

Abrupt Policy Change on Century-Old Migratory Bird Treaty Act

February 22, 2018

New York Law Journal

February 22, 2018 by Christine A. Fazio and Ethan I. Strell

The Migratory Bird Treaty Act (MBTA), enacted in 1918 and one of the oldest U.S. environmental laws, prohibits the unauthorized killing of migratory birds. 16 U.S.C. §§703-712. The MBTA was first enacted to codify a treaty between the United States and Canada (then part of Great Britain) in response to the extinction or near extinction of birds, many of which were hunted for their feathers. The broadly-worded statute says in relevant part that “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill ... any migratory bird” Id. §703(a). MBTA violations are criminal offenses, with misdemeanor convictions up to \$15,000 and/or six months of jail per violation. 16 U.S.C. §707(a). Courts apply a strict liability standard to misdemeanor MBTA violations, so the government need not prove a defendant’s intent to kill; intentional violations are felonies.

The issue that has been subject to disagreements among federal courts and within the Interior Department is whether the MBTA prohibits an “incidental take,” which is killing birds through an activity whose purpose is not killing birds. Incidental takes include deaths from power lines, wind turbines, and buildings, and poisoning from commercial or industrial activity such as from uncovered waste ponds.

In January 2017, the outgoing Obama-appointed Solicitor of the Interior Department issued a detailed memorandum reflecting longstanding agency policy that the MBTA liability applies to incidental takes. Less than a year later, the new Trump Principal Deputy Solicitor rescinded the January memo and issued a replacement, concluding that the MBTA only addresses “affirmative and purposeful actions, such as hunting and poaching,” and not incidental take. This article discusses the MBTA’s legislative history and litigation.

Legislative History

In 1916, the United States and Great Britain, on behalf of Canada, signed a convention to protect migratory birds (including game birds, non-game birds, and insectivorous birds). Congress enacted the MBTA in 1918 to implement that convention. The United States thereafter entered into separate conventions with Mexico in 1936, Japan in 1973, and Russia in 1976, which also committed the parties to protect migratory bird species. The conventions called on the parties to take action to prevent damage to migratory birds and their environment, and the MBTA has been amended periodically in response to changes required by the conventions.[1] The statute does not define “incidental take.” However, the 1936 amendments added the words “by any means” so that the statute now reads: “It shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill” 16 U.S.C. §703(a). In 1986, the statute was amended to limit the felony provision to “knowing violations” after a court found the law unconstitutional by imposing strict felony liability, but the amendment did not change the strict liability standard for misdemeanors. S. Rep. No. 99-445 (1986). The statute was further amended in 1998 to eliminate strict liability for hunting violations involving baiting (the use of grain or seeds to attract birds). The term “incidental take” was explicitly referred to by Congress in 2002 in a Department of Defense appropriation bill in which Congress temporarily exempted military operations from MBTA liability for “incidental taking” caused by military-readiness activities. (This amendment was in response to a court ruling that live-fire military training exercises that unintentionally killed migratory birds within the training area violated the MBTA (H. Rep. No. 107-436 (2002)). Section 315 of Public Law 107-314

(Dec. 2, 2002). In 2015, the Fish & Wildlife Service (FWS) announced its intent to prepare an environmental impact statement in order to adopt regulations that would define incidental taking as an MBTA violation; however, FWS has not followed through on that rulemaking.[2]

MBTA Circuit Split

The Second and Tenth Circuits have recognized MBTA liability for incidental takes. The Second Circuit held that the MBTA applies to incidental takings in *United States v. FMC Corporation*, 572 F.2d 902 (2d Cir. 1978). Here, a pesticide manufacturer pumped toxic water into a pond attractive to waterfowl, resulting in the killing of 92 birds over several months. While the manufacturer had not intended to kill birds and in fact had worked with government authorities to determine the cause of the deaths, the court, analogizing to strict tort liability, found that proof of intent was not necessary to prove an MBTA violation because the manufacture of pesticides is extra-hazardous: "Congress recognized the important public policy behind protecting migratory birds; FMC engaged in an activity involving the manufacture of a highly toxic chemical; and FMC failed to prevent this chemical from escaping into the pond and killing birds. This is sufficient to impose strict liability" *Id.* at 908. The court, however, disagreed that the MBTA applied to killing "without limitation," and thus cautioned that its decision does not dictate that every death of a bird would result in imposing strict criminal liability and that the application of criminal liability to all instances of incidental take (such as bird deaths caused by cars, airplanes, and modern glass buildings) "would offend reason and common sense," and could be addressed by prosecutorial discretion. See also *United States v. Corbin Farm Serv.* 444 F. Supp. 510 (E.D. Ca. 1978) (finding an incidental take due to deaths of birds resulting from application of pesticides).

Similarly, in *United States v. Apollo Energies*, 611 F.3d 679 (10th Cir. 2010), birds were killed after becoming trapped in oil-drilling equipment called "heater-treaters." The Tenth Circuit found that the MBTA applies to incidental take, but required a defendant to proximately cause the violation, which the court explained requires reasonable notice when it is not foreseeable that the specific conduct may result in the death of protected birds. FWS had informed one defendant for nearly a year and a half of the danger of uncovered heater-treaters before the bird deaths and affirmed his conviction. The court reversed another conviction because that defendant had not received prior notice from FWS. See also *United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070 (D. Colo. 1999) (the death of birds from electrocution by power lines is covered by the MBTA because government had proven that defendant had or should have had knowledge that its conduct may kill migratory birds).

