

The Migratory Bird Treaty Act (MBTA): Selected Legal Issues

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The Migratory Bird Treaty Act (MBTA): Selected Legal Issues

The Migratory Bird Treaty Act (MBTA) (16 U.S.C. §§ 703–712) was enacted in 1918 to implement a 1916 treaty signed by the United States and Great Britain (acting for Canada) aimed at protecting birds that migrate between the two countries. Since 1918, the MBTA has been used as a vehicle to implement other bilateral migratory bird treaties. Under the MBTA, the Department of the Interior (DOI), through the U.S. Fish and Wildlife Service (FWS), administers a program that covers 1,106 species of migratory birds that are found in the United States and covered by the treaties.

The application and enforcement of the MBTA have been the subject of significant legal debate. A wide range of federal district and appellate court cases have addressed the nature and scope of takings prohibited under the MBTA. Courts generally agree that the MBTA prohibits non-permitted direct actions that include hunting, shooting, wounding, killing, trapping, and capturing migratory birds and that these actions constitute strict liability crimes in which the actor's state of mind is irrelevant to establishing a misdemeanor violation.

Jurisprudence on the applicability of the MBTA to incidental taking of migratory birds—such as those resulting from commercial or industrial facilities such as wind turbines—is less clear, and federal courts of appeals are divided. The U.S. Court of Appeals for the Second Circuit has found that the MBTA is a strict liability statute that applies to bird deaths that incidentally result from otherwise lawful activity. The Tenth Circuit applied a similar standard but appended a proximate cause requirement that the bird deaths be reasonably foreseeable. The Ninth Circuit has found the statute not to apply to habitat destruction, and the Eighth Circuit has suggested that the MBTA prohibits only direct actions. The Fifth Circuit has held that the statute applies only to purposeful actions directed against migratory birds, such as hunting and poaching.

In the absence of direction or guidance from the Supreme Court or Congress on the scope of the MBTA's take prohibitions, DOI has issued a series of legal opinions over the course of several Administrations that take differing positions on whether the MBTA prohibits the incidental taking or killing of migratory birds. DOI under the Obama and Biden Administrations took the position that the MBTA prohibited incidental take. DOI under both Trump Administrations has taken the position that the MBTA does not prohibit incidental take, although a recent order from the Secretary of the Interior suggests that DOI may seek to enforce a prohibition on incidental take as against wind energy facilities.

The courts are also divided on whether federal agencies are subject to the MBTA's prohibitions. Courts have generally declined to apply the MBTA to regulatory actions such as permit and project approvals, holding that agencies (1) have no affirmative duty to guarantee a third-party permit holder's future compliance with the MBTA and (2) are not subject to the MBTA when their regulatory actions do not directly take migratory birds.

Legislative interest in the MBTA has also arisen in the context of the Act's exception for subsistence hunting in Alaska. DOI has gradually increased the scope of the exception to cover not just the taking of birds for food but also the sale of non-edible parts of certain birds by Alaska Natives when incorporated into traditional handicrafts. While the underlying treaties and regulations issued to date largely do not contemplate the sale of handicrafts, narrow avenues for legal sales may exist. Proposed legislation has sought to broaden the handicraft sale exception, but such efforts may run afoul of the underlying treaty terms.

Congressional considerations with respect to the MBTA include potentially resolving the incidental take question and the scope of allowable handicraft sales via legislation. Because the treaties remain in force, any laws or regulations authorizing greater use of migratory birds may raise questions about the United States' ability to meet its treaty obligations.

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Background

The Migratory Bird Treaty Act (MBTA)¹ was enacted in 1918 to implement a 1916 treaty signed by the United States and Great Britain (acting for Canada) aimed at protecting birds that migrate between the two countries.² Since 1918, the MBTA has been amended to implement subsequent bilateral migratory bird treaties between the United States and Mexico,³ Japan,⁴ and Russia.⁵ Under the MBTA, the Department of the Interior (DOI), through the U.S. Fish and Wildlife Service (FWS), administers a program that currently covers 1,106 species of migratory birds that are found in the United States and covered by the treaties.⁶

The Treaties

Each of the four treaties underlying the MBTA is unique, containing different requirements and applying to different species.⁷ Broadly, though, while the treaties are structurally distinct and vary in the details, each requires the contracting parties to limit the taking of migratory birds. Each treaty requires close seasons for hunting, and the breadth of additional take allowances varies by treaty. For example, the Japan and Russia treaties authorize the parties to permit take of migratory birds to protect people or property, while the Canada and Mexico treaties do not.⁸ The Canada, Japan, and Russia treaties also allow the parties to authorize taking of migratory birds for “specific purposes” consistent with the general objectives or principles of the treaties.⁹ The Mexico treaty does not have such a catch-all provision, instead allowing taking during close

¹ 16 U.S.C. §§ 703–12.

² Convention between the United States and Great Britain for the Protection of Migratory Birds, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702 [hereinafter U.S.-Canadian Treaty]. In 1995, the United States and Canada negotiated a protocol that replaced the original treaty. Protocol Between the Government of the United States of America 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 in Canada and the United States, Can.-U.S., Dec. 14, 1995, S. TREATY DOC. NO. 104–28 [hereinafter Amended Canada Treaty].

³ Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Mex.-U.S., Feb. 7, 1936, 50 Stat. 1311 [hereinafter U.S.-Mexico Treaty]. *See also* U.S. DEP’T OF STATE, TREATIES IN FORCE 296 (2020) (listing subsequent amendments to the treaty). The MBTA was amended on June 20, 1936, to implement this treaty. 16 U.S.C. § 703. The U.S.-Mexican Treaty was amended in 1997 to match new provisions of the Amended Canada Treaty. *See* Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals, May 5, 1997, S. TREATY DOC. NO. 105–26 [hereinafter Amended Mexico Treaty].

⁴ Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Japan-U.S., Mar. 4, 1972, 25 U.S.T. 3329 [hereinafter U.S.-Japan Treaty]. *See also* TREATIES IN FORCE, *supra* note 3, at 238 (listing subsequent amendments to the treaty). The MBTA was amended on June 1, 1975, to implement this treaty. 16 U.S.C. § 703.

⁵ Convention Between the United States of America and the Union of Soviet Socialist Republics [Russia] Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 26, 1976, 29 U.S.T. 4674 [hereinafter U.S.-Russia Treaty]. The MBTA was amended on November 8, 1978, to implement this treaty. 16 U.S.C. § 703.

⁶ *See* 50 C.F.R. § 10.13 (2025). The list of migratory birds protected under the MBTA can also be accessed at FWS, LIST OF BIRDS PROTECTED BY THE MIGRATORY BIRD TREATY ACT (2023), <https://www.fws.gov/media/list-birds-protected-migratory-bird-treaty-act-2023> [https://perma.cc/74MH-TJNC] (last visited July 21, 2025).

⁷ The full text of each treaty is reproduced in Appendixes A–F of this report.

⁸ *See* Japan Treaty, *supra* note 4, at art. III; Russia Treaty, *supra* note 5, at art. II.

⁹ *See* Amended Canada Treaty, *supra* note 2, at art. II; Japan Treaty, *supra* note 4, at art. III; Russia Treaty, *supra* note 5, at art. II.

seasons only for scientific purposes, propagation, museums, and private game farms¹⁰ or, in the case of insectivorous migratory birds, “when they become injurious to agriculture and constitute plagues.”¹¹

The treaties themselves are not enforceable against individuals or agencies.¹² Instead, the MBTA implements the treaties for purposes of United States domestic law, and certain provisions of the MBTA incorporate the treaties by reference.¹³

MBTA Provisions

The MBTA implements the treaties by prohibiting possessing, killing, and transacting in migratory birds (including the parts, nests, or eggs of such birds) without a permit from FWS, which administers a permitting regime in keeping with both the provisions of the MBTA and the underlying treaties. The following table summarizes each section of the MBTA. Further detail on selected major provisions is provided below.

