



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Director, Fish and Wildlife Service

From: Solicitor

Subject: Incidental Take Prohibited Under the Migratory Bird Treaty Act

I. INTRODUCTION

A wide array of human activities and infrastructure incidentally kill or “take” migratory birds. “Take” is an umbrella term that includes, among other things, human actions that kill wildlife. “Incidental take” is take that results from an activity, but is not the purpose of the activity. Some of the activities and infrastructure that incidentally take migratory birds include power lines, pesticide application, communication towers, oil and contaminant spills, oil waste pits, surface-mining tailing ponds, commercial fishing, and wind turbines. In many cases, simple, relatively low-cost methods have proven effective in reducing the impacts of these activities on migratory birds. Some examples include: replacing non-flashing warning lights on communication towers with flashing lights; marking power lines with bird diverters; implementing greater spacing of insulators on powerpoles and other practices to reduce electrocution hazards of power lines; fencing and netting waste pits; updating mining operations to eliminate the use of tailing ponds, and employing streamer lines on longline fishing vessels to reduce seabird bycatch.

The Migratory Bird Treaty Act (MBTA)¹ prohibits unauthorized taking or killing of migratory birds. The U.S. Fish and Wildlife Service (FWS) has long recognized that this prohibition includes incidental taking and killing (which, for brevity, I refer to collectively as “incidental take”). Consistent with that longstanding view, FWS announced in 2015 that it is considering development of regulations to provide legal authorization of incidental take in circumstances in which the take is consistent with the purposes of the MBTA.²

The courts have generally agreed with the FWS interpretation of the MBTA as prohibiting incidental take.³ However, recently a few courts have erroneously construed the prohibition of “take” in the MBTA as limited to hunting and other forms of intentional taking of migratory

¹ 16 U.S.C. §§ 703-12.

² Migratory Bird Permits; Programmatic Environmental Impact Statement, Notice of Intent, 80 Fed. Reg. 30,032 (May 26, 2015).

³ See, e.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

birds.⁴ Because of the confusion caused by the varying case law, the Solicitor's Office has worked closely with FWS to comprehensively review the question of whether the MBTA applies to incidental take. This memorandum opinion presents the Department of the Interior's legal analysis supporting FWS's long-standing interpretation that the MBTA prohibits incidental take.⁵

I explain in detail below the basis for FWS's interpretation of the MBTA, analyzing in turn the text and legislative history of the MBTA, the four treaties underlying the statute, the past agency practice of the FWS in implementing the law, and the relevant case law. In sum, the MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing. Moreover, the prohibitions of the MBTA, as informed by the underlying treaties, are not limited to hunting, poaching, or any particular factual context; rather, they extend generally to unauthorized take or killing of migratory birds, including take that is incidental to industrial or commercial activities. The MBTA imposes strict liability (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. Liability under the MBTA is bounded by limits of proximate causation, however, and applies to "direct" take where there is a close causal connection between an action and its effect of taking migratory birds.⁶

II. THE MIGRATORY BIRD CONVENTIONS

In 1916, the United States and Great Britain (on behalf of Canada), signed a convention to protect migratory birds. Congress enacted the MBTA in 1918 to implement that convention. The United States later signed three more bilateral conventions with Mexico, Japan, and Russia to protect migratory birds. After each convention, Congress amended the MBTA to cover the species addressed in the new convention. Because a primary purpose of the MBTA is to comply with the four underlying conventions, I first consider the convention language relevant to incidental take.⁷

⁴ See, e.g., *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2105) (CITGO) (holding that "take" applies only to hunting and poaching situations).

⁵ FWS's long-standing interpretation reflects its consideration that the MBTA's prohibition of take "by any means and in any manner" unambiguously includes incidental take. However, to the extent that the MBTA could be considered ambiguous on that issue, the Service's interpretation, as clarified in this Opinion and accompanying new section of the U.S. Fish & Wildlife Service Manual at 720 FWS 3, is entitled to *Chevron* deference as the expert agency's interpretation of a statute it administers. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984). Even were a court to find *Chevron* deference inapplicable, the Service's long-standing interpretation is certainly entitled at a minimum to *Skidmore* deference as the thoroughly considered, valid, and reasonable administrative judgment of FWS that it has consistently held for at least the last 40 years. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁶ Note that "incidental take" and "intentional take" are NOT equivalent to "indirect take" and "direct take." As discussed below, the latter terms relate instead to the closeness of the causal connection between an action and its effect of taking migratory birds. Thus, it is possible to have incidental take that is direct and incidental take that is indirect. This distinction is important because, as also discussed below, the prohibitions of the MBTA do not apply to indirect take, such as that caused by habitat modification.

⁷ This primary purpose is inherent in the name of the statute and expressly referenced in its provisions. See 16 U.S.C. §§ 712 & 704(a).

The 1916 convention with Canada declares the goal of the parties to ensure the preservation of migratory birds due to their “great value as a source of food or in destroying insects.”⁸ The convention covers not only “Game Birds,” but also “Nongame Birds” and “Insectivorous Birds” that are not hunted.⁹ The convention requires the United States and Canada to establish closed hunting seasons for migratory birds, to prohibit the taking of nests and eggs except for scientific or propagating purposes, and to restrict shipment or export of migratory birds or eggs during closed seasons.¹⁰ The convention authorizes permits to kill migratory birds if they become “seriously injurious” to “agricultural or other interests.”¹¹ The Canada Convention was substantially revised in 1995.¹² The revised convention declares the commitment of the parties to the long-term conservation of shared species of migratory birds through a comprehensive international framework, including “monitoring, regulation, enforcement and compliance.”¹³ Article IV of the revised convention requires each country to use its authority to “seek means to prevent damage to [migratory] birds and their environments, including damage from pollution.”¹⁴ The convention authorizes the parties to allow the taking of migratory birds at any time of the year for scientific, educational, propagative, or “other specific purposes consistent with the conservation principles of this Convention.”¹⁵

The 1936 convention with Mexico declares the parties’ intent to protect migratory birds by means of “adequate methods which will permit, in so far as the ... parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce, and industry.”¹⁶ The convention calls for the parties to establish laws and regulations to ensure the protection of migratory birds, including establishment of closed seasons, establishment of refuge zones, and other restrictions on hunting of migratory birds.¹⁷ Like the convention with Canada, the convention with Mexico protects both “migratory game” and “migratory non-game” birds.¹⁸

The conventions with Japan, entered into in 1973, and Russia, in 1976, broadly recognize the value of migratory birds for a wide range of purposes and commit the parties to protect migratory bird species. Each convention calls for the parties generally to prohibit the taking or sale of migratory birds and eggs, but authorizes the parties to allow exceptions to those prohibitions for specified purposes, including hunting during established seasons, and more generally “for scientific, educational, propagative, or other specific purposes” not inconsistent with the

⁸ Convention between United States and Great Britain for the Protection of Migratory Birds, proclamation, 39 Stat. 1702 (Aug. 16, 1916) (Canada Convention).

⁹ *Id.* art. I, 39 Stat. at 1702–03.

¹⁰ *Id.* arts. II–VI, 39 Stat. at 1703–04.

¹¹ *Id.* art. VII, 39 Stat. at 1704.

¹² Protocol Between the Government of the United States 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, Sen. Treaty Doc. 104–28 (Dec. 14, 1995).

¹³ *Id.* art. II.

¹⁴ *Id.* art. IV.

¹⁵ *Id.* art. II.

¹⁶ Convention for the Protection of Migratory Birds and Game Mammals, art. I, 50 Stat. 1311 (Feb. 7, 1936).

¹⁷ *Id.* art. II.

¹⁸ *Id.* art. IV.

principles or objectives of the conventions.¹⁹ In addition, each of the conventions with Japan and Russia calls for the parties to prevent damage to birds and their environments.²⁰

These conventions require the United States to provide mechanisms for protecting migratory birds and their habitats from all threats. Although the original convention with Canada and the convention with Mexico focus principally on mechanisms to regulate the hunting of migratory birds, both conventions protect all species of migratory birds, including non-game species, from extermination or indiscriminate slaughter. The major threat to conservation of migratory birds in 1916 was undoubtedly commercial hunting, but other significant threats that could not possibly have been anticipated in 1916 have developed over the past 100 years, including many activities that incidentally take birds, such as power lines, communication towers, oil waste pits, surface-mining tailing ponds, and wind farms.²¹ Consequently, the Canada Convention was, as noted above, amended and expanded in 1995 to call for a comprehensive approach to conservation of migratory birds, including monitoring, regulation, and enforcement. The later conventions with Japan and Russia each call for implementing legislation that broadly prohibits the take of migratory birds, subject to specified exceptions. Finally, the conventions with Japan and Russia, and the amended convention with Canada, all call for the parties to take action to prevent damage to migratory birds and their environments.

While the migratory bird conventions do not specifically address regulation of take of migratory birds that occurs incidental to other activities, their provisions broadly support the regulation of the taking and killing of migratory birds by any means, including by industrial or commercial activities unrelated to hunting. In fact, Canada stated in a diplomatic note to the State Department that it was the parties' "mutually held interpretation" of the Canada Convention that it would be consistent with that convention for Canada to make "the authorization of incidental take contingent on compliance with approved conservation measures."²² Congress plainly intended the MBTA to implement all of these treaties, including the later conventions with Russia and Japan, and the amended convention with Canada, since in each instance Congress amended the MBTA to incorporate each convention as it was adopted by the United States.

¹⁹ Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Mar. 4, 1972) (Japan Convention) art. III; Convention Concerning the Conservation of Migratory Birds and Their Environment, T.I.A.S. No. 9073 (Russia Convention), art. II.1.

²⁰ Japan Convention, art. V.2(a); Russia Convention, art. IV.1, 2(c).

²¹ See Note No. 0005 from Canadian Embassy to United States Department of State, at 2 (July 2, 2008) (diplomatic note from Canada to the State Department stating that "incidental take of migratory birds ... caused by activities including, but not limited to, forestry, agriculture, mining, oil and gas exploration, construction and fishing activities [has] increasingly become a concern for the long-term conservation of migratory bird populations).

²² *Id.* at 3; see also *The Queen v. J.D. Irving, Ltd.*, slip op. at 2–3 (New Brunswick Provincial Court June 9, 2008) (upholding the constitutionality of Canada's implementing legislation as applied outside the hunting context, and rejecting a narrow interpretation of "take" in the Canada Convention). Moreover, the doctrine of international comity instructs that the United States and Canada should consistently interpret the Canada Convention. Comity is particularly important in the context of ensuring consistent domestic application of a treaty between two nations. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) ("Comity, in the legal sense ... is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.").

III. THE TEXT OF THE MBTA AND ITS LEGISLATIVE HISTORY

A. *The MBTA*

The MBTA provides for the conservation of birds, and implements the four bilateral conventions signed by the United States and nations that share migratory birds.²³ The MBTA makes it unlawful to, among other things, “take” or “kill” migratory birds, unless that taking or killing is authorized pursuant to regulation.²⁴ In this context, “migratory bird” means any bird protected by any of the conventions, and includes almost all bird species in the United States.²⁵ The MBTA grants the Secretary of the Interior broad authority to issue regulations to authorize otherwise prohibited activities,²⁶ and as may otherwise be necessary to implement the conventions.²⁷ “Take” is currently defined in FWS’s general wildlife regulations as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.”²⁸ Neither “take” nor “kill” is defined in FWS’s MBTA-specific regulations.

