmative activities directed against wildlife, to reach the wide set of activities that may inadvertently cause a migratory bird death (e.g., operation of oil and gas production facilities, construction and operation of wind turbines and telecommunications towers, conduct of commercial forestry and agriculture, not to mention more everyday activities such as driving a car, owning

[1] Crowell & Moring represented the forest products industry in *Sweet Home*, *Newton County*, and *Martin*. We represented defendant Continental Resources in the *Brigham Oil* case discussed below.

a cat, or owning a house with picture windows)? Courts presented with this question have split.

FWS has, periodically, pushed the broad interpretation of the MBTA in enforcement actions. This initiative has met with mixed success in the federal courts and the law now varies circuit-by-circuit.

The Fifth, Eighth, and Ninth Circuit narrowly interpret MBTA "take" to include just migratory bird deaths resulting from affirmative activities directed against wildlife. The Second and Tenth Circuits interpret MBTA "take" more broadly to include many bird deaths inadvertently caused by industrial activities. This mature circuit split may set the stage for resolution by the Supreme Court.

The Case Law Supporting Position That MBTA Criminalizes Only A Narrow Range Of Conduct – The narrow view of MBTA "take" and "kill" – under which the terms are restricted to actions directed against migratory birds – received a major boost recently in *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, (5th Cir. 2015). There, the Fifth Circuit reversed a criminal conviction for migratory bird deaths when birds flew into oil production-related tanks. The *CITGO* opinion was based on multiple grounds:

> [W]e agree with the Eighth and Ninth circuits that a "taking" is limited to deliberate acts done directly and intentionally to migratory birds. Our conclusion is based on the statute's text, its common law origin, a comparison with other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary illegal act.

Id. at 488-89.

We highlight two elements of the Fifth Circuit's analysis. First, the Fifth Circuit found that the 1918 MBTA adopted the common-law understanding of a wildlife "take," which is to "reduce those animals, by killing or capturing, to human control." *Id* at 489. While Congress employed a broader definition of a wildlife "take" in more recent statutes (for instance by including the term "harm" in the definition of "take" in the 1973 ESA), *CITGO* reasons that Congress did not depart from the historical meaning of a wildlife "take" in the 1918 MBTA or in subsequent amendments. Thus, the Fifth Circuit held that the common law definition of "take" – which is limited to activities directed at wildlife – should control. *Id.* at 491.

Second, the unanimous *CITGO* panel reasoned that conviction for a crime normally requires proof of both the "*mens rea*" or state-of-mind element, and the "*actus reus*" or prohibited conduct element. *Id*. at 492. While the MBTA imposes strict liability that dispenses with the intent element (e.g., "take" that occurs "by any means or in any manner" is illegal), the MBTA still requires the *actus reus* of an "affirmative action to cause migratory bird deaths." *Id*. For example, a "person whose car accidentally collided with the bird … has committed no act 'taking' the bird for which he could be held strictly liable." *Id*. The *CITGO* panel found that the Second and Tenth Circuits had moved too quickly in finding "that because the MBTA imposes strict liability, it must forbid acts that accidentally or indirectly kill birds," thereby eliminating the *actus reus* requirement. *Id*. at 491.

In the earliest key appellate decision supporting the narrow interpretation of MBTA "take," the Ninth Circuit 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." *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991). Later, the Eighth Circuit would agree, stating 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.

Newton County Wildlife Ass'n v. U.S. Dep't of Agriculture, 113 F.3d 110, 115 (8th Cir 1997).

Newton County was followed by a district court within the Eighth Circuit. It found the unintended deaths of a few migratory birds in oil reserve pits were not criminal violations of the MBTA. *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D. N.D. 2012). There, District Judge Hovland concluded that the 1918 MBTA "only covers conduct directed against wildlife" – "lawful commercial activity which may indirectly cause the death of migratory birds does not constitute a federal crime." 840 F. Supp. 2d at 1212, 1214. The court further reasoned that the broad interpretation of MBTA "take" advocated by the government was unpersuasive because a "court is required to construe a criminal statute narrowly." 840 F. Supp. 2d at 1211. That is, the "rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subject to them." *Id*. (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008)). Accordingly, the MBTA as currently written does not make it a crime to engage in "ordinary land uses which may cause bird deaths [such as] cutting brush and trees, and planting and harvesting crops" or "ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, [which] inevitably cause migratory bird deaths." 840 F. Supp. 2d at 1212.