Table 1. Section-by-Section MBTA Summary

Section	Title	Overview
16 U.S.C. § 703	Taking, killing, or possessing migratory birds unlawful	Creates strict liability prohibition on taking, capturing, killing, possessing, transporting, or otherwise transacting in certain migratory birds “by any means or in any manner” (except as authorized under § 704 below)
16 U.S.C. § 704	Determination as to when and how migratory birds may be taken, killed, or possessed	Authorizes Department of the Interior (DOI) to create permitting program for various uses of migratory birds in keeping with treaty obligations; prohibits hunting by use of baiting
16 U.S.C. § 705	Transportation or importation of migratory birds; when unlawful	Prohibits interstate or foreign transport of birds captured, killed, taken, shipped, transported, or carried in violation of state or Canadian law
16 U.S.C. § 706	Arrests; search warrants	Authorizes DOI law enforcement officers to conduct arrests and execute search warrants
16 U.S.C. § 707	Violations and penalties; forfeitures	Imposes six-month prison sentence as penalty for strict liability offenses, one-year prison sentence as penalty for certain baiting offenses, and two-year prison sentence as penalty for knowing offenses with commercial components and authorizes forfeiture of equipment used in violations
16 U.S.C. § 708	State or territorial laws or regulations	Allows states and territories to continue enacting laws related to migratory birds that do not conflict with the MBTA, including laws establishing increased protections for migratory birds as compared to the MBTA

¹⁰ See Amended Mexico Treaty, *supra* note 3, at art. II.

¹¹ *Id.*

¹² See CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Steve P. Mulligan, at Summary (2023) (“While non-self-executing provisions bind the United States as a matter of international law, they do not create rights or obligations enforceable as domestic law in U.S. courts.”).

¹³ See, e.g., 16 U.S.C. §§ 703, 704.

Section	Title	Overview
16 U.S.C. § 709a	Authorization of appropriations	Authorizes appropriation of funds to DOI for enforcement purposes
16 U.S.C. § 710	Partial invalidity; short title	Provides that if any subsection of the MBTA is invalidated by a court, the other subsections remain in effect
16 U.S.C. § 711	Breeding and sale for food supply	Allows for breeding and sale of farm-bred migratory birds for food
16 U.S.C. § 712	Treaty and convention implementing regulations; seasonal taking of migratory birds for essential needs of indigenous Alaskans to preserve and maintain stocks of the birds; protection and conservation of the birds	Authorizes DOI to issue regulations to implement treaty provisions and to authorize taking of migratory birds by indigenous Alaskans “for nutritional and other essential needs”

Source: CRS.

16 U.S.C. § 703: The Prohibition on Taking and Killing of Migratory Birds

MBTA § 703 prohibits several actions related to migratory birds, including taking and killing them. Section 703(a) states:

Unless and except as permitted by regulations ... , *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....*¹⁴

The statute does not define the terms “hunt,” “take,” “capture,” or “kill.” FWS regulations define the term “take” as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect” or to attempt to do so.¹⁵

16 U.S.C. § 704: Permitted Take of Migratory Birds

The MBTA allows the Secretary of the Interior to authorize activities otherwise prohibited under § 703 under certain circumstances. Under § 704(a), the Secretary of the Interior “is authorized and directed ... to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking,” and other activities directed at migratory birds and “to adopt suitable regulations permitting and governing the same.”¹⁶ Section 704(b) prohibits taking migratory birds by use of baiting.¹⁷

Pursuant to its § 704(a) permitting authority, FWS has promulgated regulations for prescribed migratory bird hunting.¹⁸ These regulations allow for some recreational hunting of specified

¹⁴ 16 U.S.C. § 703(a) (emphasis added).

¹⁵ 50 C.F.R. § 10.12.

¹⁶ See 16 U.S.C. § 704(a).

¹⁷ See 16 U.S.C. § 704(b)(1)-(2).

¹⁸ See generally 50 C.F.R. pt. 20.

“migratory game birds”¹⁹ during designated hunting seasons subject to strict limitations on volume, method of take, and use after taking, among others.²⁰

FWS also issues permits that allow for specific uses of migratory birds other than hunting.²¹ FWS regulations establish permitting requirements for various purposes, such as import, export, banding or marking, scientific collecting, taxidermy, waterfowl sale and disposal, falconry, propagation, rehabilitation, depredation, and population control.²² In addition, FWS has authorized incidental take by the Armed Forces during military readiness activities after Congress enacted a law in 2002 to permit this type of incidental taking of migratory birds.²³ Congress has also authorized permitted take of migratory birds in other contexts—for example, by authorizing FWS to issue depredation permits for black vultures and common ravens to protect livestock in certain circumstances.²⁴

FWS can issue “special purpose permits” for activities not covered by the other listed categories.²⁵ A special purpose permit is required before “any person” may lawfully take or possess migratory birds and may be obtained upon “sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.”²⁶ A recent controversial example is FWS’s issuance of a special purpose permit for large-scale taking of barred owls in the Pacific Northwest “to improve the survival and recovery of northern spotted owls and to prevent declines in California spotted owls from barred owl competition,”²⁷ which has spurred both lawsuits challenging the permit issuance²⁸ and congressional response.²⁹

Section § 704(a) incorporates the underlying treaties by reference. Before FWS may issue any permitting regulations or particular permit under MBTA authority, it must determine that the activity authorized by the permitting regulation or permit “is compatible with the terms of the convention.”³⁰ In making such determinations, FWS must give “due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds.”³¹

¹⁹ *Id.* § 20.11(a).

²⁰ *See, e.g.*, 50 C.F.R. pt. 20, subpart C (“Taking”); *id.* subpart D (“Possession”); *id.* subpart K (“Annual Seasons, Limits, and Shooting Hours Schedules”).

²¹ *See* 50 C.F.R. pt. 21.

²² 50 C.F.R. §§ 21.63–95 (import and export, banding or marking, scientific collecting, taxidermy, waterfowl sale and disposal, special Canadian goose, falconry, raptor propagation, rehabilitation); *id.* §§ 21.100–180 (depredation control); *id.* § 21.183 (population control).

²³ 50 C.F.R. § 21.42; Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002).

²⁴ *See* 7 U.S.C. § 8356(a).

²⁵ 50 C.F.R. § 21.95.

²⁶ *Id.*

²⁷ Record of Decision for the Barred Owl Management Strategy; Washington, Oregon, and California, 89 Fed. Reg. 72881-72882 (Sept. 6, 2024).

²⁸ *See* Animal Wellness Action et al v. U.S. Fish and Wildlife Service et al, No. 2:24-CV-01796 (W.D. Wash. filed Oct. 31, 2024); Friends of Animals v. Morrison et al., No. 3:24-CV-01928 (D. Or. filed Nov. 19, 2024).

²⁹ *See* H.R.J. Res. 111, 119th Cong. (2025) (proposing to disapprove rule pursuant to Congressional Review Act).

³⁰ 16 U.S.C. § 704(a).

³¹ *Id.*

16 U.S.C. § 706: Enforcement

The MBTA authorizes FWS to enforce the Act's prohibitions.³² Unlike the Endangered Species Act (ESA), the MBTA does not include a citizen suit provision that allows "any person" to enforce the MBTA provisions in court.³³ However, private citizens and nonprofit organizations have brought suit against the federal government under the Administrative Procedure Act's (APA's) provisions enabling judicial review of unlawful agency action.³⁴ Sections 702 and 704 of the APA "entitle" a "person" who is "adversely affected or aggrieved by agency action" to challenge final agency action in federal court.³⁵ The U.S. Courts of Appeals for the District of Columbia and Ninth Circuits³⁶ have allowed civil suits seeking to enjoin government actions that impact or potentially impact migratory birds to proceed under the APA.³⁷

16 U.S.C. § 707: Penalty Provisions

Failure to comply with the MBTA is a crime that may result in either felony or misdemeanor penalties, depending on the type of violation.³⁸ Under § 707(a), "any person, association, partnership, or corporation" who violates the Act or its regulations is guilty of a misdemeanor and can be fined no more than \$15,000 and/or a maximum jail sentence of six months.³⁹

The felony provision in § 707(b) applies only to entities that *knowingly* take migratory birds and sell or barter them or have intent to do so.⁴⁰ For felony violations of § 703, the punishment is a fine of no more than \$2,000 and/or a maximum jail sentence of two years.⁴¹

For violations of the prohibition on baiting in § 704(b), the penalty is a misdemeanor punishable by a sentence of no more than one year and a fine of \$100,000.⁴²

Section 707 also authorizes forfeiture of equipment used by any person engaged in violations of the MBTA.⁴³

³² 16 U.S.C. § 706.

³³ Compare *id.* (authorizing DOI to enforce MBTA provisions), with *id.* § 1540(g) (allowing "any person" to file a lawsuit to enforce the ESA).

³⁴ See 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

³⁵ 5 U.S.C. §§ 702, 704.