The MBTA does not require a particular mental state for a violation of its prohibitions. Section 2 of the MBTA as originally passed read:

Unless and except as permitted by regulations made as hereinafter provided, *it shall be unlawful to* hunt, *take*, capture, *kill*, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time or *in any manner, any migratory bird*, included in the terms of the [Canada convention] or any part, nest, or egg of any such bird.²⁹

Unless authorized by the Federal Government, the taking or killing of a covered bird “in any manner” was prohibited, without reference to a mental state. Neither did the original remedy provision in section 6 require a particular mental state:

Any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this Act, or who shall violate or fail to comply with any regulation made pursuant to this Act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500 or be imprisoned not more than six months, or both.³⁰

²³ See 16 U.S.C. § 703.

²⁴ *Id.*

²⁵ 50 C.F.R. § 10.13.

²⁶ 16 U.S.C. 704(a).

²⁷ *Id.* § 712(2).

²⁸ See 50 C.F.R. § 10.12.

²⁹ Act of July 3, 1918, ch. 128, § 2, 40 Stat. 755 (codified as amended at 16 U.S.C. § 703(a)) (emphasis added).

³⁰ *Id.* § 6, 40 Stat. 756 (codified as amended at 16 U.S.C. § 707(a)).

Thus, the MBTA did not, in its original form, expressly distinguish between incidental take and intentional take or require a particular mental state to violate the statute. And although the MBTA expressly prohibits hunting (except as permitted), the broader prohibitions of the statute (*e.g.*, “take,” “kill,” “possess”) are not limited to that context.

The legislative history of the 1918 Act does not expressly address the applicability of the MBTA to incidental take. The committee reports and floor debate indicate that the primary concerns of Congress in drafting the legislation were the “effective protection of useful migratory birds,”³¹ and compliance with the Canada Convention.³² To be sure, the legislative history refers to overhunting as a cause of the declines of migratory bird populations, but also refers to habitat loss and cites the value of protecting migratory birds for aesthetic and practical reasons unrelated to hunting and poaching.³³

Subsequent amendments to the MBTA are relevant to the regulation of incidental take. In 1936, Congress revised the language of section 2 of the MBTA in a variety of ways. Most relevant here, the “at any time or in any manner” language was moved to the beginning of the section (eliminating any possible ambiguity as to what it modified) and was strengthened by adding “by any means.”³⁴ The provision thus now reads:

Unless and except as permitted by regulations made 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, 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, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between [the United States and Canada, Mexico, Japan, and Russia].³⁵

Next, in 1960, Congress added a felony provision with respect to commercial-related violations to section 6.³⁶ Thereafter, the act was amended to add references to the later-signed conventions.

³¹ S. Rep. No. 65-27, at 2 (1917).

³² H.R. Rep. No. 65-243, at 2 (1918).

³³ S. Rep. No. 65-27, at 2 (1917) (appending letter from Secretary of State incorporating statement from Department of Agriculture); H.R. Rep. No. 65-243, at 2 (1918) (same); see *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal.) (“It is undeniable that Congress was concerned with hunting and capturing migratory birds when it enacted the MBTA; the legislative history confirms this concern. The fact that Congress was primarily concerned with hunting does not, however, indicate that hunting was its sole concern.”), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978); *Moon Lake Elec. Ass’n v. United States*, 45 F. Supp.2d 1070, 1080–82 (D.D.C. 1999) (“MBTA’s legislative history indicates that Congress intended to regulate recreational and commercial hunting” but “also suggests, however, that Congress intended the MBTA to regulate more than just hunting and poaching.”).

³⁴ Act of June 20, 1936, ch. 634, § 3, 49 Stat. 1556.

³⁵ 16 U.S.C. § 703(a).

³⁶ Act of Sept. 8, 1960, Pub. L. 86-732, 74 Stat. 866 (codified as amended at 16 U.S.C. § 707(b)).

Three relatively recent amendments to the MBTA speak directly to the question of mental state that must be proven in a prosecution under the MBTA. First, Congress amended section 6(b) in 1986, limiting the felony provision to knowing violations.³⁷ Congress did so in response to a court decision holding that the felony provision of the MBTA violated due process for imposing a felony on a strict-liability basis, and was therefore unconstitutional.³⁸ As the Senate Report explains, the amendment was meant “to cure the unintended infirmity” identified by the court.³⁹ But the report also states that “[n]othing in this amendment is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions ... a standard which has been upheld in many Federal court decisions.”⁴⁰

Second, in 1998, Congress amended section 3 of the MBTA to eliminate strict liability for hunting violations involving baiting (the use of grain to attract birds to a hunted field), and instead substituted a negligence standard.⁴¹ Congress was concerned with issues of fairness raised by application of the strict-liability standard to baiting.⁴² In recommending this amendment, the Senate Report noted that it would create only a narrow exception to the longstanding general rule of strict liability under the MBTA:

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. 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.⁴³

Finally, in 2002 Congress expressly addressed incidental take under the MBTA in the particular context of military-readiness activities.⁴⁴ In the 2002 legislation, Congress (1) temporarily exempted “incidental taking” caused by military-readiness activities from the prohibitions of the MBTA, (2) required the Secretary of Defense to identify, minimize, and mitigate the adverse effect of military-readiness activities on migratory birds, and (3) directed FWS to issue regulations under the MBTA creating a permanent authorization for military-readiness activities.⁴⁵ This legislation was enacted in response to a court ruling that had enjoined military

³⁷ Emergency Wetlands Resources Act of 1986, Pub. L. 99-645, § 501, 100 Stat. 3590.

³⁸ See *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985).

³⁹ S. Rep. No. 99-445, at 16 (1986).

⁴⁰ *Id.*

⁴¹ Migratory Bird Treaty Reform Act of 1998, Pub. L. 105-312, § 102(2), 112 Stat. 2956 (codified at 16 U.S.C § 704(b)).

⁴² See S. Rep. No. 105-366, at 2 (1998); H. Rep. No. 105-542, at 4-6 (1998).

⁴³ S. Rep. No. 105-366, at 3 (1998); see *id.* at 2 (describing strict liability as “a hallmark of the law”).

⁴⁴ Although this legislation directly addressed the implementation of the MBTA, it did not technically amend the MBTA. Nonetheless, for convenience, I also refer to it as an amendment to the MBTA.

⁴⁵ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, Div. A, Title III, § 315 (2002), 116 Stat. 2509, reprinted in 16 U.S.C.A. § 703, Historical and Statutory Notes. The Stump Act contained conflicting language regarding whether the regulations should be drafted as an authorization or an exemption. Because the legislation did not actually amend the MBTA, which a true exemption would have required, the Departments of the Interior and Defense concurred that FWS’s regulations would be appropriately drafted as an authorization.

training that incidentally killed migratory birds.⁴⁶ Significantly, Congress limited the authorization for military-readiness activities to training and operations related to combat and the testing of equipment for combat use; it expressly excluded routine military-support functions and the “operation of industrial activities” from the protection afforded by the 2002 legislation, leaving such non-combat-related activities fully subject to the prohibitions of the Act.

B. Analysis

The text of the MBTA in 1918 did not require a particular mental state for a violation of its prohibitions, and therefore imposed strict liability. This conclusion is reinforced by later amendments to the MBTA. Similarly, the plain language of the text does not limit the MBTA’s prohibitions to a certain factual context, and there is no legislative history to the contrary.

1. The original text of the MBTA created a broadly applicable strict-liability crime.

The plain language of the MBTA does not specify a required mental state for most violations. Although some of the prohibited acts are logically inconsistent with anything other than purposeful action (hunting, attempting to kill), that fact does not demonstrate congressional intent to impose a mental-state requirement on other prohibitions that do not logically incorporate such a requirement. At the time Congress drafted the MBTA, the words “take” and “kill” could be interpreted expansively. A contemporaneous dictionary defined the word “take” to include “[t]o grasp with the hand or with any instruments; to lay hold of; to seize; to grasp; to get into one’s hold” as well as “[t]o seize or lay hold of and remove; to carry off; to remove generally.”⁴⁷ The word “kill” was defined as “[t]o deprive of life, animal or vegetable, in any manner and by any means; to put to death; to slay.”⁴⁸ Both definitions are sufficiently broad to encompass actions performed knowingly, negligently, or without any knowledge of wrongdoing.⁴⁹

I recognize the word “take” had at common law a particular connotation when used in the context of game animals, denoting the act of reducing a wild animal to possession or control.⁵⁰ But there is no evidence that the common-law meaning of “take” required deliberate or intentional conduct, as opposed to inadvertent or negligent conduct that reduced wildlife to human possession or control. Likewise, there is no reason to believe that Congress intended to limit the term “take” in the MBTA to hunting or to otherwise require deliberate, intentional action. Congress’s simultaneous use of the term “kill,” a term that certainly lacks any connotation in common law as being restricted to hunting or intentional conduct, demonstrates that Congress meant broadly to prohibit actions that cause the death of birds. At the same time, it is evident that, by including the terms “hunt” and “kill” within the list of prohibited actions,

⁴⁶ *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 and 201 F. Supp. 2d 113 (D.D.C. 2002), *vacated on other grounds sub nom. Ctr. for Biological Diversity v. England*, 2003 U.S. App. Lexis 1110 (D.C. Cir. Jan. 23, 2003); see H. Rep. No. 107-436, at 286, 288 (2002).

⁴⁷ Webster’s Imperial Dictionary, at 1697–98 (1915).

⁴⁸ *Id.* at 922.

⁴⁹ See also *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1078–79 (D. Colo. 1999) (analyzing similar definitions from a different dictionary, which included “to cause to die” in the definition of “take”).

⁵⁰ See, e.g., *Geer v. State of Conn.*, 161 U.S. 519 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S., 322 (1979); *Babbitt v. Sweet Home Chapter Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting).

Congress intended the term “take” to mean something other than simply hunting or poaching activity. And, as a final matter, the fact that the migratory bird conventions have always protected non-game and insectivorous species of birds as well as game species, including hundreds of species not subject to hunting or other forms of intentional take, makes it implausible that Congress would have focused exclusively on hunting in enacting legislation to implement the protections of those conventions.

Moreover, all of the prohibitions were modified by the phrase “in any manner,” later strengthened to read “by any means or in any manner.” This language is extraordinarily expansive and mandates the broadest reasonable interpretation of the scope of the MBTA.⁵¹ As discussed below, Federal courts have relied upon this language in concluding that the MBTA prohibits incidental take. The MBTA’s plain language compels the conclusion that the prohibitions of the MBTA are strict-liability crimes (except in the context of felony prosecutions and baiting cases) and not limited to a particular factual context, such as hunting. The prohibitions of the MBTA thus apply to incidental take.

2. Subsequent MBTA amendments demonstrate the MBTA’s strict-liability nature and applicability to incidental take.

My conclusion that the MBTA applies to incidental take is confirmed by the three amendments to the Act discussed above that addressed mental state. The first two amendments, regarding the felony provision and baiting, imposed limited mental-state requirements—those requirements were only necessary if the existing statute’s silence with respect to mental state meant that no particular mental state was required. Likewise, the third amendment, which specifically authorized incidental take related to military-readiness activities, can only be understood as reflecting congressional understanding that the Act otherwise prohibits incidental take.

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. Those Congresses did not change this “hallmark of the law,”⁵² but instead crafted narrow amendments to address particular circumstances where they believed strict liability was unwarranted. Had Congress wanted to remove strict liability as the default mental state under the MBTA, Congress would not have proceeded in such a piecemeal fashion. In 1986, Congress could have amended the statute to change the default mental state for *any* violation to a knowing violation. Instead, it applied the knowing standard only to felonies: the Senate Report emphasizes that “[n]othing in this amendment is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions.”⁵³ Similarly, in 1998, Congress amended the MBTA to correct a perceived unfairness related to applying the strict-liability standard to the baiting context. Again, the resulting amendment targets the particular problem and nothing further—“elimination of strict liability” in the baiting context was “not intended in any way to reflect upon the general

⁵¹ See *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (“Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.”).