In contrast, the Fifth Circuit, while agreeing that the MBTA is strict liability, held that under the MBTA, "a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds." *United States v. Citgo Petroleum*, 801 F.3d 477 (5th Cir. 2015) (bird deaths from uncovered oil waste tanks). However, the court expressly limited its analysis to the word "take," which was in the charging instrument, and did not consider the broader statutory language "kill." Relying on the common law understanding of "take," which involves affirmatively reducing an animal to human control, the court found that the defendant must commit the act voluntarily. The court explained: "There is no doubt that a hunter who shoots a migratory bird without a permit in the mistaken belief that it is not a migratory bird may be strictly liable for a 'taking' under the MBTA because he engaged in an intentional and deliberate act toward the bird," but a "person whose car accidentally collided with the bird, however, has committed no act 'taking' the bird for which he could be held strictly liable. Nor do the owners of electrical lines 'take' migratory birds who run into them." See also *United States v. Brigham Oil & Gas L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012) (in a case involving birds found dead near reserve pits used in oil and gas extraction, finding the term "take" in 50 C.F.R. §10.12 means an intentional act and does not cover "a lawful action that may result in the death of a bird"); *United States v. Ray Westall Operating*, 2009 U.S. Dist. LEXIS 130674 (D.N.M. Feb. 25, 2009) (finding that the incidental military training amendment was required because military shooting and weapons training was similar to hunting activities but Congress did not intend the MBTA to criminalize negligent acts or omissions by industrial activities that are not directed at birds but which incidentally and proximately cause bird deaths).

Other federal court decisions have not directly addressed incidental take, but have held that activities that destroy or modify bird habitats are too attenuated from the bird deaths and not covered by the statute. See *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991) (MBTA

does not apply to the death of birds caused by habitat destruction such as logging operations); *Newton County Wildlife Association v. US Forest Service*, 113 F.3d 110 (8th Cir. 1997) (destruction of forests containing migratory birds does not violate MBTA); *Mahler v. U.S. Forest Service*, 927 F. Supp. 1559 (S.D. Ind. 1996) (Forest Service cutting of trees that could destroy nesting areas did not violate MBTA).

Conflicting Department of Interior Policy Memos

On Jan. 10, 2017, right before leaving office, Hilary C. Tompkins, President Obama's appointed Interior Solicitor, issued Memorandum M-37041, opining that the MBTA prohibits incidental takings. Following longstanding FWS policy, the memo concluded that the prohibitions in the MBTA are not limited to hunting, poaching or any particular factual context, but rather they extend to any take or killing of migratory birds, including take that is incidental to industrial or commercial activities. The opinion limited liability to where there is a close causal connection between an action and birds' deaths, and not to more attenuated takes, such as deaths caused by habitat modification.

On Dec. 22, 2017, Daniel Jorjani, the DOI's Principal Deputy Solicitor under the Trump administration, issued a new memorandum (M-37050) permanently withdrawing and replacing Tompkins' memo. Jorjani's memo concluded that "consistent with the text, history, and purpose of the MBTA, the statute's 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." In other words, the new memo reversed decades of agency practice that the MBTA prohibits incidental take.[3] Like the Fifth Circuit's *Citgo* decision, which the memo says triggered the department's further evaluation of the matter, Jorjani's memo relies largely on the common law understanding of "take," discounts Congress's explicit 2004 exemption from MBTA liability of "the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity," Pub. L. 108-447, div. E, title I, §143(d), Dec. 8, 2004, 118 Stat. 3072, and discounts the concepts of proximate cause and prosecutorial discretion to avoid "absurd results."

Conclusion

The MBTA has been instrumental in saving birds since the law was established 100 years ago and has been consistently interpreted by the Interior Department to include incidental take. Nevertheless, the scope of the statute's coverage as it applies to the unintended killing of migratory birds now is in dispute. While the Trump administration's interpretation currently reflects Interior policy, the resolution of this question, if not addressed by Congress, will likely be resolved by the Supreme Court.

Endnotes:

[1] Convention between United States and Great Britain for the Protection of Migratory Birds, 39 Stat. 1702 (Aug. 16, 1916); Convention between United States and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (Feb. 7, 1936); Convention between United States and Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, 25 U.S.T. 3329 (Sept. 19, 1974); Convention between United States and Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, 29 U.S.T. 4647 (Oct. 13, 1978).

[2] Notice of Intent to prepare Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032 (May 26, 2015).

[3] Representative Liz Cheney, Republican of Wyoming, also sought to codify no MBTA incidental take liability as an amendment to a bill addressing oil and gas and wind leases. Cheney's amendment would have added the following to the MBTA's liability section: "This Act shall not be construed to prohibit any activity proscribed by section 2 of this Act that is accidental or incidental to the presence or operation of an otherwise lawful activity." H.R. 4239.

Christine A. Fazio is a partner and co-director in the environmental practice group at Carter Ledyard & Milburn. **Ethan I. Strell** is assistant general counsel of the National Audubon Society.

Reprinted with permission from the February 22, 2018 edition of the *New York Law Journal*. © 2018 ALM media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com.