³⁶ For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

³⁷ See, e.g., *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1203, 1204 (9th Cir. 2004) (holding that "anyone who is 'adversely affected or aggrieved' by an agency action alleged to have violated the MBTA has standing to seek judicial review of that action"); *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 886 (D.C. Cir. 2000) (citing 5 U.S.C. § 702, *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), and *Noble v. Union River Logging Co.*, 147 U.S. 165 (1893), as authority allowing for judicial review of government actions regarding compliance with the MBTA).

³⁸ 16 U.S.C. § 707(a)–(b).

³⁹ *Id.* § 707(a).

⁴⁰ *Id.* § 707(b).

⁴¹ *Id.* The Criminal Fine Improvements Act, 18 U.S.C. § 3571(b), increases the maximum fine amount to \$250,000 for the felony violation.

⁴² 16 U.S.C. § 707(c); 18 U.S.C. § 3571(b).

⁴³ 16 U.S.C. § 707(d).

16 U.S.C. § 712: Subsistence for Alaska Natives and Authorizing Regulations

The final section of the MBTA authorizes the Secretary of the Interior to issue regulations allowing for subsistence hunting and gathering by Alaska Natives “in accordance with the various migratory bird treaties and conventions[.]”⁴⁴ The law allows such “taking of migratory birds and the collection of their eggs” only for “nutritional and other essential needs,” as determined by the Secretary, and only during seasons established “so as to provide for the preservation and maintenance of stocks of migratory birds.”⁴⁵ FWS has issued regulations governing Alaska Native subsistence use of migratory birds and their parts, including the use of migratory bird parts in handicrafts.⁴⁶

Section 712 also contains a general authorization for the Secretary of the Interior to issue “such regulations as may be necessary to implement the provisions” of the various migratory bird treaties.⁴⁷

Scope of MBTA Prohibitions

A number of courts, and FWS itself, have grappled with the question of exactly what acts the MBTA prohibits. As discussed above, § 703(a) makes it unlawful to, among other things, “take” a migratory bird (or its nest or eggs).⁴⁸ MBTA regulations define the term “take” as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect.”⁴⁹ Neither the Act nor the implementing regulations specify a mental state for the offense, and courts have made varying inferences from the text as to whether an otherwise lawful act that results in the taking of a migratory bird would be prohibited.

Mental State

Generally, a criminal offense consists of both a prohibited act (the *actus reus*) and a guilty mind (the *mens rea*, also known as the “scienter” requirement).⁵⁰ A criminal offense that does not require the *mens rea* element, such as § 703(a) of the MBTA, is sometimes referred to as a strict liability crime.⁵¹ This means that proof of intent to take, or even knowledge of taking, a migratory bird is not needed to establish a misdemeanor violation of this provision of the Act.⁵² By contrast, the felony penalty provision in § 707(b), regarding the prohibition on selling migratory birds, was amended in 1986 to limit its application to entities that *knowingly* sell or barter migratory birds or

⁴⁴ 16 U.S.C. § 712(a).

⁴⁵ *Id.*

⁴⁶ See 50 C.F.R. pt. 92.

⁴⁷ *Id.* § 712(b).

⁴⁸ 16 U.S.C. § 703(a). Taking a migratory bird is a strict liability crime, giving rise to misdemeanor penalties under 16 U.S.C. § 707(a). Knowingly taking a migratory bird to sell or with the intention of selling it is a felony crime under § 707(b).

⁴⁹ 50 C.F.R. § 10.12.

⁵⁰ For background on the *mens rea* requirement in criminal law, see CRS Report R46836, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, by Michael A. Foster (2021).

⁵¹ *Id.* at 8.

⁵² See, e.g., *United States v. Corrow*, 119 F.3d 796, 798 (10th Cir. 1997) (simple possession of eagle feathers is unlawful under the MBTA); *United States v. Morgan*, 311 F.3d 611, 616 (5th Cir. 2002) (upholding conviction of a hunter who exceeded the daily bag limit of birds allowed under applicable hunting regulations).

take migratory birds with the intent to sell or barter them.⁵³ This amendment followed a decision from the Sixth Circuit dismissing a felony indictment on constitutional grounds. Specifically, the Sixth Circuit held that strict liability application of the MBTA to the sale of migratory birds violates the Fifth Amendment's Due Process Clause, because without a *mens rea* requirement, "a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his reputation."⁵⁴ A Senate report accompanying the 1986 amendment to the felony provision stated, "Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld in many Federal court decisions."⁵⁵

Similarly, in 1998, Congress eliminated strict liability for the prohibition in § 704(b) on taking of migratory birds by baiting by requiring that a "person knows or reasonably should know that the area is a baited area."⁵⁶ A Senate report accompanying this amendment explained that 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" for misdemeanor offenses. The report noted, "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."⁵⁷

Incidental Take

The fact that a misdemeanor MBTA violation does not require any knowing or even negligent conduct gives rise to the question of whether acts that are themselves otherwise lawful, but have the effect of harming migratory birds, constitute criminal violations. DOI has referred to this concept as "incidental take," defined by the agency as "take that results from an activity, but is not the purpose of that activity."⁵⁸ Examples include industrial activities that inadvertently cause bird deaths or harvesting timber from an area where migratory birds may nest.

Federal circuit courts have varied widely in determinations about whether, and to what extent, the MBTA prohibits incidental take. At one end of the spectrum, the Second Circuit has affirmed the strict liability standard for incidental take, likening the standard to that applied in toxic tort cases.⁵⁹ The Tenth Circuit has appended a proximate cause requirement to the otherwise strict liability for incidental take.⁶⁰ The Ninth Circuit ruled that the MBTA does not prohibit incidental take in the context of otherwise lawful habitat destruction,⁶¹ and the Eighth Circuit suggested that the statute does not impose strict liability for conduct indirectly resulting in migratory bird

⁵³ Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582 (codified as amended at 16 U.S.C. § 707(b)).

⁵⁴ See S. REP. NO. 99-445, at 16 (1986) (citing *United States v. Wulff*, 758 F.2d 1121 (1985)).

⁵⁵ *Id.*

⁵⁶ Migratory Bird Treaty Reform Act of 1998, Pub. L. No. 105-312, 112 Stat. 2956 (codified as amended at 16 U.S.C. § 704(b)).

⁵⁷ S. REP. NO. 105-366, at 2-3 (1998).

⁵⁸ Memorandum from Solic., DOI, to Dir., FWS, at 8 (Jan. 10, 2017) [hereinafter *Tompkins Opinion*], https://legacy-assets.eenews.net/open_files/assets/2017/02/21/document_ew_01.pdf [<https://perma.cc/QX6H-U5H2>].

⁵⁹ *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978).

⁶⁰ *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 690 (10th Cir. 2010).

⁶¹ *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991).

deaths.⁶² The Fifth Circuit has held that the MBTA prohibits only affirmative, intentional acts directed at migratory birds.⁶³

Broad Application of the Take Prohibitions in the Second and Tenth Circuits

In *United States v. FMC Corp.*, the Second Circuit affirmed the conviction of FMC, a manufacturer of pesticides whose wastewater retaining pond poisoned migratory birds that landed in it.⁶⁴ The court analogized the migratory bird injuries resulting from FMC's "affirmative act" of manufacturing "highly toxic" pesticides to claims based on strict liability torts.⁶⁵ The court concluded that the absence of a specified mental state in the MBTA, the relatively minor fines imposed, congressional recognition of the public policy to protect migratory birds, and FMC's failure to prevent lethal amounts of the chemicals from accumulating in the pond were sufficient reasons to impose strict liability.⁶⁶

The Tenth Circuit, in *United States v. Apollo Energies, Inc.*, held that acts subject to strict liability under the MBTA must be proximate causes of migratory bird deaths.⁶⁷ The defendants in that case were oil drilling operators whose equipment trapped and killed migratory birds.⁶⁸ The operators argued that the MBTA was unconstitutionally vague because it prohibited such a wide range of conduct that it could not possibly provide fair notice of what acts would constitute a crime.⁶⁹ First affirming the strict liability nature of the statute, the court rejected the defendants' constitutional argument on the basis that "the actions criminalized by the MBTA may be legion, but they are not vague."⁷⁰ However, recognizing that the strict liability regime fairly raises concerns about whether the statute gives fair notice of what acts are prohibited, the court held that "a strict liability interpretation of the MBTA for the conduct charged here satisfies due process only if defendants proximately caused the harm to protected birds."⁷¹ The court explained that "when the MBTA is stretched to criminalize predicate acts that could not have been reasonably foreseen to result in a proscribed effect on birds, the statute reaches its constitutional breaking point."⁷² In affirming the convictions, the court held that the record showed that it was reasonably foreseeable that protected birds could be trapped in the operators' equipment because FWS had put the operators on notice that their equipment had the potential to trap and kill protected birds nearly a year and a half before the bird deaths.⁷³

⁶² *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997).

