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# What You Need to Know About Developments Under the Migratory Bird Treaty Act

## Insight — Winter 2020

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The Migratory Bird Treaty Act (MBTA) carries out the United States' commitment to four treaties with Canada, Japan, Mexico and Russia, respectively, that protect birds that migrate across international borders.

The MBTA applies to over 1,000 species of native migratory birds and makes it unlawful to “pursue, hunt, take, capture, kill, attempt to take, capture or kill, [or] possess” any of those birds or their parts, nests or eggs, unless expressly permitted by federal regulations.

The MBTA is administered by the U.S. Fish and Wildlife Service (Service). However, its penalty provisions are solely criminal (as opposed to civil), meaning its enforcement is carried out by the Department of Justice (DOJ), not the Service. For each unauthorized take of protected bird, a violator may be subject to penalties of up to \$15,000, imprisonment for up to six months, or both, regardless of intent.

Currently, some permits are available under the MBTA for narrow purposes, such as falconry or importing of migratory birds. However, permits are not generally available to authorize the injury or death of migratory birds during otherwise lawful activities—such as mining, oil and gas operations, or construction and operation of pipelines, transmission lines or renewable energy facilities. This is commonly referred to as incidental take.

## Circuit Split on Incidental Take

Several U.S. Courts of Appeals have had split decisions on whether incidental take falls within the scope of the MBTA's take prohibition. On the one hand, the Second Circuit (covering Connecticut, New York and Vermont) and Tenth Circuit (covering Colorado, Kansas, Oklahoma, New Mexico, Utah and Wyoming) have concluded that entities can be held liable for incidental take.

The Fifth Circuit (covering Louisiana, Mississippi and Texas) has reached the opposite conclusion, holding that “take” under the MBTA is limited to deliberate acts done directly and intentionally to migratory birds. Prior decisions from the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota) and Ninth Circuit (covering Alaska, Arizona, California, Nevada, Oregon and Washington)

support this conclusion.

Thus, the judicial interpretation of the scope of the MBTA's criminal prohibitions varies depending on where the action occurs.

### **Dueling Solicitor's Opinions**

In January 2017, in the last days of the Obama Administration, the Solicitor of the Interior, the top lawyer at the Department of Interior (DOI), issued a Solicitor's Opinion that concluded that the MBTA's prohibitions include incidental take.

Less than a month later, the Trump Administration temporarily suspended and withdrew this opinion. In December 2017, the new Acting Solicitor of the Interior issued a new Solicitor's Opinion that reached the exact opposite conclusion as the previous one, finding that the statute's prohibitions apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs and do not apply to incidental take.

Thus, the current position of DOI is that any migratory bird injuries or mortalities that occur during the course of otherwise lawful activities is not an MBTA violation.

Not surprisingly, the second Solicitor's Opinion has already been challenged in court, with two lawsuits filed in May 2018 by conservation organizations and a similar complaint filed by eight states in September 2018. The court recently consolidated these cases and rejected the government's motion to dismiss, but it is still too early to tell whether or how those lawsuits may affect this issue.

### **Practical Implications**

One of the practical implications of DOI's position is that the Service's Office of Law Enforcement currently will not refer any incidental take of migratory birds to DOJ for prosecution. While DOJ is not bound by the Solicitor's Opinion, it is highly unlikely (especially under the current Administration) that it would independently pursue an MBTA prosecution for incidental take.

Another practical implication is that the Service will not have the same leverage to negotiate commitments from project proponents to implement minimization or mitigation measures for migratory birds. In fact, the Service issued a guidance memo in April 2018, which clarifies that the Service may not withhold a permit or request or require mitigation based upon incidental take concerns under the MBTA.

However, the consideration of impacts to migratory birds will still be part of environmental analyses under the National Environmental Policy Act, which will likely continue to result in some level of migratory bird conservation in actions authorized by federal agencies.

It continues to be advantageous for project proponents to work with the Service to avoid and minimize impacts to migratory birds.

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