⁵² S. Rep. No. 105-366, at 2 (1998).

⁵³ S. Rep. No. 99-445, at 16 (1986).

application of strict liability under the MBTA.”⁵⁴ And in 2002, Congress could simply have amended the MBTA to expressly exclude incidental take from its prohibitions; instead, Congress authorized incidental take only by military-readiness activities (and explicitly excluded the “operation of industrial activities” from this authorization).

I acknowledge that there is an enormous and varied body of case law discussing the relevance of a later Congress’s interpretation of preexisting law. It is widely recognized that the intent of the Congress that enacted the relevant provision controls,⁵⁵ and views of subsequent Congresses are not *necessarily* dispositive as to the meaning of prior Congresses in passing legislation.⁵⁶ In some circumstances courts give such views little or no weight to subsequent legislative interpretations,⁵⁷ while in others, courts give great weight.⁵⁸

To determine the appropriate weight to give subsequently expressed views by Congress, the courts consider a number of factors that generally relate to the context in which those views were expressed.⁵⁹ Thus, the Supreme Court has rejected giving significant weight to subsequent views in the following circumstances: those views are merely inferred by analogy to treatment of the issue in other subsequent legislation;⁶⁰ those views were made promoting relevant but unsuccessful legislation;⁶¹ or those views are found in isolated statements by individual members or committees,⁶² particularly if not in the context of an amendment to the applicable law.⁶³

In contrast, in circumstances in which the subsequent Congress actually enacts new law declaring the intent of an earlier statute, courts give great weight to the views of the subsequent Congress.⁶⁴ This principle applies in circumstances in which the new legislation did not expressly declare the intent of the earlier statute, but the new legislation is premised on a particular interpretation of the earlier statute.⁶⁵ Giving weight to subsequent interpretations of Congress is particularly appropriate when the precise intent of the original enactment is “obscure,”⁶⁶ and this principle applies with special force when combined with the principle of

⁵⁴ S. Rep. No. 105-366, at 3 (1998).

⁵⁵ *E.g.*, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979).

⁵⁶ *E.g.*, *Bell v. New Jersey*, 461 U.S. 773, 784–85 (1983).

⁵⁷ *See, e.g.*, *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).

⁵⁸ *See, e.g.*, *Red Lion Broad. Co. v. Fed. Comm’n Comm’n*, 395 U.S. 367, 380–82 (1969).

⁵⁹ *See Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750 (1st Cir. 1992) (stating that in case-by-case analysis of what weight to give subsequent legislative interpretation, “context is all-important”).

⁶⁰ *See United States v. X-Citement Video*, 513 U.S. 64, 77 n.6 (1994).

⁶¹ *E.g.*, *United States v. Wise*, 370 U.S. 405, 411 (1962).

⁶² *Southeastern Cmty. College v. Davis*, 442 U.S. 397, 412 n.11 (1979); *see also Hagen v. Utah*, 510 U.S. 399, 420 (1994) (contrasting “merely passing references in texts” to “deliberate expressions of informal conclusions about congressional intent” of the Congress that enacted the original language).

⁶³ *See Dunn v. Commodities Future Trading Comm’n*, 519 U.S. 465, 478–79 (1997) (“legislative dicta” in legislative history of subsequent amendment that made no change to applicable law shed no light on intent of Congress that enacted relevant provision).

⁶⁴ *Red Lion*, 395 U.S. at 380–82.

⁶⁵ *See Loving v. United States*, 517 U.S. 748, 770 (1996); *cf. United States v. Fausto*, 484 U.S. 439, 453 (1988) (“This classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.”).

⁶⁶ *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

deference to a long-standing interpretation of the implementing agency.⁶⁷ And at least some weight is accorded not just to the subsequent legislation itself, but also congressional statements in the legislative history of the subsequent legislation.⁶⁸

Here, the actions of subsequent Congresses strongly support the interpretation that the MBTA's prohibitions apply to incidental take. As discussed above, the intent of the original statute is, at worst, "obscure"—Congress was silent in 1918 as to the required mental state.⁶⁹ As discussed further below, the interpretation of each amending Congress was consistent with longstanding agency practice.⁷⁰ And the subsequent legislative interpretation does not consist of mere opinions of members or committees of a subsequent Congress. Rather, Congress was enacting new law to address concerns with the existing law. In doing so, the amending Congresses were necessarily interpreting the existing law. In other words, "Congress is not merely expressing an opinion on a matter which may come before a court but is acting on what it understands its own prior acts to mean."⁷¹

Although none of the three amendments amended section 2 of the MBTA or expressly stated that in 1918 Congress intended the MBTA to be a strict-liability statute that applied to incidental take of migratory birds, in each case Congress passed legislation amending the MBTA that can only be understood as being premised on that Congress's interpretation of the original 1918 prohibition.⁷² As discussed above, none of the amendments make sense absent the conclusion that the MBTA is generally a strict-liability statute.⁷³ Moreover, the recognition of the strict-liability nature of the MBTA by Congress has been "consistent and authoritative,"⁷⁴ and failure to accept that interpretation would "virtually nullify" the amendments.⁷⁵ For example, expressly authorizing incidental take resulting from military-readiness activities would be a legal nullity if that take were not otherwise prohibited. Although the statements in the committee reports described above may be due less weight than the legislation itself,⁷⁶ they are due at least some weight,⁷⁷ and in any case merely confirm what logically follows from the text of the original Act and the amendments themselves.

Finally, the context here is not similar to those cases in which the Supreme Court determined that views of subsequent Congresses were entitled to little or no weight in interpreting prior

⁶⁷ See *Red Lion*, 395 U.S. at 380–82; *Andrus v. Allard*, 444 U.S. 51, 57 (1979) (agency interpretation is particularly relevant that Congress twice reviewed and amended statute without disturbing agency interpretation).

⁶⁸ See *Bell v. New Jersey*, 461 U.S. 773, 784–85 (1983).

⁶⁹ See *Seatrains Shipbuilding Corp.*, 444 U.S. at 596.

⁷⁰ See *Red Lion*, 395 U.S. at 380–82.

⁷¹ *Mt. Sinai Hospital, Inc. v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975).

⁷² See *Loving*, 517 U.S. at 770; *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 419 (1992) (although provision at issue was not itself amended, amendment confirmed agency's interpretation of original statutory language because contrary interpretation would make subsequent amendment superfluous).

⁷³ See *Gozlon-Peretz v. United States*, 498 U.S. 395, 405–06 (1991) (subsequent enactment could only be explained by particular interpretation of existing law).

⁷⁴ See *United States v. Waste Industries, Inc.*, 734 F.2d 159, 166 (4th Cir. 1984).

⁷⁵ See *Andrus v. Shell Oil Co.*, 446 U.S. 657, 672 (1980).

⁷⁶ See *Consumer Prod. Safety Comm'n*, 447 U.S. 102, 117–18 n.13 (1980).

⁷⁷ See *Bell*, 461 U.S. at 784–85.

legislation.⁷⁸ Successful legislation was passed (three times), that legislation directly relates to the question at issue (the mental state required for a violation of the MBTA), and the subsequent legislative history is not limited to isolated statements by individual members or committees. In fact, a number of the judicial opinions considering the applicable mental state under the MBTA, discussed in greater detail below, expressly refer to the legislative history of the subsequent amendments to the MBTA as confirming the strict-liability nature of the MBTA's prohibitions.⁷⁹

Three subsequent Congresses thus interpreted the prohibitions of the MBTA generally to apply on a strict-liability basis or specifically to apply to incidental take. Those interpretations are entitled to significant weight. Moreover, the text of the statutory prohibitions themselves are broadly written, and include no suggestion that any particular mental state is required for a violation to occur. Therefore, both the text and legislative history of the MBTA strongly support FWS's longstanding conclusion that the Act's prohibitions apply on a strict-liability basis and specifically to incidental take.

My conclusion is also supported by the language of the conventions. The later conventions include broad prohibitory language as well as language regarding preventing damage to birds and their environments. Canada stated in a diplomatic note to the United States that the parties agreed that regulation of incidental take is consistent with the Canada Convention. And Congress viewed the MBTA as sufficiently broad in scope to allow implementation of the later conventions and subsequent protocols by amending the MBTA to include references to them, without expanding the MBTA's prohibitions.

IV. PAST AGENCY PRACTICE

Records of enforcement action demonstrate that the government has construed the MBTA as a strict-liability statute at least since 1939.⁸⁰ FWS has consistently interpreted the MBTA to apply to incidental take, as first expressly manifested in enforcement cases. And while FWS has generally used enforcement discretion rather than authorization by permits to address incidental take in circumstances in which prosecution is not desirable, FWS has authorized incidental take of migratory birds in a variety of appropriate circumstances and has publicly indicated its intent to broaden its program of authorization. Finally, FWS has acted consistently with this interpretation in other contexts, including its continuing efforts to work with various industries to minimize incidental take, and in its public statements in an international environmental proceeding. Thus, FWS's longstanding interpretation and implementation of the Act strongly supports construing the MBTA to apply to incidental take.

⁷⁸ Cf. *Mt. Sinai Hospital, Inc.*, 517 F.2d at 343 (comparing circumstance before it with cases in which subsequent legislative history was given little weight).

⁷⁹ *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995) (in baiting context); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010) (in incidental-take context); *United States v. Citgo Petroleum*, 893 F. Supp. 2d 841, 845, 847 (S.D. Tex. 2012) (in incidental-take context). But see *United States v. Chevron USA, Inc.*, 2009 U.S. Dist. Lexis 102682, at *11 (W.D. La. Oct. 30, 2009) (citing case law, discussed above, giving little weight to views of some members of Congress concerning interpretation of statute adopted years before).

⁸⁰ See *United States v. Schultze*, 28 F. Supp. 234, 236 (D. Ky. 1939) (finding defendants who had killed doves in the vicinity of a baited field guilty though there was no evidence of any guilty knowledge or intent).

A. Enforcement

Since at least the early 1970s, FWS and the Department of Justice (DOJ) have brought enforcement cases outside the traditional hunting or poaching context. Over the last 40 years, FWS's Office of Law Enforcement (OLE) has investigated hundreds of activities or hazards that kill birds in the incidental-take context, including oil pits, power-line electrocutions, contaminated waste pools, pesticide application, oil spills (e.g., *Exxon Valdez*, *Deepwater Horizon*), among others. After investigation, the U.S. Government has brought a number of criminal cases for MBTA incidental-take violations. OLE has been judicious in exercising its enforcement authority over incidental take—with respect to hazards or activities that chronically take birds, OLE has generally pursued criminal prosecution only after notifying the industry of the problem, working with it to find solutions, and proactively educating each industry about ways to avoid or eliminate the take of migratory birds.⁸¹ Although, as discussed below, a few courts have rejected MBTA prosecutions for incidental take, the majority have upheld them. Moreover, many prosecutions are not contested, and are successful without resulting in a written judicial opinion.

B. Authorization of incidental take

Examples of authorized incidental take under the MBTA also confirm that FWS has long interpreted the MBTA to apply to incidental take. Those authorizations would not be necessary if the MBTA did not apply to incidental take.