⁶³ *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 489, 492 (5th Cir. 2015).

⁶⁴ *FMC Corp.*, 572 F.2d 902.

⁶⁵ *Id.* at 908.

⁶⁶ *Id.*

⁶⁷ 611 F.3d 679 (10th Cir. 2010).

⁶⁸ *Id.* at 682.

⁶⁹ *Id.* at 683.

⁷⁰ *Id.* at 689.

⁷¹ *Id.* at 682.

⁷² *Id.* at 689–90.

⁷³ *See id.* at 691 (affirming two of the convictions where the operators received notice of the equipment's potential to trap and kill migratory birds prior to the birds' deaths and vacating one conviction because there was no evidence that the operator was aware of problems with heater-treaters in the oil industry or in his specific operations prior to an FWS educational campaign). For other cases applying similar proximate cause analyses, see *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (MBTA strict liability regime prohibits foreseeable harm to birds); *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999) (imposing proximate cause limitation on MBTA strict liability).

Narrower Application of the Take Prohibitions in the Ninth, Eighth, and Fifth Circuits

The Ninth Circuit, in *Seattle Audubon Society v. Evans*, took a narrower view of the scope of incidental take by limiting the MBTA's applicability to otherwise lawful habitat destruction.⁷⁴ That case dealt with federal agencies' logging activity in northern spotted owl habitat. The Ninth Circuit relied on the different definitions of "take" adopted in the ESA and the MBTA to hold that the MBTA did not prohibit the logging.⁷⁵ The ESA's definition of "take" includes activities that "harm" or "harass" threatened or endangered wildlife, including wildlife deaths proximately caused by "habitat modification."⁷⁶ The Ninth Circuit compared this definition to the MBTA regulatory definition of "take" at 50 C.F.R. § 10.12, which the court said "describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918. The statute and regulations promulgated under it make no mention of habitat modification or destruction."⁷⁷ The court acknowledged that other courts have held that the MBTA "reaches as far as *direct*, though unintended, bird poisoning from toxic substances."⁷⁸ In distinguishing those pesticide cases, the court explained that the underlying reasoning was "inapposite" because it "did not suggest that habitat destruction, leading *indirectly* to bird deaths, amounts to the 'taking' of migratory birds within the meaning of the MBTA."⁷⁹ The court concluded that "[h]abitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA."⁸⁰

The Eighth Circuit has also addressed the issue of incidental take in the context of habitat destruction. In *Newton County Wildlife Association v. U.S. Forest Service*, the Eighth Circuit rejected a challenge to U.S. Forest Service (USFS) timber sale activities that would disrupt nesting of migratory birds and result in the death of some birds.⁸¹ In discussing the applicability of the MBTA to logging, the court noted:

Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds. Thus, we agree with the Ninth Circuit that the ambiguous terms "take" and "kill" in 16 U.S.C. § 703 mean "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918."⁸²

⁷⁴ *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

⁷⁵ *Id.* at 303.

⁷⁶ 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

⁷⁷ *Seattle Audubon*, 952 F.2d at 302.

⁷⁸ *Id.* at 303 (emphasis added).

⁷⁹ *Id.* (emphasis added).

⁸⁰ *Id.*

⁸¹ *Newton Cnty. Wildlife Ass'n v. USFS*, 113 F.3d 110 (8th Cir. 1997).

⁸² *Id.* at 115. It is unclear what weight this analysis carries, because the court's holding did not turn on this reasoning. Instead, the court's actual holding was that the plaintiffs were effectively challenging FWS's decision not to require USFS to obtain an MBTA special purpose permit. *Id.* at 116. The court observed that that challenge would need to be brought against FWS—not USFS—and further that FWS's decision was an unreviewable exercise of enforcement discretion. *Id.* at 116. Consequently, the court's statements about the scope of the MBTA may constitute nonbinding *dicta*. See *id.* at 115 ("Our conclusions about the apparent scope of MBTA are necessarily tentative because we lack the views of the Fish and Wildlife Service, the agency charged with administering and enforcing that statute."). That said, at least one court in the Eighth Circuit has described the MBTA analysis in *Newton County* as "controlling precedent" (continued...)

The *Newton County* court did not address the pesticide cases such as *FMC Corp.* that the Ninth Circuit had distinguished on the basis that those cases involved “direct, though unintended” harm to birds.⁸³ It is therefore unclear how the *Newton County* court might view a similar fact pattern.⁸⁴

The Fifth Circuit took up the issue of incidental take in *United States v. CITGO Petroleum Corp.*, in which the court reversed a criminal conviction for the death of migratory birds that flew into and died in oil production-related tanks.⁸⁵ The court reasoned that the MBTA did not define “take” and that, in the absence of a statutory definition, the term should be interpreted in accordance with its common law meaning, namely, “to reduce [wild] animals, by killing or capturing, to human control.”⁸⁶ The court concluded, “One does not reduce an animal to human control accidentally or by omission; he does so affirmatively.”⁸⁷

In so holding, the Fifth Circuit distinguished between the act of taking (*actus reus*) and (2) the guilty mind (*mens rea*). The court acknowledged that while the government need not prove that the defendant had any criminal intent, it must still prove that the act was performed voluntarily—and a “take,” the court reasoned, “is not something that is done unknowingly or involuntarily.”⁸⁸ As such, “requiring defendants, as an element of an MBTA misdemeanor crime, to take an affirmative action to cause migratory bird deaths is consistent with the imposition of strict liability.”⁸⁹ The court compared a hunter who shoots a migratory bird without a permit under the mistaken belief that it is not a migratory bird to a person whose car accidentally collides with a bird.⁹⁰ The hunter, the court explained, would be strictly liable even though he did not intend to kill a migratory bird because he engaged in an “intentional and deliberate act toward the bird,” whereas the driver’s act was not intentional and deliberate.⁹¹

Accidental Takings of Migratory Birds

Like the Fifth Circuit in *CITGO*, courts have generally excluded wholly accidental, human-related deaths of birds—such as those caused by collisions with vehicles or buildings—from the reach of the MBTA.⁹² These accidental takings differ from other types of incidental takings (e.g., takings caused by birds flying into wind turbines) because accidental takings are generally unforeseeable and unpreventable accidents. Although the courts agree that the MBTA should

to the effect that activities not constituting “the sort of conduct engaged in by hunters and poachers ... do not fall under the prohibitions of the Migratory Bird Treaty Act.” *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012).

⁸³ *Seattle Audubon*, 952 F.2d at 303.

⁸⁴ Notably, the court in *Brigham Oil & Gas*, *supra* note 82, characterized *FMC Corp.* as incompatible with *Newton County* on the basis that, as the court understood it, *FMC Corp.* applied the MBTA to “indirect, unintentional commercial activity.” 840 F. Supp. 2d at 1211. This description of *FMC Corp.* is in conflict with the Ninth Circuit’s characterization of *FMC Corp.* as applying the MBTA to “direct, though unintended bird poisoning.” *Seattle Audubon*, 952 F.2d at 303. This contrast reflects the difficulty of distinguishing between “direct” and “indirect” harm.

⁸⁵ 801 F.3d 477 (5th Cir. 2015).

⁸⁶ *Id.* at 489 (citing *Babbitt v. Sweet Home Chapter Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 492.

⁸⁹ *Id.*

⁹⁰ *Id.* at 492–93.

⁹¹ *Id.* at 493.

⁹² See *Threats to Birds: Migratory Birds Mortality – Questions and Answers*, FWS, <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php> [<https://perma.cc/BS8B-F3AW>] (last visited July 17, 2025) (listing the most common human-caused sources of bird mortality in North America).

exclude these types of accidental bird deaths, they disagree about whether limiting the application of the MBTA to such cases should be a dispositive consideration for interpreting the statutory prohibitions.