Other district court decisions outside the Fifth, Eighth, and Ninth Circuits also construe the MBTA narrowly. Notable examples include opinions finding that timber harvesting, even though leading to migratory bird deaths, is not an unlawful MBTA "take" include *Curry v. U.S. Forest Service*, 988 F. Supp. 541, 549 (W.D. Pa. 1997); and *Mahler v. U.S. Forest Service*, 927 F. Supp. 1559, 1573-83 (S.D. Ind. 1996).

Case Law Supporting An Expansive View Of MBTA "Take" – On the other hand, some circuit courts and district courts have sided with FWS's broad view that MBTA "take" and "kill" refer, not to conduct directed against wildlife, but to any activity that has the direct effect of killing or injuring a migratory bird. FWS's view gains some support from the statutory references to killing "by any means or in any manner," and the inclusion of misdemeanor penalties for takes that are not "knowing." 16 U.S.C. §§ 703, 707.

As mentioned above, in a series of criminal prosecutions, the Department of Justice has pushed the broad interpretation of the statute, and some courts have accepted the theory, gradually expanding the scope of the MBTA in these jurisdictions. In the earliest decision, the Second Circuit affirmed the conviction of a manufacturer of pesticides for migratory bird deaths. *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978). Still the *FMC* court stated misgivings (a "construction 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") and suggested possibly limiting incidental takes to "extrahazardous" activities (actually what are termed "ultrahazardous" activities in tort law parlance). 572 F.2d at 905, 907. In a contemporaneous high-profile case, an applicator of pesticides was found to have violated the MBTA. *United States v. Corbin Farm Servs.*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd on other grounds,* 578 F.2d 259 (9th Cir. 1978).

Most recently, the Tenth Circuit concluded that MBTA "take" is a "strict liability" misdemeanor crime, covering all deaths of migratory birds (finding there is no *mens rea* or intent-to-kill-birds requirement), and concluded that the MBTA is not unconstitutionally vague. *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010). This reasoning was sufficient to sustain misdemeanor convictions of oil producers once FWS put them on notice that their heater-treaters could trap and kill migratory birds. But that reasoning did not allow criminal penalties for conduct that occurred before FWS provided notice that the activity could be a proximate cause of MBTA "take." *See* 611 F.3d at 688-91 ("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.").

Within the Tenth Circuit, the Department of Justice earlier convinced a district court that the MBTA was not limited to activities directed against migratory birds (e.g., hunting). The District Court for Colorado found that the MBTA prohibited migratory

bird deaths which an electric utility could reduce by adopting some relatively inexpensive and available protective measures. *United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070 (D. Colo. 1999). As illustrated by *Moon Lake* and several of the oil industry prosecutions, under its historical practice, FWS normally will not recommend prosecution unless the actor declines to adopt available measures to reduce the known risk of migratory bird deaths.

The Supreme Court Might Resolve The Circuit Conflict – In summary, there is now a mature conflict among the circuit courts on whether the 1918 MBTA concepts of taking or killing migratory birds are limited to conduct directed against wildlife (the view of the Fifth, Eighth, and Ninth Circuits), or whether these concepts cover any migratory bird death proximately caused by a defendant (FWS's view, which is largely shared by the Second and Tenth Circuits). One way to resolve this conflict – and the uncertainty for those potentially subject to MBTA sanctions – would be for the Supreme Court to accept a petition for certiorari, and issue a ruling of national scope.

FWS's Initiative On Regulatory Permits For MBTA Incidental Take – Before the Fifth Circuit's *CITGO* decision, in May 2015 FWS announced that it was considering developing an MBTA permitting program to authorize what would now be called incidental take. 80 Fed. Reg. 30032 (May 26, 2015). This announcement came in the form of a scoping notice under the National Environmental Policy Act ("NEPA"). The notice stated that FWS intended to prepare a draft environmental impact statement analyzing alternatives for permitting incidental take under the MBTA for certain industries and requested public comment on regulatory options.

