

INSIGHTS

The Migratory Bird Treaty Act: Flight of Fancy or Enduring Change?

February 26, 2020

By: [Ann D. Navaro](#)

The Trump Administration has issued a proposed rule, 85 Fed. Reg. 5915 (February 3, 2020), that would codify its interpretation of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 et seq., as applying only to the direct take of birds subject to the Act. For decades, the federal government interpreted the MBTA as criminalizing both the direct (intentional) and incidental (unintentional and incident to an otherwise lawful activity) take of birds, their nests, and eggs covered by the Act. Permission could be obtained for direct take, for example for hunting or for control of nuisance birds, but no such MBTA-specific framework existed to evaluate and permit incidental take under the Act. As a result, project proponents, such as builders of wind farms, were left negotiating informal arrangements with the federal government in some circumstances or found themselves at the mercy of “prosecutorial discretion,” in others. The leading causes of incidental bird deaths -- cats, collisions with buildings, and collisions with cars -- were left largely unaddressed by the federal government in implementation of the MBTA. Judicial decisions addressing the scope of the Act have held both that the Act does criminalize incidental take and that it does not.

Into this flighty situation stepped the Trump Administration. On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior issued a legal opinion that reversed years of practice and a prior legal opinion, concluding that the MBTA does not prohibit incidental take. Consistent with that opinion, on February 3, 2020, the Administration issued a proposed rule that would codify the revised interpretation. The proposed rule relies on the plain language of the statute, its history, and on constitutional concerns surrounding the extension of criminal liability under a statute that is ambiguous at best.

The MBTA makes it unlawful: “at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird, any part, next, or egg of any such bird . . .” 16 U.S.C. 703(a). Proponents of the prior interpretation urge that the language “at any time, by any means or any manner” evidences an intent to broadly criminalize any acts that result in bird deaths, even if they are not deliberate and not targeted at birds. The proposed rule rests on a contrary view – that the words “hunt, take, capture, kill” are all affirmative acts directed at birds that have the purpose of reducing them to human control. In the proposed rule, the Administration considers the legislative history of the Act and concludes that it confirms the view that the MBTA was enacted to address the direct take of birds -- in response to over-hunting of birds and to Canadian concerns regarding the impact of U.S. actions on bird populations in Canada – and not to broadly criminalize any and all

behavior that may kill birds.

The Trump Administration's interpretation is already under review in the United States District Court for the Southern District of New York. In that case, the plaintiffs brought a direct challenge to the Department of the Interior's 2017 legal opinion. The court denied the government's Motion to Dismiss the matter; summary judgment briefing is ongoing.

Comments on the proposed rule can be submitted through March 19, 2020, in Docket No. FWS-HQ-MB-2018-0090 at www.regulations.gov.