For example, the Second Circuit in *FMC Corp.* acknowledged the possibility that its broad interpretation of the MBTA could “bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows into which birds fly, would offend reason and common sense,” but it nonetheless concluded that such situations could be handled through the “sound discretion of prosecutors and the courts.”⁹³ The court reasoned that a “nominal fine” and prosecutorial discretion would address such situations.⁹⁴

Other courts have criticized the reasoning in *FMC Corp.*, explaining that “prosecutorial discretion is not a limiting principle of statutory interpretation”⁹⁵ and that “proper construction of a criminal statute cannot depend upon the good will of those who must enforce it.”⁹⁶ The U.S. District Court for the District of Colorado in *United States v. Moon Lake Electric Association* suggested that requiring that an act or omission be the proximate cause of a taking is an “important and inherent limiting feature of the MBTA’s misdemeanor provision.”⁹⁷

The Fifth Circuit in *CITGO* disagreed that proximate cause was a sufficient limitation on the strict liability standard of the MBTA, however, reasoning that under such an interpretation of the MBTA the government could still prosecute for these types of accidental deaths, leading to “absurd results.”⁹⁸ This expansive reading, the court explained, would subject owners of glass windows, communication towers, wind turbines, cars, cats, and “even church steeples” to the MBTA penalties upon a finding of guilt for killing a migratory bird.⁹⁹ As a result, the Fifth Circuit held that requiring an “affirmative action to cause migratory bird deaths is consistent with the imposition of strict liability” such that a “person whose car accidentally collided with the bird ... has committed no act ‘taking’ the bird for which he could be held strictly liable.”¹⁰⁰

FWS Enforcement and DOI Legal Opinions on Incidental Take

Prior to 2017, DOI interpreted the MBTA to prohibit incidental take and kills, imposing strict liability for activities and hazards that led to the deaths of protected migratory birds.¹⁰¹ FWS enforced the prohibition on incidental take through various strategies.¹⁰² It aimed first at achieving voluntary compliance through guidance on industry best practices to minimize incidental take of migratory birds and published specific guidance for the wind energy industry related to siting of turbines.¹⁰³ FWS made clear that adherence to the guidance did not “absolve”

⁹³ *FMC Corp.*, 572 F.2d at 905.

⁹⁴ *Id.*

⁹⁵ See *Mahler v. USFS*, 927 F. Supp. 1559, 1583 (S.D. Ind. 1996) (holding that the MBTA did not apply to USFS’s planned logging during migratory nesting season because the MBTA did not apply to activities that resulted in unintended deaths of migratory birds).

⁹⁶ See *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1084 (D. Colo. 1999) (holding that application of the MBTA strict liability standard is limited by proximate causation and not prosecutorial discretion).

⁹⁷ *Id.* at 1085.

⁹⁸ *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 493–94 (5th Cir. 2015).

⁹⁹ *Id.* at 494.

¹⁰⁰ *Id.*

¹⁰¹ *Nat. Res. Def. Council v. DOI*, 478 F. Supp. 3d 469, 473 (S.D.N.Y. 2020).

¹⁰² *Id.*

¹⁰³ See *Reducing Impacts to Migratory Birds: Best Practices by Industry*, FWS, <https://www.fws.gov/node/5233941> (continued...)

individuals or companies from MBTA violations for taking or killing protected migratory birds but indicated that it would use its enforcement discretion to focus on investigating and prosecuting those who harm or kill migratory birds without taking steps to avoid the take (i.e., those who do not adhere to the guidance).¹⁰⁴

In certain instances when entities did not implement such best practices, FWS pursued prosecution and issued fines. For example, in November 2013, Duke Energy Renewables pled guilty to violating the MBTA for the deaths of golden eagles and other migratory birds at two wind projects that included 176 wind turbines on private land in Wyoming.¹⁰⁵ A year later, in December 2013, PacifiCorp Energy agreed to pay \$2.5 million in fines, restitution, and community service after pleading guilty to charges arising from 38 golden eagle deaths and 336 other protected bird deaths at two of its wind farms in Wyoming.¹⁰⁶

Since 2017, a series of DOI solicitors have issued legal opinions staking out different positions on whether the MBTA prohibits the incidental taking or killing of migratory birds.

In January 2017, then-DOI Solicitor Hilary Tompkins issued a legal opinion, M-37041 (the Tompkins Opinion), formalizing FWS's long-standing interpretation that the MBTA's "broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing...."¹⁰⁷ The Tompkins Opinion asserted that the statutory terms "take" and "kill" "by any means or matter" in the MBTA § 703(a) prohibitions are "sufficiently broad to encompass actions performed knowingly, negligently, or without any knowledge of wrongdoing"¹⁰⁸ and that, as such, takings "incidental to industrial or commercial activities" would violate the MBTA.¹⁰⁹ The Tompkins Opinion concluded that because the MBTA imposes strict liability for misdemeanors, including for incidental take, "the government need not show

(last visited July 18, 2025) (listing activity-specific voluntary best practices to reduce impacts to migratory birds); FWS, U.S. FISH AND WILDLIFE SERVICE LAND-BASED WIND ENERGY GUIDELINES (2012). FWS estimates that wind turbines may kill half a million birds a year. *Wind Turbines*, FWS (Apr. 18, 2018), <https://www.fws.gov/Midwest/wind/wildlifeimpacts/index.html> [<https://archive.is/rZPs0>].

¹⁰⁴ *Id.*

¹⁰⁵ *United States v. Duke Energy Renewables Inc.*, No. 2:13-CR-00268 (D. Wyo. filed Nov. 7, 2013). *See also* Press Release, Dep't of Justice, Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (Nov. 22, 2013), <https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects> [<https://perma.cc/45BX-PJSE>]. According to the charges presented in court, Duke Energy Renewables failed to make all reasonable efforts to build the projects in a way that would avoid the risk of avian deaths by collision with turbine blades despite prior warnings about this issue from FWS. *Id.* Under a plea agreement with the government, the company agreed to pay fines, restitution, and community service totaling \$1 million and was placed on probation for five years. *Id.* The Department of Justice stated that this "case represents the first criminal conviction under the Migratory Bird Treaty Act for unlawful avian takings at wind projects." *Id.*

¹⁰⁶ *United States v. PacifiCorp Energy*, No. 2:14-CR-00301 (D. Wyo. filed Dec. 19, 2014). *See also* Press Release, Dep't of Justice, Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (Dec. 19, 2014), <https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects-0> [<https://perma.cc/8K45-KG87>]. PacifiCorp pled guilty to two misdemeanor violations of the MBTA and was sentenced to five years' probation. *Id.* The company also agreed to institute a compliance program to prevent bird deaths at the utility's four commercial wind farms in Wyoming. *Id.* Similar to the Duke Energy case, the charges alleged that the company failed to make all reasonable efforts to build projects in a way that would avoid risk of bird deaths by collision with turbine blades consistent with the guidance finalized by FWS in 2012. *Id.* Wyoming, where these enforcement cases were filed, is within the Tenth Circuit. It may be more difficult to prosecute wind energy developers for incidental take in the Fifth, Eighth, and Ninth Circuits, where courts have narrowed the reach of the MBTA to varying degrees. *See supra* "Narrower Application of the Take Prohibitions in the Ninth, Eighth, and Fifth Circuits."

¹⁰⁷ Tompkins Opinion, *supra* note 58, at 2.

¹⁰⁸ *Id.* at 8.

¹⁰⁹ *Id.* at 2.

that a defendant willfully or intentionally took or killed birds to prove a violation of the MBTA.”¹¹⁰

To reach this conclusion, the Tompkins Opinion relied, in part, on the legislative history of amendments that added *mens rea* requirements for violations of other MBTA provisions discussed above. The Tompkins Opinion asserted that 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,” meaning that no “particular mental state is required for a [misdemeanor] violation to occur.”¹¹¹ The opinion also highlighted the Tenth Circuit’s opinion in *Apollo Energies*, the Second Circuit’s opinion in *FMC Corp.*, and other similar cases that held that 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.”¹¹² In keeping with *Apollo Energies*, the Tompkins Opinion conceded that “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.”¹¹³ The opinion drew a distinction between the concepts of direct/indirect and incidental/intentional, arguing that “directness” refers to “the closeness of the causal connection between an action and its effect of taking migratory birds” and that “it is possible to have incidental take that is direct and incidental take that is indirect.”¹¹⁴ The opinion leveraged this distinction to acknowledge that “the prohibitions of the MBTA do not apply to indirect take, such as that caused by habitat modification,” while still taking the overall position that take incidental to industrial or commercial activities is prohibited as a consequence of being “direct.”¹¹⁵

During the first Trump Administration, DOI issued a different legal interpretation of the MBTA’s application to incidental takings. In December 2017, then-Principal Deputy Solicitor Daniel Jorjani replaced the Tompkins Opinion with a new legal opinion, M-37050 (the Jorjani Opinion).¹¹⁶ That opinion concluded that the MBTA “prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.”¹¹⁷ The Jorjani Opinion explained that the MBTA’s strict liability provisions are not triggered until there is a deliberate act (the *actus reus*) to take a migratory bird.¹¹⁸ To support its conclusion, the Jorjani Opinion relied, in part, on the Fifth Circuit’s decision in *CITGO*, discussed above, and other similar cases. The opinion also noted that the legislative history of amendments that added *mens rea* requirements for violations were not related to MBTA § 703(a) take prohibitions. On February 3, 2020, FWS proposed regulations to codify its interpretation on incidental take.¹¹⁹

¹¹⁰ *Id.*

¹¹¹ *Id.* at 9, 12.