1. Regulations granting incidental take authorization to the Armed Forces.

As part of the 2003 National Defense Authorization Act (2003 NDAA), Congress directed FWS to issue regulations that authorize the incidental taking of migratory birds by the Armed Forces during military-readiness activities.⁸² Accordingly, in 2007, in coordination and cooperation with the Department of Defense, FWS finalized new regulations to authorize, with limitations, incidental take that results from military-readiness activities of the Armed Forces.⁸³ As discussed above, the 2003 NDAA demonstrates that Congress interpreted the MBTA to apply to incidental take. But FWS's promulgation of the regulation was also consistent with, and evidence of, the same longstanding interpretation by the FWS itself. Indeed, in justifying the legality of the regulation in the preamble, FWS explained how the authorization of incidental take was consistent with the MBTA and the underlying treaties.⁸⁴ Moreover, FWS limited the authorization provided to the Armed Forces in significant ways, retaining authority to suspend or withdraw authorization for incidental take if such take would be incompatible with the migratory bird conventions or result in a significant adverse effect on a population of a migratory bird species.⁸⁵ FWS's retention of this authority makes clear that it viewed the Act as applying to

⁸¹ See Chief's Directive: Enforcement of the Migratory Bird Treaty Act as it Relates to Industry and Agriculture (Nov. 2, 2015).

⁸² Pub. L. No. 107-314, 116 Stat. 2509 (2002).

⁸³ 50 C.F.R. § 21.15.

⁸⁴ 72 Fed. Reg. 8931, 8946 (Feb. 28, 2007).

⁸⁵ 50 C.F.R. § 21.15.

incidental take by the Armed Forces in circumstances not covered by the special authorization established by the regulations.

2. Special purpose permits for incidental take.

The “Special Purpose Permit” regulations allow FWS to issue a permit “for activities that fall outside the scope of specific MBTA permit types.”⁸⁶ In some circumstances, FWS has used this authority to issue permits for incidental take under the MBTA. Most broadly, FWS has since 1996 included MBTA take authorization under § 21.27 in all Endangered Species Act (ESA) section 10(a)(1)(B) incidental-take permits for ESA-listed migratory birds. Thus, FWS authorizes incidental take under the MBTA, with ESA section 10(a)(1)(B) permits also constituting MBTA incidental-take permits.⁸⁷

FWS also has issued four stand-alone MBTA Special Purpose permits for incidental take of migratory birds to Federal agencies. Three of these permits authorized incidental take of migratory birds during projects to eradicate exotic, invasive species that were degrading habitat for native species, including migratory birds, on various islands. These included a rat-eradication project on Anacapa Island off the California coast (2001); a project to remove introduced foxes on Kanaga Island, part of the Alaska Maritime National Wildlife Refuge (2010); and another rat-eradication project on Palmyra Atoll National Wildlife Refuge (2011). Finally, the Service issued a permit to the National Marine Fisheries Service (NMFS) in 2012 authorizing take of seabirds that occurs as incidental bycatch under NMFS’s regulation of the Hawaii-based shallow-set longline swordfish fishery.

3. Notice regarding future MBTA incidental-take authorization.

On May 26, 2015, FWS published a notice of intent to prepare a programmatic environmental impact assessment to evaluate the potential environmental impacts of a proposal to develop regulations that specifically authorize incidental take under the MBTA.⁸⁸ The notice is expressly predicated on FWS’s interpretation that the MBTA applies to incidental take.⁸⁹

C. Other Consistent Agency Practices and Statements

FWS has consistently interpreted the MBTA as prohibiting incidental take in other contexts as well. First, FWS’s work with various industries and companies to reduce the incidental take of migratory birds is in part predicated on that take being prohibited by the MBTA. For example, FWS issued voluntary wind-energy guidelines that provided guidance to wind-energy developers and operators about how to reduce the incidental take of migratory birds. That guidance stated that compliance with the guidelines would be taken into account when FWS considered referring

⁸⁶ 50 C.F.R. § 21.27.

⁸⁷ See *Habitat Conservation Planning and Incidental Take Permit Processing, Appendix 5—FWS Guidance on Addressing Migratory Birds and Eagles (FWS Only)* (1996), available at <http://www.fws.gov/endangered/esa-library/pdf/Hcpapp5.pdf>.

⁸⁸ Migratory Bird Permits; Programmatic Environmental Impact Statement, Notice of Intent, 80 Fed. Reg. 30,032 (May 26, 2015).

⁸⁹ *Id.* at 30,034, col. 1.

alleged take for prosecution, but compliance would not absolve developers or operators of MBTA liability.⁹⁰

Second, prior executive branch interpretation of FWS regulations is consistent with FWS's interpretation of "take." Executive Order 13186 states that "take" as defined in 50 C.F.R. § 10.12 "includes both 'intentional' and 'unintentional' take."⁹¹ The Executive Order further defines "unintentional take" as "take that results from, but is not the purpose of, the activity in question."⁹²

Third, FWS's longstanding interpretation of the MBTA is also reflected in the position of the United States in an international proceeding. The North American Agreement on Environmental Cooperation (a side agreement to the North American Free Trade Agreement (NAFTA)) set up the Commission for Environmental Cooperation and provided a mechanism for nongovernmental organizations or persons to assert that the United States, Canada, or Mexico is failing to effectively enforce an environmental law. A number of organizations filed a statement with the Commission, asserting that the United States had a policy of failing to enforce the MBTA with respect to incidental take resulting from logging operations. In its response, the United States acknowledged that the MBTA is a strict-liability statute that applies to direct incidental take.⁹³

V. CASE LAW

A. History

The courts originally addressed the question of what mental state was required to violate the prohibitions of the MBTA in the baiting context. "Baiting" is spreading feed to attract birds for hunting purposes.⁹⁴ FWS authorizes hunting of migratory birds subject to a variety of conditions.⁹⁵ One of those conditions is that the hunting not take place on or over any baited area or by the aid of baiting.⁹⁶ Hunting with the aid of baiting is not, of course, a form of incidental take—killing birds is the purpose of the hunting. But because one can have a variety of mental states with respect to the bait—one can intend to hunt with the aid of bait, one can know of the bait but not intend to be aided by it, one can be negligent as to the presence of bait, or one could have no reasonable way of knowing that bait was present—the question of whether

⁹⁰ USFWS, Land-Based Wind Energy Guidelines, at 6 (2012) (designed to help wind-energy operators minimize impacts to protected wildlife, including incidental take of migratory birds); *see also, e.g.*, APLIC and USFWS, Avian Protection Plan (APP) Guidelines (2005) (comprehensive guidance for reducing incidental take of bird from power structures). *See generally United States v. Friday*, 525 F.3d 938, 959 (10th Cir. 2008) (describing how the Service uses the threat of prosecution to reduce avian mortality caused by power lines).

⁹¹ Exec. Order No. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3853, § 2(a) (Jan. 10, 2001).

⁹² *Id.* § 2(c).

⁹³ Response of the United States of America to the Submission Made by the Alliance for the Wild Rockies, et al. under Article 14 of the North American Agreement on Environmental Cooperation, at 3–4 (Feb. 29, 2000) (SEM-99-002), *available at* http://www.cec.org/sites/default/files/submissions/1995_2000/8475_99-2-rsp-e.pdf (last visited Dec. 2016).

⁹⁴ *See* 50 C.F.R. § 20.11(k).

⁹⁵ *See generally* 50 C.F.R. part 20.

⁹⁶ 50 C.F.R. § 20.21(i).

a particular mental state was required under the MBTA was frequently disputed in enforcement actions involving baiting.

Since at least 1939, most courts in baiting cases have concluded that, because Congress deliberately omitted a mental-state requirement, the MBTA's prohibition on taking birds is a strict-liability crime that does not require the government to prove any particular mental state on the part of the defendant.⁹⁷ Thus, the government did not need to prove a hunter intended to lure birds with bait—the hunter violated the MBTA simply by taking a migratory bird over a baited area. Although these cases were decided in a context where the take itself was in fact intentional (hunting migratory birds), the language that the courts used to explain their conclusions was, consistent with the statutory language, quite broad.⁹⁸

Based on the MBTA's broad prohibition on take of migratory birds by any means or in any manner and the absence of any mental state requirement for a misdemeanor violation, the government has also brought prosecutions for incidental take of migratory birds. Several prosecutions relating to birds incidentally killed by "oil pits" led to unreported decisions in the early 1970s.⁹⁹ The first two reported decisions in the incidental-take context were issued in 1978. Both involved the accidental poisoning of birds.

In *United States v. Corbin Farm Service*,¹⁰⁰ the defendants were alleged to have sprayed a pesticide, contrary to the labeling of the pesticide, on a field on which waterfowl repeatedly fed, resulting in the death of a number of ducks. In response to the defendants' motion to dismiss, the court easily concluded that the incidental killing of migratory birds with poison is prohibited by the broad language of the MBTA ("by any means or in any manner").¹⁰¹ Turning to the question of whether intent to kill birds, which was lacking in this case, is required, the court concluded that it was not.¹⁰² The court reasoned that the MBTA is a "public welfare offense," a class of crime that dispenses with the requirement of a showing of intent.¹⁰³ Thus, "the MBTA can constitutionally be applied to impose criminal penalties on those who did not intend to kill migratory birds."¹⁰⁴ The court suggested, however, that a crime might not have been committed if the "defendants acted with reasonable care or if they were powerless to prevent the violation."¹⁰⁵ As the case was at the motion-to-dismiss stage, the court did not decide the factual issue of whether plaintiffs acted with reasonable care.¹⁰⁶

⁹⁷ See *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995) (discussing history). *But see United States v. Sylvester*, 848 F.2d 520, 522 (5th Cir. 1988) (Fifth Circuit is unique in rejecting strict liability under the MBTA, instead imposing a "should have known" mental state). See generally MICHAEL J. BEAN AND MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW 72–75* (3d ed. 1997).

⁹⁸ See, e.g., *United States v. Schultze*, 28 F. Supp. 234, 236 (D. Ky. 1939) ("it was not the intention of Congress to require any guilty knowledge or intent to complete the commission of the offense.").

⁹⁹ See, e.g., *United States v. Stuarco Oil Co.*, No. 73-CR-127 (D. Colo. July 11, 1973).

¹⁰⁰ 444 F. Supp. 510 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978).

¹⁰¹ *Id.* at 531–32.

¹⁰² See *id.* at 532–36.

¹⁰³ *Id.* at 535–36 (quoting *Morissette v. United States*, 342 U.S. 246, 256 (1952)).

¹⁰⁴ *Id.* at 536.

¹⁰⁵ *Id.*; cf. *United States v. Park*, 421 U.S. 658, 673 (1975) (suggesting that being powerless to prevent a violation of strict-liability criminal statute could be a defense).

¹⁰⁶ 444 F. Supp. at 536.

In *United States v. FMC Corporation*,¹⁰⁷ a pesticide manufacturer allowed washwater contaminated with a pesticide to escape into a pond, resulting in numerous bird deaths. On appeal of its conviction under the MBTA, FMC argued that its conviction had been improper because it had not intended to kill birds.¹⁰⁸ Analogizing the manufacture of pesticides to “extrahazardous” (or “abnormally dangerous”) activities that would support strict liability in a tort context, the court held that, on the facts before it, proof of intent was not necessary.¹⁰⁹ And, although the court expressly cautioned that “[i]mposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party,”¹¹⁰ it also opined that concerns regarding “innocent technical violations” could be addressed via enforcement discretion.¹¹¹

Together, the *Corbin Farm Service* and *FMC* cases represent the initial judicial confirmation of the principle that the MBTA applies to incidental take. In turn, these successful prosecutions under the MBTA for incidental take led to another type of lawsuit: citizen suits against the government. Even though the MBTA has no citizen-suit provision, Federal agencies are generally subject to judicial review of final agency actions under the Administrative Procedure Act (APA).¹¹² The APA authorizes members of the public to challenge agency action that is arbitrary, capricious, or “otherwise not in accordance with law.”¹¹³ Thus, even though the members of the public have no legal remedy against the private entities that violate the MBTA, courts have held that members of the public can file citizen suits seeking to enjoin federal action that they allege violates the MBTA, as that violation may make the action “not in accordance with law.”¹¹⁴

The first important case involved appeals of a number of district court cases addressing the application of the MBTA to migratory birds killed by logging activity on National Forests. In *Seattle Audubon Society v. Evans*,¹¹⁵ environmental groups contended that habitat modification that led indirectly to deaths of northern spotted owls constituted “take” under the MBTA. The Ninth Circuit disagreed. The court first noted that the regulatory definition of “take” that applies to the MBTA “describes physical conduct of the sort engaged in by hunters and poachers,” and that there is no mention of habitat modification in the MBTA or its regulations.¹¹⁶ Next, the court examined the distinction between the statutory definition of “take” in the Endangered Species Act and the regulatory definition of “take” under the MBTA.¹¹⁷ The former definition

¹⁰⁷ 572 F.2d 902 (2d Cir. 1978).