While FWS has regulations to permit migratory bird hunting seasons and other directed-at-wildlife takes, FWS has no current regulations that clearly authorize permits for incidental take of migratory birds outside certain military contexts. The position of the United States in one case was that there "are no provisions for the Service to issue permits authorizing UNINTENDED" takes or deaths of migratory birds. *CBD v. Pirie*, 191 F. Supp. 2d at 167. "[M]igratory bird permits are not generally available for 'incidental' take of protected species, such as those caused by typical commercial or industrial operations." Reimer & Snodgrass, *Tortoises, Bats, and Birds, Oh My: Protected-Species Implications for Renewable Energy Projects*, 46 Idaho L. Rev. 545, 552, 566 (2010).

FWS's positions that (i) MBTA "take" covers every unpermitted migratory bird death, and (ii) there is no regulation authorizing a permit to make incidental take lawful, create a broad web of potential criminal liability. FWS's historical answer to this dilemma is that the public should rely on FWS's sound exercise of prosecutorial discretion. *See, e.g., Moon Lake*, 45 F. Supp. 2d at 1084-85. As FWS restated in 2015, the "Service focuses its enforcement efforts under the MBTA on industries or activities that chronically kill birds and has historically pursued criminal prosecution under the Act only after notifying an industry of its concerns regarding avian mortality, working with the industry to find solutions, and proactively educating industry about ways to avoid or minimize take of migratory birds." 80 Fed. Reg. 30034. The 2015 scoping notice indicates FWS's desire to move away from reliance on prosecutorial discretion and informal arrangements to reduce unintended migratory bird deaths, and to move towards regulatory programs to permit certain incidental takes.

For persons or companies in Circuits that have adopted FWS's broader interpretation of the MBTA, such a regulatory program would provide an opportunity to obtain legal certainty of protection against prosecution, but the relief is still far in the future. FWS has only begun a NEPA process that is likely to take multiple years and then would be followed by a notice-and-comment rulemaking process to promulgate the program.

FWS received over 140 public comments on its 2015 notice. Industries that had been subjected to or threatened with MBTA prosecutions (e.g., oil and gas companies, utilities, wind energy producers) sometimes favored the initiative on permits for incidental take as a way to eliminate potential MBTA criminal liability, and to provide regulatory certainty.

Other commenters questioned FWS's legal authority for the rulemaking. *See* http://www.regulations.gov/#!documentDetail;D=FWS-HQ-MB-2014-0067-0001.

Surprisingly, FWS's notice skipped over the threshold legal issue. FWS did not address whether the MBTA concept of "take" includes what is called "incidental take" in the 1982 ESA amendments. If the scope of MBTA "take" and "kill" is limited to conduct directed against wildlife, then FWS lacks the legal authority to expand the MBTA's criminal scope to include land-use or other activities that incidentally cause migratory bird deaths, and FWS lacks authority to regulate such claimed incidental takes.

The Fifth Circuit's *CITGO* decision highlights the problem with FWS's assumption that it has the statutory authority to regulate incidental takes: the Fifth, Eighth, and Ninth Circuits disagree. If FWS adopts incidental take regulations under the MBTA, as things stand now, those regulations are vulnerable to challenge in one of those Circuits. This consideration may increase the Executive Branch's desire to have the Supreme Court resolve the circuit conflict, and to issue a nationwide ruling on the scope of MBTA "take" and "kill." FWS's initiative on regulating and permitting incidental take under the MBTA may be halted or slowed as a practical matter, unless and until the Supreme Court or Congress provides clear support of the FWS position.

At present, persons and companies conducting activities that do inadvertently cause migratory bird deaths remain subject to potential MBTA prosecutions in many jurisdictions. Those persons and companies are subject to a crazy quilt of MBTA interpretations that vary circuit-by-circuit, and sometimes judge-by-judge, and dependent on the government's exercise of prosecutorial discretion. For many in the private sector, this legal uncertainty and risk is unacceptable, or at least suboptimal.

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While we hope this overview of the MBTA provides you with a helpful background, this overview cannot provide legal advice. Persons with emerging MBTA issues should contact a knowledgeable practitioner.

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