¹¹² *Id.* at 23–30.

¹¹³ *Id.* at 2.

¹¹⁴ *Id.* at 2 n.6.

¹¹⁵ *Id.* See also *supra* note 84 (noting disagreement among courts as to what constitutes “direct” versus “indirect” harm).

¹¹⁶ Memorandum from the Principal Deputy Solic., DOI, to the Sec’y, Deputy Sec’y, Asst. Sec’y for Land & Minerals Mgmt., and Asst. Sec’y for Fish & Wildlife & Parks, DOI (Dec. 22, 2017), <https://www.doi.gov/sites/default/files/uploads/m-37050.pdf> [<https://perma.cc/2XUP-497Q>].

¹¹⁷ *Id.* at 2.

¹¹⁸ See *id.* at 22–23 (asserting that the deliberate acts [e.g., to take or kill] prohibited by the MBTA “are purposeful and voluntary affirmative acts directed at reducing an animal to human control, such as when a hunter shoots a protected bird causing its death”).

¹¹⁹ Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5915 (Feb. 3, 2020).

The first Trump Administration’s interpretation led to further judicial and regulatory actions. On August 11, 2020, a federal district court in *Natural Resources Defense Council (NRDC) v. DOI* vacated the Jorjani Opinion.¹²⁰ The court held that the plain language of the MBTA’s prohibition on taking protected migratory birds “at any time, by any means, and in any manner” means that the MBTA prohibits incidental killing of the birds.¹²¹ The court rejected DOI’s argument that the Jorjani Opinion interprets only the *actus reus* of the take prohibitions by limiting its coverage to activities that are “directed at” birds and thus does not impose a *mens rea* requirement. The court concluded, “There is nothing in the text of the MBTA that suggests that in order to fall within its prohibition, activity must be directed specifically at birds.”¹²² DOI filed a notice of appeal of the court’s ruling on October 9, 2020.¹²³ While that appeal was pending, FWS finalized its proposed rule on January 7, 2021, codifying its interpretation of incidental take from the Jorjani Opinion.¹²⁴ In the preamble, FWS explained that it disagreed with the district court’s decision in *NRDC* and that the Jorjani Opinion was consistent with the Fifth Circuit’s decision in *CITGO*.¹²⁵ The final rule was to go into effect on February 8, 2021.¹²⁶

The Biden Administration promptly took multiple actions to reverse the first Trump Administration’s interpretation and regulations regarding incidental take of migratory birds. FWS delayed the effective date of the January 7 rule,¹²⁷ and the parties filed a stipulation to withdraw the appeal in *NRDC*.¹²⁸ Principal Deputy Solicitor Robert Anderson issued a new memorandum, M-37065 (the Anderson Opinion), permanently withdrawing the Jorjani Opinion.¹²⁹ The Anderson Opinion referred to and adopted the reasoning of the court in *NRDC* and also noted concerns raised by the government of Canada regarding whether the Jorjani Opinion was consistent with the underlying treaty.¹³⁰

On October 4, 2021, FWS revoked the January 7 rule, effectively reinstating its prior interpretation that the MBTA prohibits incidental take.¹³¹ FWS explained that its interpretation was consistent with the *NRDC* decision and its previous practice of applying enforcement discretion in incidental take circumstances.¹³² The same day, FWS also published an advance notice of proposed rulemaking announcing its intent to codify its interpretation and develop a

¹²⁰ 478 F. Supp. 3d 469 (S.D.N.Y. 2020).

¹²¹ *Id.* at 481.

¹²² *Id.* at 487–88.

¹²³ Notice of Appeal, *NRDC*, 478 F. Supp. 3d 469 (2020) (18-CV-4596), Dkt. No. 94.

¹²⁴ Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134 (Jan. 7, 2021).

¹²⁵ *Id.* at 1134.

¹²⁶ *Id.* The decision in *NRDC* to vacate the Jorjani Opinion did not directly affect DOI’s proposed rule, even though the subject matter was related, because the rule was a different agency action. When the rule became final on January 7, 2021, it also became subject to separate judicial review. As this section discusses, however, it appears that the January 7, 2021, rule may be superseded by subsequent agency action.

¹²⁷ Regulations Governing Take of Migratory Birds; Delay of Effective Date, 86 Fed. Reg. 8715 (Feb. 9, 2021).

¹²⁸ Stipulation, *NRDC v. DOI*, No. 20-3491 (2d Cir. Feb. 25, 2021), Dkt. No. 73.

¹²⁹ Memorandum from Principal Deputy Solic., DOI, to Sec’y & Asst. Sec’y for Fish & Wildlife & Parks, DOI (Mar. 8, 2021) [hereinafter Anderson Opinion], <https://www.doi.gov/sites/default/files/permanent-withdrawal-of-sol-m-37050-mbta-3.8.2021.pdf> [<https://perma.cc/34DN-C25G>].

¹³⁰ *Id.*

¹³¹ Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54642 (Oct. 4, 2021).

¹³² *Id.*

permitting program to authorize incidental takes.¹³³ FWS received over 11,000 comments on the proposed rule by the close of the comment period.¹³⁴

Soon after, FWS issued Director's Order No. 225, providing guidance to its staff on how to implement its position on incidental take and to clarify its related enforcement policies.¹³⁵ The order announced plans to prioritize enforcement against incidental take from an otherwise illegal activity or foreseeable incidental take from legal activities where regulated entities did not implement "beneficial practices" to avoid or minimize incidental take.¹³⁶ The order referenced best practices that FWS has developed for specific structures (e.g., communication towers and electric utility lines) and industries (e.g., oil and gas and wind energy).¹³⁷ The order also directed FWS employees to avoid or minimize take in their own activities.¹³⁸ The order went into effect on December 3, 2021.

Under this direction, FWS once again pursued criminal charges against wind energy companies. On April 5, 2022, ESI Energy entered a plea agreement in the U.S. District Court for the District of Wyoming in which it admitted to violating the MBTA.¹³⁹ ESI admitted that its turbines in Wyoming and New Mexico had struck and killed 136 bald and golden eagles.¹⁴⁰ Pursuant to the plea agreement, the court sentenced ESI Energy to pay a \$1,861,000 fine and \$6,210,991 in restitution, serve a five-year period of probation, and follow an Eagle Management Plan to minimize future eagle deaths at its wind turbine facilities.¹⁴¹

The Biden Administration never published a proposed or final rule codifying its approach to incidental take. On April 11, 2025, in the second Trump Administration, Acting Solicitor Gregory Zerzan issued another memorandum opinion, M-37085 (the Zerzan Opinion), revoking the Anderson Opinion.¹⁴² The Zerzan Opinion cited President Trump's January 2025 executive order titled "Unleashing American Energy," which instructed agencies to "suspend, revise, or rescind all agency actions identified as unduly burdensome."¹⁴³ The Zerzan Opinion instructed all offices and bureaus of DOI to treat the Jorjani Opinion as controlling "except with respect to actions relying on such opinion that are to be taken within the jurisdiction of the United States District Court for the Southern District of New York."¹⁴⁴

President Trump's July 7, 2025, executive order titled "Ending Market Distorting Subsidies for Unreliable, Foreign-Controlled Energy Sources" requires the Secretary of the Interior to "conduct

¹³³ Migratory Bird Permits Notices, 86 Fed. Reg. 54667 (Oct. 4, 2021).

¹³⁴ See FWS, *Rulemaking Docket: Comments on Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds*, REGULATIONS.GOV, <https://www.regulations.gov/docket/FWS-HQ-MB-2021-0105/comments> [<https://perma.cc/GF5L-4CAB>] (last visited July 18, 2025).

¹³⁵ FWS, Director's Order No. 225: Incidental Take of Migratory Birds (Oct. 5, 2021), <https://www.fws.gov/guidance/sites/guidance/files/documents/do225.pdf> [<https://perma.cc/3DTU-8TTR>].

¹³⁶ *Id.* at 2–3.

¹³⁷ *Id.* at 3.