¹⁰⁸ *Id.* at 907.

¹⁰⁹ *Id.* at 907–08.

¹¹⁰ *Id.* at 908.

¹¹¹ *Id.* at 905.

¹¹² 5 U.S.C. §§ 551 *et seq.*

¹¹³ *Id.* § 706(2)(A).

¹¹⁴ Although it is beyond the scope of this opinion, I note that a Federal agency acting solely in a *regulatory* capacity does not itself “take” or “kill” birds for purposes of the MBTA if birds are subsequently incidentally taken or killed by a third party subject to that regulation. *Protect our Cmty's Found. v. Jewell*, 825 F.3d 571, 586 (9th Cir. 2016). That said, Federal agencies in that circumstance may have obligations under Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3853 (Jan. 10 2001).

¹¹⁵ 952 F.2d 297 (9th Cir. 1991).

¹¹⁶ *Id.* at 302.

¹¹⁷ *Id.* at 303.

includes “harm,”¹¹⁸ further defined by regulation to include habitat modification in certain circumstances,¹¹⁹ while the latter does not include “harm” in its definition of “take.”¹²⁰ The Ninth Circuit agreed with the district court that these differences are “distinct and purposeful.”¹²¹ Finally, the appellate court distinguished *FMC* and *Corbin Farm Service* on the basis that those cases involved direct, although unintended, bird poisoning; the court did not read those cases as suggesting “that habitat destruction, leading indirectly to bird deaths, amounts to the ‘taking’ of migratory birds” under the MBTA.¹²² Thus, under the Ninth Circuit’s analysis, the crucial factor in the application of the prohibitions of the MBTA was whether the action in question directly or indirectly resulted in bird deaths.¹²³

Apparently in response to the holding in *Seattle Audubon*, plaintiffs began to allege not just indirect take caused by habitat modification, but also direct taking of migratory birds when Federal agencies undertake or approve land-management activities during nesting season. These claims under the APA had some success, allowing some district courts in other circuits to distinguish *Seattle Audubon*, follow *Corbin Farm Service* and *FMC*, and hold that timber harvesting that directly kills birds (as opposed to harming birds by affecting their habitat) is a violation of the take prohibition.¹²⁴

Other courts rejected application of the MBTA in the logging context. One of these, *Mahler v. U.S. Forest Service*,¹²⁵ contains a detailed rebuttal of the harmonization of *Seattle Audubon*, on the one hand, and *Corbin Farm* and *FMC*, on the other. In *Mahler*, the district court acknowledged that application of the MBTA to incidental take “draws substantial support from the statutory language and from case law developed in criminal cases.”¹²⁶ Nonetheless, the court concluded that the MBTA “applies to activities that are intended to harm birds or to exploit harm to birds, such as hunting and trapping, and trafficking in birds and bird parts. The MBTA does

¹¹⁸ 16 U.S.C. § 1532(19).

¹¹⁹ 50 C.F.R. § 17.3.

¹²⁰ 50 C.F.R. § 10.12.

¹²¹ 952 F.2d at 303.

¹²² *Id.*

¹²³ Note that the direct versus indirect dichotomy presented by the Ninth Circuit can be more precisely resolved as a legal matter by determining whether the action taken was the proximate cause of the resulting bird deaths. Timber harvesting that directly kills nesting birds when trees are felled is more clearly the proximate cause of those deaths than timber felling as habitat loss, which has a more attenuated effect—the potential death of birds through increased competition for reduced resources at some unknown point in the future. *See, e.g., United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999). A previous appellate case rejected an MBTA claim on different grounds. *Defenders of Wildlife v. Envtl. Prot. Agency*, 882 F.2d 1294, 1302–03 (8th Cir. 1989) (court rejected claim against EPA alleging that its regulation of pesticides under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136–136y, resulted in migratory birds being poisoned, holding that FIFRA provided the exclusive means of judicial review of EPA’s pesticide decisions).

¹²⁴ *Sierra Club v. Martin*, 933 F. Supp. 1559, 1564–65 (N.D. Ga. 1996), *reversed on other grounds*, 110 F.3d 1551 (11th Cir. 1997); *see Sierra Club v. U.S. Dept. of Agric.*, 1995 U.S. Dist. Lexis 21507, at *54–59 (S.D. Ill. Sept. 23, 1995) (distinguishing between claims relating to indirect and direct takings, rejecting claim of indirect taking, citing *Seattle Audubon*, finding that Forest Service had not adequately addressed direct take claim, and directing Forest Service to address issue on remand), *aff’d*, 116 F.3d 1482 (7th Cir. 1997); *see also Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 175 (D.D.C. 2002) (holding that military live-fire exercises that incidentally killed migratory birds violated the MBTA), *vacated on other grounds sub nom. Ctr. for Biological Diversity v. England*, 2003 U.S. App. Lexis 1110 (D.C. Cir. Jan. 23, 2003).

¹²⁵ 927 F. Supp. 1559 (S.D. Ind. 1996).

¹²⁶ *Id.* at 1576.

not apply to other activities that result in unintended deaths of migratory birds.”¹²⁷ Looking at the statutory language, the court emphasized the lack of any express indication that Congress intended the MBTA to apply to incidental take, and concluded that, in context, the “by any means or in any manner” language should be understood to ensure that all means of hunting or capturing birds were covered.¹²⁸ Next, the court asserted that the history of the statute (at that time) did not show any concern for incidental take of migratory birds.¹²⁹ The court also noted that a broad interpretation of the MBTA’s prohibitions was inconsistent with the decades of logging without criminal prosecutions under the MBTA, and that application of the MBTA would substantially restrict, or even effectively prohibit, most logging.¹³⁰ Finally, the court found that the “apparent lack of any meaningful limits” on applying the MBTA to incidental take mitigated against that interpretation.¹³¹ Courts in two other logging cases expressed similar conclusions with little analysis.¹³² And decisions in a few APA cases in other contexts have included language at least suggesting that the MBTA may not apply to certain incidental take.¹³³

After *Seattle Audubon*, courts addressing arguments by criminal defendants that the MBTA does not apply to incidental take had to consider the holdings and reasoning of the APA cases. Thus, a prosecution involving electrocution of raptors by power lines resulted in a decision that strongly rebutted the analysis in *Mahler*. In *United States v. Moon Lake Electric Ass’n*,¹³⁴ the district court distinguished between two questions: (1) whether the MBTA applies only to intentionally harmful conduct, and (2) whether the MBTA proscribes only physical conduct normally associated with hunting and poaching. The court easily disposed of the first question, holding that because the misdemeanor provision of the MBTA is a strict-liability crime, the statute could not be limited to conduct requiring any form of intent.¹³⁵ The court then embarked on a detailed analysis of the hunting-and-poaching issue.

¹²⁷ *Id.* at 1579.

¹²⁸ *Id.* at 1579–80.

¹²⁹ *Id.* at 1580–81.

¹³⁰ *Id.* at 1581–82.

¹³¹ *Id.* at 1582–83.

¹³² *Curry v. U.S. Forest Service*, 988 F. Supp. 541, 549 (W.D. Penn. 1997); *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (dicta).

¹³³ *City of Sausalito v. O’Neill*, 386 F.3d 1186 (9th Cir. 2004) (following *Seattle Audubon* and rejecting MBTA claim regarding Park Service tree cutting because take alleged to occur only indirectly through habitat modification); *Protect Our Cmty’s Found. v. Salazar*, 2013 U.S. Dist. Lexis 159281, at *55 (S.D. Cal. Nov. 6, 2013) (in challenge to DOI’s approval of wind-energy project, court concluded that plaintiffs failed to demonstrate that a permit is required under the MBTA for unintentional killing); *Protect Our Cmty’s Found. v. Jewell*, 2014 U.S. Dist. Lexis 50698, at *59 (S.D. Cal. Mar. 25, 2014) (“Indeed, the governing interpretation of the MBTA in the Ninth Circuit is quite narrow and holds that the statute does not even prohibit incidental take of protected birds from otherwise lawful activity.”) (citing *Seattle Audubon*), *aff’d on other grounds*, 825 F.3d 571 (9th Cir. 2016) (notably, the Ninth Circuit did not cite *Seattle Audubon* and stated that “BLM’s decision to grant [a wind-energy company’s] right-of-way request was many steps removed in the causal chain from the potential commission of an unlawful ‘take’ caused by wind-turbine collisions,” implying that incidental take caused by the wind-energy company’s turbine operations could be prohibited by the MBTA). *But cf. Protect our Cmty’s Found. v. Black*, No. 14-cv-2261 JLS (JMA), at 14 n.8 (S.D. Cal. Mar. 29, 2016) (stating, in determining whether BLM violated the Bald and Golden Eagle Protection Act and the MBTA in approving a wind project that may take eagles, that “agencies have the authority to authorize conduct that would otherwise violate a law—for example, FWS’s ability to authorize incidental take of eagles.”).

¹³⁴ 45 F. Supp. 2d 1070 (D. Colo. 1999).

¹³⁵ *Id.* at 1073–74.

Addressing the statutory language, the court noted that of the long list of prohibitions found in the statute or the regulatory definition of “take,” only four (hunting, capturing, shooting, and trapping) “identify conduct that could be construed as solely the province of hunters and poachers.”¹³⁶ The court also explained that the prohibition of “killing” “by any means and in any manner” suggested that Congress intended broader application, rather than punishing only those who act with specific motives.¹³⁷ And the court noted that Congress was aware that the MBTA had been interpreted to apply beyond hunting and poaching.¹³⁸

Next, the court addressed the contrary case law, discussing *Seattle Audubon* and *Mahler* at length. Regarding *Seattle Audubon*, the *Moon Lake* court took no position regarding the MBTA’s applicability to take caused by habitat modification, but to the extent that *Seattle Audubon* “may be read to say that the MBTA regulates only physical conduct normally associated with hunting and poaching, its interpretation of the MBTA is unpersuasive.”¹³⁹ In particular, the court found *Seattle Audubon*’s distinction between direct and indirect takings to be illogical, conflating the concepts of causation and “*actus reus*” (wrongful act), and reading into the MBTA a mental-state requirement that ignores the strict-liability nature of the misdemeanor provision.¹⁴⁰ After noting “that Congress reviewed and substantively amended the MBTA in 1986 without attempting to vitiate the holdings of *FMC* . . . and *Corbin Farm*,”¹⁴¹ the court examined contemporaneous dictionary definitions of “kill” and “take” and found nothing to suggest that they apply only to a “direct” application of force.¹⁴²

Turning to *Mahler*, the *Moon Lake* court found that *Mahler*’s reliance on legislative history was unwarranted, as the prohibition on killing migratory birds by any means and in any manner is not ambiguous.¹⁴³ Nonetheless, the *Moon Lake* court engaged in a detailed examination of the legislative history of the 1918 Act,¹⁴⁴ and concluded that it suggests “that Congress intended the MBTA to regulate more than just hunting and poaching.”¹⁴⁵ The *Moon Lake* court also rejected *Mahler*’s reliance on an absence of criminal prosecutions—although there had been no previous prosecutions based on bird deaths caused by power lines, the court noted that the government had instituted at least five MBTA prosecutions against private companies without the physical conduct normally associated with hunting and poaching.¹⁴⁶ Finally, the *Moon Lake* court addressed *Mahler*’s concern about the unreasonableness of the government’s interpretation. Although agreeing “that courts should not rely on prosecutorial discretion to ensure that a statute does not ensnare those beyond its proper confines,”¹⁴⁷ the court found other reasons for concluding that a broad reading of the MBTA would not lead to absurd results. First, in an

¹³⁶ *Id.* at 1074.

¹³⁷ *Id.* at 1074–75 (noting that the prohibition on possession and sale applies regardless of whether the birds were taken illegally).

¹³⁸ *Id.* at 1075 (citing hearing relating to Kesterson Reservoir, a government-operated facility that caused migratory bird deaths due to contamination, in which MBTA liability was discussed).

¹³⁹ *Id.* at 1076.

¹⁴⁰ *Id.* at 1077.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1078–79.

¹⁴³ *Id.* at 1079.

¹⁴⁴ *See id.* at 1079–82.

¹⁴⁵ *Id.* at 1080.

¹⁴⁶ *Id.* at 1082–83 (citing three oil-pit-related prosecutions, in addition to *FMC* and *Corbin Farm*).

¹⁴⁷ *Id.* at 1084.

MBTA prosecution, the government must prove proximate causation, which requires that the death of the migratory bird be “reasonably anticipated or foreseen as a natural consequence” of the action.¹⁴⁸ Second, the court noted that exceptions in the MBTA and its regulations allow for reasonable regulation by the Secretary.¹⁴⁹ Thus, the court rejected the argument that the MBTA prohibits only physical conduct normally exhibited by hunters and poachers.¹⁵⁰

The opinion in *Moon Lake*, detailed as it was, did not, however, end the debate in the courts hearing MBTA enforcement cases in the incidental-take context.¹⁵¹ Since *Moon Lake*, two circuit courts have reached opposite conclusions.

First, the Tenth Circuit affirmed convictions under the MBTA in *United States v. Apollo Energies, Inc.*¹⁵² *Apollo Energies* was a consolidated appeal of convictions stemming from the death of birds that became trapped in a particular type of oil-drilling equipment (“heater-treaters”). Defendants first argued that the MBTA does not create a strict-liability crime, and that they lacked the required mental state.¹⁵³ The court held that this contention was foreclosed by a previous Tenth Circuit opinion, *United States v. Corrow*,¹⁵⁴ which had held in a possession-and-sale case that misdemeanor violations under the MBTA were strict-liability crimes,¹⁵⁵ and noted that nothing in *Corrow* “lends itself to carving out an exception for different types of conduct,”¹⁵⁶ such as operation of equipment that incidentally takes birds. In concluding that the MBTA is a strict-liability statute, the *Apollo Energies* court cited the 1986 felony amendment as “evidence the legislative scheme invokes a lesser mental state [than knowingly] for misdemeanor violations.”¹⁵⁷ And the court suggested that the facts of contrary cases might be distinguishable as involving habitat modification, but noted that that case was not before it.¹⁵⁸ The court continued: “The question here is whether unprotected oil field equipment can take or kill migratory birds. It is obvious the oil equipment can.”¹⁵⁹

Defendants also made due-process arguments: (1) the MBTA is unconstitutionally vague as to what constitutes a crime; (2) the MBTA does not provide fair notice because of its breadth, reaching innocuous acts several steps removed from bird deaths, and (3) the MBTA violates due

¹⁴⁸ *Id.* at 1085.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1088.

¹⁵¹ See *United States v. WCI Steel, Inc.*, 2006 U.S. Dist. Lexis 55593, at *6–14 (N.D. Ohio Aug. 10, 2006) (discussing split in cases, without ruling).

¹⁵² 611 F.3d 679 (10th Cir. 2010), *aff’d* 2009 U.S. Dist. Lexis 6160 (D. Kan. 2009); see also *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 841 (S.D. Tex. 2012) (conviction for birds taken in large open tank at a refinery), *rev’d*, 801 F.3d 477 (5th Cir. 2015); cf. *United States v. Van Fossan*, 899 F.2d 636, 639 (7th Cir. 1990) (issue of mental state not raised on appeal, but court noted that it was not plain error to convict defendant without establishing that he knew his actions—purposefully poisoning non-migratory birds—would also kill migratory birds); *United States v. Chevron USA, Inc.*, 2009 U.S. Dist. Lexis 102682, at *8–11 (W.D. La. Oct. 30, 2009) (criminal sanctions for incidental take “clearly proper” in some cases—particularly where otherwise prohibited act foreseeably resulted in death of protected species—but not where take was unforeseeable result of legal act).

¹⁵³ 611 F.3d at 683.

¹⁵⁴ 119 F.3d 796 (10th Cir. 1997).

¹⁵⁵ 611 F.3d at 684–85.

¹⁵⁶ *Id.* at 685.

¹⁵⁷ *Id.* at 686.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

process as applied to the defendants' conduct. The court easily disposed of the first of these arguments, holding that the MBTA is broad, but not vague.¹⁶⁰

Regarding the breadth of the MBTA, the court embraced and elaborated on *Moon Lake's* assertion that proximate causation (in the form of foreseeability) functions as a limit on MBTA prosecutions: "When the MBTA is stretched to criminalize predicate acts that could not have been reasonably foreseen to result in the proscribed effect on birds, the statute reaches its constitutional breaking point."¹⁶¹ Thus, the court concluded that "the MBTA requires a defendant to proximately cause the statute's violation to pass constitutional muster."¹⁶² To resolve the due process concern, the court required reasonable notice when it is not foreseeable that the specific conduct may result in the death of protected birds.¹⁶³ Turning to the convictions on appeal, the court found that the record demonstrated that the Service had notified one of the defendants of the danger over a year before the bird death resulting in its conviction.¹⁶⁴ The court reversed the first conviction of the other defendant, as the court found that no reasonable person would have known at that point (without specific notice), that the equipment at issue would lead to deaths of migratory birds.¹⁶⁵

In contrast to the Tenth Circuit, the Fifth Circuit recently overturned an MBTA conviction for birds taken in a large open tank at a refinery. In *United States v. CITGO Petroleum Corp.*,¹⁶⁶ the Fifth Circuit began its discussion by citing Justice Scalia's dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*¹⁶⁷ as support for the proposition that "take" is an ancient common-law term referring to the reduction of wildlife, by killing or capturing, to human control.¹⁶⁸ The court asserted, without citation to authority, that "[o]ne does not reduce an animal to human control accidentally or by omission; he does so affirmatively."¹⁶⁹ The court rejected *Moon Lake's* analysis of definitions of "take" contemporaneous with the passage of the MBTA, stating that the existence of alternative definitions was not determinative, given that "take" was "a well-understood term of art under the common law when applied to wildlife."¹⁷⁰

¹⁶⁰ *Id.* at 688–89.

¹⁶¹ *Id.* at 690.

¹⁶² *Id.*

¹⁶³ *Id.* at 689.

¹⁶⁴ *Id.* at 691.

¹⁶⁵ *Id.*; see also *United States v. Rollins*, 706 F. Supp. 742, 743–45 (D. Idaho 1989) (holding that the MBTA is strict-liability statute, but unconstitutionally vague under the facts of the case, in which the defendant had no reason to believe that his action—pesticide application exercising due care—posed a threat to birds).

¹⁶⁶ 801 F.3d 477 (5th Cir. 2015), *rev'g* 893 F. Supp. 2d 841 (S.D. Tex. 2012); see also *United States v. Ray Westall Operating, Inc.*, 2009 U.S. Dist. Lexis 130674 (D.N.M. Feb. 25, 2009) (holding that MBTA only applies to hunting-and-poaching situations, and elaborating on and updating *Mahler* to some degree, by discussing the treaties underlying the MBTA—finding no express suggestion that the parties intended to require regulation of incidental take—and addressing *Pirie* and the military-readiness amendment—which the court distinguished as direct taking, analogous to hunting); *United States v. Brigham Oil & Gas*, 840 F. Supp. 2d 1202 (D.N.D. 2012) (holding that MBTA only applies to hunting-and-poaching situations).

¹⁶⁷ 515 U.S. 687 (1995).

¹⁶⁸ 801 F.3d at 489.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Next, the court contrasted the MBTA to the ESA and the Marine Mammal Protection Act,¹⁷¹ which define “take” to include harassing or harming animals. In the court’s view, the latter two statutes expressly expanded “take” beyond its common-law origins to include accidental harm to animals by including terms like “harm” or “harass” in the statutory definitions of “take.” In contrast, “[t]he absence from the MBTA of terms like ‘harm’ or ‘harass,’ or any other language signaling Congress’s intent to modify the common law definition supports reading ‘take’ to assume its common law meaning.”¹⁷²

The court also rejected two traditional arguments supporting application of the MBTA to incidental take. First, it held that the “by any means or in any manner” language meant only that all manner and means of *hunting* are covered by the prohibition.¹⁷³ Second, the court rejected the argument that the statutory exemption for incidental take resulting from military-readiness activities “implicitly expanded ‘take’ beyond its common-law meaning.”¹⁷⁴

The *CITGO* court then addressed the *FMC* and *Apollo Energies* decisions. Noting that those cases did not explore the meaning of “take,” the Fifth Circuit stated that they “confuse the *mens rea* and the *actus reus* requirements.”¹⁷⁵ According to the distinctions “inherent in the nature of the word ‘taking,’” the act of taking “is not something that is done unknowingly or involuntarily.”¹⁷⁶ This “reveal[s] the strict liability argument as a non-sequitur.”¹⁷⁷

Finally, citing FWS data on the number of birds killed by windows, communication towers, and cats, the court concluded that its interpretation of “take” is bolstered by the absurd results of the government interpretation, which would make all owners of hazards to birds subject to prosecution at will.¹⁷⁸

It is important to note that because some of the language in *CITGO*’s indictment referred only to “taking” birds, but not to “killing” birds, the Fifth Circuit took the position that only the prohibition of “take” was at issue in this case.¹⁷⁹ The court indicated in dicta without analysis, however, that the prohibition on killing birds is likewise “limited to intentional acts aimed at migratory birds.”¹⁸⁰

B. Analysis and Synthesis

There is strong consensus among the courts that Congress’s decision not to expressly require a particular mental state for the misdemeanor provision of the MBTA means that the MBTA is a strict-liability statute and therefore does not itself require that the government prove a particular mental state in an enforcement action. Although some courts find this dispositive as to the

¹⁷¹ 16 U.S.C. §§ 1361–1421h.

¹⁷² 801 F.3d at 490.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 491.

¹⁷⁵ *Id.* at 492.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 493.

¹⁷⁸ *Id.* at 494.

¹⁷⁹ *Id.* at 489.

¹⁸⁰ *Id.* at n.10.

question of whether the MBTA prohibits incidental take, other courts disagree, holding or suggesting that even if the MBTA's misdemeanor prohibition applies on a strict-liability basis in the context of hunting and poaching, take incidental to other activities simply falls outside of the intended scope of the MBTA. However, those cases impermissibly narrow (or choose to ignore) the MBTA's prohibition on take by "any means and in any manner." That language, coupled with the broad language of the underlying treaties, compels the conclusion that the prohibitions of the MBTA apply to take incidentally and proximately caused by any activity.