¹³⁸ *Id.*

¹³⁹ *United States v. ESI Energy LLC*, No. 1:22-CR-00048 (D. Wyo. filed Apr. 1, 2022).

¹⁴⁰ Press Release, Dep't of Just., ESI Energy LLC Sentenced to Killing and Wounding Eagles in Its Wind Energy Operations (Apr. 5, 2022), <https://www.justice.gov/archives/opa/pr/esi-energy-llc-wholly-owned-subsiadiary-nextera-energy-resources-llc-sentenced-after-pleading> [<https://perma.cc/2BJD-6UNC>].

¹⁴¹ *Id.*

¹⁴² Memorandum from Acting Solic., DOI, to Sec'y & Asst. Sec'y for Fish & Wildlife & Parks, DOI (Apr. 11, 2025) [hereinafter Zerzan Opinion], <https://www.doi.gov/sites/default/files/documents/2025-04/m-37085.pdf> [<https://perma.cc/8KEX-MCM9>].

¹⁴³ Exec. Order No. 14,154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

¹⁴⁴ Zerzan Opinion, *supra* note 142.

a review of regulations, guidance, policies, and practices under the Department of the Interior’s jurisdiction to determine whether any provide preferential treatment to wind and solar facilities in comparison to dispatchable energy sources.”¹⁴⁵ Consequently, on July 29, 2025, Secretary of the Interior Doug Burghum issued Order No. 3437, with subject “Ending Preferential Treatment for Unreliable, Foreign-Controlled Energy Sources in Department Decision Making.”¹⁴⁶ The order instructed Assistant Secretaries to conduct various reviews, including of “wildlife permits and analyses, including but not limited to ... Incidental Take permits” and “Migratory Bird Treaty Act compliance consultation.”¹⁴⁷ It further instructed the Assistant Secretary for Land and Minerals Management to provide the Secretary with a report that “describes and provides recommendations regarding ... trends in environmental impacts from onshore and offshore wind projects on wildlife, especially birds, marine mammals, and fisheries.”¹⁴⁸ It remains to be seen whether this order will result in FWS revisiting the Zerzan Opinion or otherwise revising its position on incidental take.

Government Actions Affecting Migratory Birds

Various federal government actions may affect birds that are protected under the MBTA. For example, a federal agency could potentially implicate the MBTA by intentionally killing migratory birds in an effort to control overpopulation or by disturbing bird habitats in the course of managing federal lands and property.¹⁴⁹ Whether these actions violate the MBTA take prohibitions depends not just on whether the MBTA prohibits incidental take but also on whether federal agencies are subject to the MBTA at all.

Federal courts have expressed differing opinions on the applicability of the MBTA to federal agencies. Courts have generally agreed that the penalty provisions in 16 U.S.C. § 707, which apply to “persons,” would not cover federal agencies. Courts have diverged, however, on whether § 707 is the only means by which the MBTA can be enforced. The Eighth and Eleventh Circuits have held that the MBTA can be enforced only through its own penalty provisions. The D.C. Circuit has taken a different approach: Focusing on the fact that 16 U.S.C. § 703 does not limit its applicability to “persons,” the D.C. Circuit has found those prohibitions to be applicable to federal agencies and enforceable through courts’ equitable power to issue injunctions and vacate agency actions.

Eighth and Eleventh Circuits: MBTA Prohibitions Do Not Apply to Federal Agency Actions

In *Sierra Club v. Martin*, the Sierra Club challenged the USFS’s timber-cutting and road-building activities on the basis that they would disturb the nesting seasons of certain migratory birds and

¹⁴⁵ Exec. Order No. 14,315, 90 Fed. Reg. 30821 (July 7, 2025).

¹⁴⁶ Secretary of the Interior, Order No. 3437: Ending Preferential Treatment for Unreliable, Foreign-Controlled Energy Sources in Department Decision Making (July 29, 2025), <https://www.doi.gov/document-library/secretary-order/so-3437-ending-preferential-treatment-unreliable-foreign> [<https://perma.cc/BEU7-7LB3>].

¹⁴⁷ *Id.* at 3-4.

¹⁴⁸ *Id.* at 5.

¹⁴⁹ See, e.g., *Humane Soc’y of the United States v. Glickman*, 217 F.3d 882, 883–84 (D.C. Cir. 2000) (addressing whether the MBTA prohibits federal agencies from killing or taking migratory birds without a permit to address overpopulation of geese in Virginia); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1203–04 (9th Cir. 2004) (addressing whether rehabilitation of a former military base that may result in the “foreseeable deaths” of migratory birds because of disturbance to migratory birds and their nests violated the MBTA).

result in the killing of between 2,000 and 9,000 of those birds.¹⁵⁰ Sierra Club sued under the APA, which requires reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁵¹ Specifically, the Sierra Club claimed that the USFS’s activities were not in accordance with law in part because they violated the MBTA’s prohibition on killing migratory birds.¹⁵²

The Eleventh Circuit denied review under the APA, explaining that, under the APA, an “agency’s actions could only fail to be ‘in accordance with law’ when that agency’s actions are *subject to that law*.”¹⁵³ The court concluded, reading the statute as a whole, that the MBTA is a “criminal statute making it unlawful *only* for persons, associations, partnerships, and corporations to ‘take’ or ‘kill’ migratory birds” and that the MBTA “does not subject the federal government to its prohibitions.”¹⁵⁴ To support its conclusion, the court emphasized the MBTA’s historical context, explaining that the application of the MBTA to the federal government would “severely impair” the USFS’s obligation “to furnish a continuous supply of timber” for the country, a duty that would “inevitably” result in deaths of birds and destruction of nests.¹⁵⁵

Soon after the Eleventh Circuit’s decision in *Sierra Club v. Martin*, the Eighth Circuit addressed similar issues in *Newton County Wildlife Association v. USFS*.¹⁵⁶ In this case, as noted in an earlier portion of this report, the plaintiffs alleged that the USFS violated the MBTA by failing to obtain “special permits” from FWS for timber sales that would “disrupt nesting migratory birds, killing some.”¹⁵⁷ Similar to the Eleventh Circuit’s reasoning in *Sierra Club v. Martin*, the court determined that the term “person” as used in the MBTA did not appear to apply to sovereign governments based on common usage.¹⁵⁸ The court rejected the plaintiffs’ arguments that the MBTA must cover federal agencies for the U.S. government to maintain its 1916 treaty obligations, concluding that the government’s obligation to comply with the treaty came from the treaty itself.¹⁵⁹ The parties’ obligations under the treaty, the court explained, are to execute the treaty, which the United States did by enacting a statute that applies to private parties.¹⁶⁰

D.C. Circuit: MBTA Prohibitions Apply to Federal Agency Actions

The D.C. Circuit took a different approach. In *Humane Society of the United States v. Glickman*, the D.C. Circuit addressed whether the MBTA prohibits federal agencies from killing or taking

¹⁵⁰ *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997).

¹⁵¹ 5 U.S.C. § 706(2)(A).

¹⁵² *Martin*, 110 F.3d at 1554.

¹⁵³ *Id.* at 1555.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1556.

¹⁵⁶ 113 F.3d 110 (8th Cir. 1997). The *Martin* decision, 110 F.3d 1551, was published on April 29, 1997, and the *Newton County* decision was published on May 6, 1997.

¹⁵⁷ *Newton Cnty.*, 113 F.3d at 114–15.

¹⁵⁸ See *id.* (“Since, in common usage, the term ‘person’ does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.”). The court did not address whether the “sovereign” included federal officers acting in their official capacity.

¹⁵⁹ *Id.* at 115.