The cases holding that the MBTA applies to incidental take are correctly decided, and fully support FWS's longstanding and consistent interpretation. As those cases conclude, the text of the MBTA lacks a mental-state requirement. Read literally (and reasonably), the broad language of the prohibition includes incidental take.¹⁸¹ The legislative history of the original 1918 law is not inconsistent with this view.¹⁸² Moreover, the history of the amendments to the MBTA that relate to required mental states compel this construction.¹⁸³ And interpreting the MBTA to apply to incidental take directly furthers Congress's broad purpose to conserve migratory birds in compliance with the conventions that the MBTA implements, which call for the United States to protect all listed species of migratory birds, not just game species.

In addition, for over 40 years in a variety of contexts, the government has consistently applied the misdemeanor provision of the MBTA to incidental take. FWS OLE, in partnership with DOJ, has judiciously brought enforcement actions in the incidental-take context.

The history of the government's defense of APA claims based on the MBTA also confirms the long-standing position of the government. In those cases, the government has argued against application of the APA when other statutes provide exclusive means of judicial review,¹⁸⁴ that the MBTA does not apply to take indirectly caused by habitat modification,¹⁸⁵ that the MBTA does not apply to agencies acting in their regulatory capacity,¹⁸⁶ and that injunctive relief should not be imposed.¹⁸⁷ But the government has never defended itself in these suits by arguing that the MBTA does not apply to incidental take.¹⁸⁸

Although FWS has largely relied on enforcement discretion to address innocent technical violations of the MBTA, in appropriate circumstances FWS has authorized various parties to incidentally take migratory birds. FWS promulgated 50 C.F.R. § 21.15 (authorizing take incidental to military-readiness exercises), issues MBTA authorizations for incidental take of migratory birds also listed under the ESA and covered under an ESA Habitat Conservation Plan, and has issued other MBTA permits for incidental take, such as the permits for incidental take of birds resulting from efforts to eliminate nonnative mammals. Moreover, FWS is currently undergoing a NEPA process to analyze alternatives for regulations that authorize incidental take

¹⁸¹ See, e.g., *Corbin Farm Serv.*, 444 F. Supp. at 532.

¹⁸² E.g., *Moon Lake*, 45 F. Supp. 2d at 1079–82.

¹⁸³ E.g., *Apollo Energies*, 611 F.3d at 686.

¹⁸⁴ *Defenders*, 882 F.2d at 1202–03.

¹⁸⁵ *Seattle Audubon*, 952 F.2d at 303.

¹⁸⁶ *Protect Our Cmty. Found.*, 2013 U.S. Dist. Lexis 159281, at *51.

¹⁸⁷ *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d at 163.

¹⁸⁸ See *Mahler*, 927 F. Supp. at 1577, 1578 (noting government's unwillingness to disavow the holdings in *FMC* and *Corbin Farm Service*).

under the MBTA. Finally, FWS’s longstanding interpretation of the MBTA is reflected in its interactions with companies and industries that incidentally take migratory birds, as well as in official documents such as the response of the United States to the Commission on Environmental Cooperation.

Considering the text of the statute, the legislative history, the congressional purpose, and the history of agency practice, the cases holding that the MBTA applies solely to activity like hunting and poaching are not persuasive. I address the opinions in *CITGO* and *Mahler* in detail, as they provide the most cogent and authoritative arguments in support of the opposing position.

The *CITGO* court’s reasoning was highly dependent on what it called the “common law definition” of “take.” Although it is true that, with respect to wildlife, “take” historically has been used in the context of reducing wild animals to human control, the court’s assumption that this historical usage is the *exclusive* meaning of “take” is unsupported. With one exception, the authorities cited by the court define “take” by describing what it includes—none of those authorities assert limitations to the scope of “take,” or otherwise affirmatively state that nothing else is included in “take.” The exception is Justice Scalia’s dissent in *Sweet Home*, which made exactly the same unsupported assumption. After noting historical references to “take” in the wildlife context being used to describe reducing wildlife to human possession, the dissent stated, without citation:

It is obvious that “take” in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).¹⁸⁹

But it is not at all obvious that the existence of this understanding of “take” makes all other understandings of take inherently invalid.¹⁹⁰ Tellingly, neither the *CITGO* court nor the *Sweet Home* dissent pointed to another authority that states that incidental take cannot be “take” in the wildlife context, much less a single case in which a prosecution for take was rejected on the grounds that the facts did not constitute “take” in the common-law sense. All that the *CITGO* court and the *Sweet Home* dissent pointed to are authorities stating that reducing wildlife to human control *is* “take.” In short, the *CITGO* court and the *Sweet Home* dissent failed to recognize the distinction between the existence of a commonly understood meaning of a term, and the assertion that that meaning is exclusive of other possible meanings.¹⁹¹ Moreover, a common-law definition does not apply when “common understanding of the word departs largely from the technical meaning it had at the old common law.”¹⁹² Thus, even when a term had a clear common-law meaning, the Supreme Court has applied an “ordinary, contemporary, common meaning” of the term that is more consistent with a statute’s purpose.¹⁹³

¹⁸⁹ 515 U.S. at 718 (Scalia, J., dissenting).

¹⁹⁰ See *Taylor v. United States*, 495 U.S. 575, 593 (1990) (Congress “presumably had in mind *at least* the ‘classic’ common-law” version of take when it passed the MBTA) (emphasis added).

¹⁹¹ See *Moskal v. United States*, 498 U.S. 103, 115–17 (1990) (undefined term did not have “one meaning” at common law); *United States v. Turley*, 352 U.S. 407, 411–12 (1957) (same).

¹⁹² *Reagan v. United States*, 157 U.S. 301, 302 (1895).

¹⁹³ *Perrin v. United States*, 444 U.S. 37, 42 (1979); see also *Taylor*, 495 U.S. at 593–96; *Bell v. United States*, 462 U.S. 356, 360–62 (1983).

The fact that Justice Scalia's discussion on this point "was [not] criticized" by the *Sweet Home* majority,¹⁹⁴ should not be taken as an endorsement by the majority because this discussion was irrelevant given the actual statutory language of the ESA. And, of course, the persuasiveness of Justice Scalia's opinion is strongly limited by its status as a dissent.

The *CITGO* court asserted that the government's argument "is at odds with the common law definition of 'take' in the MBTA regulations."¹⁹⁵ The court's assertion is both technically inaccurate and substantively wrong. It is technically inaccurate because regulations in Part 10 of 50 C.F.R. are not "MBTA regulations," they are generic definitions that apply to all of FWS's wildlife laws.¹⁹⁶ The court's assertion is wrong substantively because the definition of "take" found in 50 C.F.R. § 10.12 is *not* consistent with the "common law definition" described by the court. It does not limit "take" to only the reduction of wild animals to human control. Instead, it includes "kill," "pursue," and "wound," which would not in and of themselves constitute "take" in the court's narrow conception. Even Justice Scalia acknowledged in his dissent in *Sweet Home* that similar words in the ESA's statutory definition of "take" expanded the word "take" from the common law definition—although he minimized the importance of this fact by characterizing the expansion as "slight[]," "not unusual[]," and in the service of merely clarifying that the "process of taking" is included in the definition.¹⁹⁷ More importantly, the *majority* in *Sweet Home* expressly noted that some of the verbs included in the ESA's statutory definition of "take," including "pursue" and "wound," are inconsistent with the asserted "established definition" of "take."¹⁹⁸ Thus, because the applicable regulatory definition of "take" includes these terms, it undermines, rather than supports, the *CITGO* court's position.

In any case, even if the *CITGO* court's conclusion with respect to "take" were correct, the question of the scope of "kill" would remain. Had the court actually grappled with the prohibition of "kill," there would have been little basis for it to conclude that "kill" should be interpreted as applying only in a hunting and poaching context. There is certainly no common-law definition suggesting that wildlife can only be killed by hunters. The court's opinion did include a footnote suggesting that the result of the analysis under "kill" would be the same, but that footnote is unconvincing dicta.¹⁹⁹ First, the *CITGO* court stated that the court in *FMC* questioned whether "kill" has any independent meaning in this context. Quite apart from failing to acknowledge the basic canon of statutory construction to avoid interpreting a statute in a way that renders any word superfluous or unnecessary,²⁰⁰ the *CITGO* court failed to note that the court in *FMC* upheld application of the "kill" prohibition to an instance of incidental take. Second, the *CITGO* court argued that because another statute, the Migratory Bird Conservation

¹⁹⁴ *CITGO*, 801 F.3d at 489.

¹⁹⁵ *Id.* at n.11 (citing 50 C.F.R. § 10.12); *see also id.* at 491.

¹⁹⁶ 50 C.F.R. § 10.11; *see also id.* at § 10.1 (listing the eight statutes to which the "General Provisions" of Part 10 apply).

¹⁹⁷ 515 U.S. at 718 (Scalia, J., dissenting).

¹⁹⁸ 515 U.S. at 698 n.10; *see also* Bean and Rowland at 213, *supra* note 96 ("the terms 'wound' and 'kill' implied an intent to prohibit activities based on their consequences rather than the intent of the persons responsible for them.").

¹⁹⁹ *CITGO*, 801 F.3d at 489 n.10.

²⁰⁰ 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2008).

Act, defines “take” to include “kill,”²⁰¹ “kill” may have little independent force. I conclude, however, that the inclusion of “kill” in the definition of “take” in that statute indicates that Congress had already abandoned the narrow common-law conception of “take.” Finally, the *CITGO* court’s footnote seriously mischaracterized footnote 10 of the majority opinion in *Sweet Home*. The majority stated that “most of” the terms in the ESA’s take definition “refer to deliberate actions *more frequently* than does ‘harm[.]’”²⁰² The majority did not say that “kill” fits that description, and the majority later reached the opposite conclusion.²⁰³

Some of the *CITGO* court’s remaining discussion of “take” might also be viewed as applying to “kill,” but as discussed below, this analysis is also flawed. For example, the court claimed that it was following the Ninth Circuit decision in *Seattle Audubon*.²⁰⁴ The *CITGO* court, however, made a different distinction than that made by the *Seattle Audubon* court. As discussed above, *Seattle Audubon* distinguished between direct and indirect (habitat modification) take, and thus expressly distinguished, rather than rejected, the holdings of *FMC* and *Corbin Farm Service*. *Seattle Audubon* should not be read as holding that *direct* incidental taking or killing, such as that at issue in *CITGO*, is not prohibited by the MBTA.²⁰⁵ The *CITGO* court also claimed to be following *Newton County Wildlife Ass’n v. U.S. Forest Service*,²⁰⁶ but failed to indicate that the relevant discussion in that case is unclear because of its use of “indirectly,”²⁰⁷ and in any case is merely dicta.²⁰⁸

²⁰¹ 16 U.S.C. § 715*n*.

²⁰² 515 U.S. at 698 n.11 (emphases added).

²⁰³ *Id.* at 701.

²⁰⁴ *CITGO*, 801 F.3d at 488–89.

²⁰⁵ This conclusion is supported by the Ninth Circuit’s recent decision in *Protect our Cmty. Found.*, 825 F.3d 571. That case involved a challenge to a right of way that the Bureau of Land Management (BLM) issued for a wind-energy facility. Plaintiffs claimed that BLM violated the MBTA and the APA by not obtaining authorization to incidentally take the birds that would die as a result of the operation of the wind facility. The Ninth Circuit held that there was no violation because the prohibitions of the MBTA do not apply to agencies that act in a purely regulatory capacity. *Id.* at 586. The court would not have needed to reach this conclusion if the *CITGO* court’s interpretation of *Seattle Audubon* was correct: the Ninth Circuit could have simply followed its own precedent and held that the take was merely incidental, and therefore not prohibited by the MBTA. Instead, the Ninth Circuit noted that BLM’s actions would not “directly or proximately cause” the take, *id.*, thus recognizing and applying the correct understanding of *Seattle Audubon*’s holding. See also *Protect our Cmty. Found. v. Black*, No. 14-cv-2261 JLS (JMA), at 14 n.8 (S.D. Cal. Mar. 29, 2016) (stating that FWS has authority to authorize incidental take under the MBTA).

²⁰⁶ *CITGO*, 801 F.3d at 488.

²⁰⁷ 113 F.3d 110, 115 (8th Cir. 1997) (stating that “conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds” is not subject to strict liability) (emphasis added).

²⁰⁸ *Id.* (“Our conclusions about the apparent scope of [the] MBTA are necessarily tentative because we lack the views of the Fish and Wildlife Service.”). Several legal commentators reviewing the applicability of the MBTA to incidental take have repeated this same error, arguing that the Eighth and Ninth Circuits are part of a split in the Circuit Courts, joining the Fifth Circuit in holding that the MBTA does not prohibit take outside the realm of hunting and poaching, with the Second and Tenth Circuits holding that the MBTA prohibits incidental take. See, e.g., Sara Orr & Jennifer Roy, *Court Limits Migratory Bird Treaty Act Applicability to Incidental Take*, Latham’s Clean Energy Law Report, Sept. 17, 2015, available at <http://www.cleanenergylawreport.com/environmental-and-approvals/court-limits-migratory-bird-treaty-act-applicability-to-incidental-take/> (“the Eighth and Ninth Circuits have concluded that the scope of the MBTA should be limited to exclude incidental take”). But cf. Gerald George, *Migratory Bird Treaty Act Narrowly Interpreted: the Fifth Circuit Joins the Eighth and Ninth Circuits*, Energy & Environmental Law Blog, Sept. 10, 2015, available at <http://www.energyenvironmentallaw.com/2015/09/10/migratory-bird-treaty-act-narrowly-interpreted-the-fifth-circuit-joins-the-eighth-and-ninth-circuits/> (correctly describing the narrow holdings of the Eighth and Ninth Circuit

The *CITGO* court compared the MBTA to the ESA and the MMPA, statutes in which, the court asserted, Congress expressly modified the common-law definition of “take” by including terms like “harm” and “harass,” thus covering “accidental or indirect harm to animals.”²⁰⁹ “Harm and harass are the terms Congress uses when it wishes to include negligent or unintentional acts within the definition of ‘take.’ Without these words, ‘take’ assumes its common law definition.”²¹⁰ However, the words on which the court relies, “harm” and “harass,” do not necessarily implicate incidental take any more than does “take” itself. As with “take,” harmful and harassing acts may be directed at protected animal species or be incidental in nature. Moreover, “kill” is also a term that Congress uses when it wishes to prohibit incidental take—as Congress did in the MBTA. Thus, the MBTA’s take prohibition is narrower than that of the ESA—but not because the MBTA requires scienter. Rather, as held by *Seattle Audubon*, the exclusion of “harm” and “harass” in the MBTA exclude it from applying to indirect (habitat modification) take.

The *CITGO* court’s treatment of Congress’s mandate of an exception for take incidental to military-readiness activities is likewise unconvincing.²¹¹ The court simply failed to grapple with the fact that legislation would have been entirely unnecessary if the court’s interpretation is correct. And if Congress thought that commercial activities not directed at migratory birds should fall outside the MBTA, it would not have excluded the “operation of industrial activities” from the definition of “military readiness activities.”²¹² At the same time, the court mischaracterized the government’s argument, stating that the government’s position was that the military-readiness legislation “implicitly and hugely expanded” the scope of the MBTA.²¹³ It would have made little sense for the government to stake out such a position against the backdrop of several decades of agency practice interpreting the MBTA to prohibit incidental take. In fact, the military-readiness legislation fills the same role with respect to the MBTA as the 1982 amendments to ESA do to the original 1973 ESA: in both cases, the later legislation would make no sense if the scope of the original legislation was as narrow as some were arguing.²¹⁴ Thus, the later legislation did not change the scope of the original enactment at all, but rather it helped to clarify the proper interpretation of the original enactment. Similarly, *Mahler*’s dismissal of the import of the 1986 amendment to the felony provision and the associated committee report language²¹⁵ fails to acknowledge the fact that the 1986 amendment post-dates the *FMC* and *Corbin Farm Service* cases. The 1985 Kesterson Hearings clearly

Courts as declining to “apply the MBTA to habitat modification that would foreseeably result in bird mortalities.”). But, as discussed above, neither the Eighth nor Ninth Circuits have clearly and expressly held that the MBTA does not apply to incidental take. To be sure, there is currently a split in the Circuits on whether the MBTA prohibits incidental take, but it can only be accurately described as a split between the Second and Tenth Circuits on one side and the Fifth Circuit on the other (and even the Fifth Circuit has not definitively ruled on whether the prohibition of “kill” applies to incidental take).

²⁰⁹ *CITGO*, 801 F.3d at 490.

²¹⁰ *Id.* at 491; *see also id.* at 490.

²¹¹ *Id.* at 490–91.

²¹² Bob Stump National Defense Authorization Act for Fiscal Year 2003, § 315(f)(2)(B), Pub. L. No. 107-314, 116 Stat. 2509 (2002).

²¹³ *CITGO*, 801 F.3d at 490–91.

²¹⁴ *See Sweet Home*, 515 U.S. at 700–01 (1982 amendments allowing FWS to authorize incidental take supported interpretation that incidental take prohibited).

²¹⁵ *Mahler*, 927 F. Supp. at 1580–81,

demonstrate that Congress knew of the executive branch’s interpretation of the MBTA at the time.²¹⁶

Similarly, the *CITGO* court’s rejection of *FMC* and *Apollo Energies* depends entirely on the *CITGO* court’s erroneous conclusion regarding “take.” The *CITGO* court claimed that *FMC* and *Apollo Energies* confused *mens rea* and *actus reus*.²¹⁷ In fact, the *CITGO* court committed precisely the error of which it accused its sister circuits, by grafting a scienter component onto the prohibited act.²¹⁸ The court was correct insofar as the fact that the MBTA is a strict-liability crime does not mean that everything is a violation of the MBTA—the defendant must carry out the prohibited act. The court, however, misunderstood what the prohibited act is. Under the MBTA, it is *any* affirmative act that proximately causes a protected bird to die.

The *CITGO* court’s argument that the FWS interpretation would lead to “absurd results”²¹⁹ is belied by the experience of the last 45 years. As discussed above, the government has consistently taken the position that the MBTA applies to incidental take. Contrary to the court’s intimation, the societal impact has been minimal, and largely positive. Oil pits have been netted, power lines made less dangerous, and bird mortality reduced from what it would otherwise be, all at little societal cost. FWS OLE and DOJ have been judicious in bringing MBTA charges. And, as noted above, FWS is currently engaged in a process to reduce reliance on enforcement discretion by providing authorization for incidental take in appropriate circumstances.

The *Mahler* court made two related arguments, both of which are unconvincing. First, the lack of a history of MBTA prosecutions in the logging context does not have the significance that *Mahler* attributed to it. An agency’s decision not to prosecute is generally committed to the agency’s absolute discretion.²²⁰ Although it is true that the government has generally not prosecuted logging-related bird deaths under the MBTA,²²¹ the court did not mention the government’s enforcement activity in other incidental-take contexts.²²² The government has subsequently publicly explained how its enforcement priorities relate to logging and MBTA violations.²²³ The *Mahler* court’s failure to recognize the proper role of enforcement discretion led the court to use unsupportable circular logic. In effect, the court argued that the MBTA cannot apply to logging because the government has not enforced the MBTA in that context, and

²¹⁶ See *Moon Lake*, 45 F. Supp. 2d at 1075; see also *Andrus v. Allard*, 444 U.S. 51, 57 (1979) (it is particularly relevant that Congress twice reviewed and amended statute without disturbing agency interpretation). The Kesterson Hearings addressed whether the operation of a contaminated reservoir that attracted and poisoned waterfowl violated the MBTA. See, e.g., *Drainage Problems and Contamination at Kesterson Reservoir: Hearings before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 99th Cong. 10–19 *et seq.* (1985).

²¹⁷ *CITGO*, 801 F.3d at 492.

²¹⁸ See 1 LaFare, *Substantive Criminal Law* § 5.2(a) (2d ed. 2003) (“intention to produce a specified result” is an element of *mens rea* or scienter, not *actus reus*).

²¹⁹ *CITGO*, 801 F.3d at 494.

²²⁰ *Heckler v. Chaney*, 470 U.S. 821, 831 (1984).

²²¹ *Mahler*, 927 F. Supp. at 1581.

²²² See *Moon Lake*, 45 F. Supp. 2d at 1083.

²²³ Response of the United States of America to the Submission Made by the Alliance for the Wild Rockies, et al. Under Article 14 of the North American Agreement on Environmental Cooperation, at 11–18 (Feb. 29, 2000), available at http://www.cec.org/sites/default/files/submissions/1995_2000/8475_99-2-rsp-e.pdf (last visited Dec. 2016).

then implies that the government's enforcement of incidental take in other contexts is erroneous because those contexts are indistinguishable from logging.

Second, *Mahler* found support for its conclusion in what it characterized as the “apparent lack of any meaningful limits” on liability under the MBTA if the MBTA applies to incidental take.²²⁴ *Mahler*, however, failed to recognize that meaningful limits on liability under the MBTA do exist. Those limits include: (1) legal authorization in accordance with regulations promulgated under section 2(a) of the MBTA;²²⁵ (2) consistent with *Seattle Audubon*, the MBTA's applicability only to take that is proximately caused by an action (direct incidental take as opposed to indirect incidental take);²²⁶ and (3) enforcement discretion, by which FWS and DOJ may address possible due-process concerns by taking into account the foreseeability of the take.²²⁷ Together, these limitations more than meet any need for a “reasonable principle to limit the broad reading” of the MBTA.²²⁸

In light of the above analysis, I reach the following conclusions. First, using all of the traditional rules of statutory construction, and in the broad context of section 2 of the MBTA, 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. Second, even if the traditional common-law meaning of “take” introduces some ambiguity as to whether that term applies to incidental take, “kill” is unambiguous. Third, even if “take” and “kill” were both considered ambiguous in this context, I conclude that the best reading of the MBTA is that these prohibitions apply to incidental take. Fourth, I conclude, consistent with *Seattle Audubon*, that the causal connection between an action and indirect take of migratory birds (for example, take caused solely by the long-term effects of habitat modification) is too attenuated for liability to attach.

VI. CONCLUSION

Based on the analysis above, I conclude that the MBTA's prohibitions on taking and killing migratory birds apply broadly to any activity, subject to the limits of proximate causation, and are not limited to certain factual contexts. Therefore, those prohibitions can and do apply to direct incidental take.


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²²⁴ *Mahler*, 927 F. Supp. at 1582.

²²⁵ 16 U.S.C. § 704(a).

²²⁶ *Seattle Audubon*'s distinction between direct take and indirect take (e.g., take caused solely by the long-term effects of habitat modification) reflects principles of causation. Proximate causation requires an action to be sufficiently related to the result caused to make legal culpability appropriate.

²²⁷ See *Apollo Energies*, 611 F.3d at 690.

²²⁸ See *Mahler*, 927 F. Supp. at 1582–83.