¹⁶⁰ *Id.* As noted above, *supra* note footnote 82, the holding in *Newton County* was that FWS not issuing a permit under the MBTA would be a matter of enforcement discretion and therefore not reviewable under the APA. As such, much like its analysis with respect to incidental take, the court’s commentary on applicability of MBTA prohibitions to the federal government may constitute nonbinding *dicta*.

migratory birds without a permit from FWS.¹⁶¹ In this case, the Department of Agriculture planned to capture and kill Canadian geese, without a FWS depredation permit, to address the negative impacts to crops and water quality from overpopulation of geese in Virginia.¹⁶²

Although the court agreed with the agency that the misdemeanor penalty provisions in 16 U.S.C. § 707(a) do not apply to federal agencies,¹⁶³ the court turned to § 703 to determine if the agency was separately subject to its prohibition on killings and takings of migratory birds without a permit.¹⁶⁴ The court held that under the plain meaning of the statute, the § 703 prohibitions do apply to federal agencies.¹⁶⁵ The court explained that § 703 does not restrict its prohibition to private parties and provides no exemption for federal agencies.¹⁶⁶ In disagreeing with the *Sierra Club v. Martin* decision from the Eleventh Circuit and the *Newton County* decision from the Eighth Circuit discussed above, the court concluded that both decisions rest on the “mistaken idea that in 1918, § 703 could be enforced *only* through the criminal penalty provision in § 707(a).”¹⁶⁷ The court cited Supreme Court cases from the late nineteenth and early twentieth centuries allowing for equitable or injunctive relief for suits against federal officers for failing to comply with specific statutes.¹⁶⁸ Ultimately, the court held that the agency violated the MBTA by failing to obtain a permit to take the geese.¹⁶⁹

The *Humane Society* court, in disagreement with the Eleventh Circuit decision in *Sierra Club v. Martin*, concluded that it would be “odd” if federal agencies were exempt from the § 703 prohibitions, because the U.S.-Canadian treaty underlying the MBTA “binds the contracting parties” to its terms.¹⁷⁰ Article II of the 1916 treaty prohibits hunting of specific types of migratory birds during certain seasons, and Article V prohibits takings of nests or eggs of migratory birds at all times.¹⁷¹ The court stated that “the fact that the [MBTA] enforced a treaty between our country and Canada reinforces our conclusion that the broad language of § 703 applies to actions of the federal government.”¹⁷²

Scope of Federal Actions Subject to the MBTA

Even where courts would apply the MBTA to federal agency actions, they have not extended that applicability to agency actions authorizing third-party projects that could kill migratory birds. Courts have declined to apply the MBTA to regulatory actions related to third-party projects based on two main principles: (1) agencies are not subject to the MBTA when their regulatory

¹⁶¹ 217 F.3d 882 (D.C. Cir. 2000).

¹⁶² *Id.* at 883–84.

¹⁶³ The agency argued, and the court agreed, that the term “person” does not ordinarily include the sovereign. *See id.* at 886 (citing *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)). The court pointed out that the agency did not discuss whether federal officers carrying out the take of migratory birds would be considered “persons” under MBTA § 707, and the court did not address it. *Id.* However, as discussed above, the court determined that even if the sovereign is not subject to the § 707 penalties, federal agencies are still subject to the § 703 take prohibitions and civil suits. *Id.*

¹⁶⁴ *Id.* at 885.

¹⁶⁵ *Id.* at 885–88.

¹⁶⁶ *Id.* at 886.

¹⁶⁷ *Id.* at 888 (emphasis added).

¹⁶⁸ *Id.* at 886.

¹⁶⁹ *Id.* at 888.

¹⁷⁰ *Id.* at 887 (citing the closing proclamation in the treaty, in which President Woodrow Wilson stated that “the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof”).

¹⁷¹ *See* U.S.-Canadian Treaty, *supra* note 2 (allowing certain exceptions for “scientific or propagating purposes”).

¹⁷² *Humane Soc’y of the United States*, 217 F.3d at 887.

actions do not directly take migratory birds, and (2) agencies have no affirmative duty to guarantee a third-party's future compliance with the MBTA.¹⁷³ The question has often arisen in the context of energy infrastructure.

A prime example is *Protect Our Communities Foundation v. Jewell*, a 2016 decision from the Ninth Circuit.¹⁷⁴ Environmental groups claimed, among other things, that the U.S. Bureau of Land Management (BLM) (1) violated the MBTA by granting a right-of-way on public lands to a private company to develop and operate a wind energy facility that would incidentally take migratory birds or (2) in the alternative, violated the APA because the BLM failed to require the facility to secure an MBTA take permit prior to granting the right-of-way.¹⁷⁵ In affirming summary judgment for BLM, the Ninth Circuit rejected both claims, holding that the MBTA does not contemplate “secondary” liability of agencies that act in a purely regulatory capacity where those regulatory actions do not “directly or proximately cause the ‘take’ of migratory birds.”¹⁷⁶ The court concluded that the APA and MBTA place no “affirmative duty” on BLM to guarantee a grantee’s future compliance with the MBTA or prevent future unlawful action by a grantee.¹⁷⁷

FWS took a similar position in 2015, stating that “the agencies themselves are not subject to the prohibitions of the MBTA when acting in their regulatory capacities.”¹⁷⁸ Nonetheless, even if a federal agency is not required to obtain an MBTA permit when authorizing third-party activities, the third-party permittee may need to obtain a permit for incidental take related to the project.¹⁷⁹

Alaska Native Exception

Like several other wildlife protection statutes, the MBTA makes an exception to its general prohibitions for subsistence use by Alaska Natives.¹⁸⁰ MBTA’s exception for Alaska Natives, added to the statute in 1978 after the United States entered migratory bird treaties with Japan and the Soviet Union, provides:

In accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the Union of Soviet Socialist Republics, the Secretary of the Interior is authorized to issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as

¹⁷³ See, e.g., *Friends of the Boundary Mountains v. U.S. Army Corps of Eng’rs*, 24 F. Supp. 3d 105, 113–15 (D. Me. 2014); *Pub. Emps. for Env’t Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 117–18 (D.D.C. 2014), *rev’d on other grounds*, 827 F.3d 1077 (D.C. Cir. 2016); *Pub. Emps. for Env’t Resp. v. Hopper*, 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016); *Protect Our Cmty. Found. v. Chu*, No. 12-CV-3062, 2014 WL 1289444, at *25–26 (S.D. Cal. Mar. 27, 2014).

¹⁷⁴ 825 F.3d 571 (9th Cir. 2016).

¹⁷⁵ *Id.* at 585–86.

¹⁷⁶ *Id.* at 585.

¹⁷⁷ *Id.* at 586–88.

¹⁷⁸ *Migratory Bird Permits; Programmatic Environmental Impact Statement; Notice of Intent*, 80 Fed. Reg. 30032, 30034 (May 26, 2015).

¹⁷⁹ See, e.g., *Pub. Emps. for Env’t Resp. v. Hopper*, 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016) (noting that the agency conceded that the wind energy developer was required to obtain a permit for incidental take of migratory birds from wind turbines).

¹⁸⁰ 16 U.S.C. § 712. For an overview of other statutes addressing subsistence use in Alaska, see CRS Report R47511, *Subsistence Uses of Resources in Alaska: An Overview of Federal Management*, by Mark K. DeSantis and Erin H. Ward (2023).

determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.¹⁸¹

The referenced Canada and Mexico treaties were amended in the 1990s to accommodate indigenous subsistence use of migratory birds in Alaska. Both amended treaties permit harvesting of certain migratory birds and their eggs by indigenous Alaskans, provided that regulations ensure that taking is “non-wasteful” and “consistent with the customary and traditional uses by such indigenous inhabitants for their own nutritional and other essential needs[.]”¹⁸²

In 1995, after the United States and Canada negotiated treaty amendments, the U.S. Secretary of State submitted a letter to the President that summarized the proposed changes. The Secretary of State noted that the amended treaty would authorize the United States “to establish a subsistence harvest of birds, their eggs and down in any season. Sale of these items is not permitted, except for limited sale of non-edible by-products of birds taken for nutritional purposes incorporated into authentic articles of handicraft.”¹⁸³ The letter also articulated a tension between the amended Canada Treaty and the U.S.-Japan Convention because the Japan Convention had a more restrictive definition of “subsistence hunt” than the amended Canada Treaty—specifically, the Japan Convention “does not include hunting by resident Alaskans who are not ‘Eskimos’ or ‘Indians,’ and the purpose of a subsistence hunt is limited to the provision of food and clothing (excluding, for example, the making of traditional handicrafts).”¹⁸⁴ The letter also noted the Japan Convention’s “specific prohibition on ‘any sale, purchase or exchange’ of birds and their eggs, by-products or parts” and made clear that any subsistence hunt authorized pursuant to the amended Canada Treaty would need to be implemented so as not to violate the Japan Convention.¹⁸⁵

As such, the Secretary of State stated that the amended Canada Treaty would be “implemented so that birds are taken only for food. Non-edible by-products of birds taken for nutritional purposes incorporated into authentic articles of handicraft by Alaska Natives may be sold in strictly limited situations” and pursuant to regulation.¹⁸⁶

Regulatory Treatment of Handicraft Sales

FWS issued regulations implementing the MBTA Alaska Native subsistence exception in 2002.¹⁸⁷ Broadly, the regulations established a co-management council consisting of state, federal, and Alaska Native authorities and prescribed a subsistence hunting season (typically spring and summer) outside the general migratory game bird hunting season (typically fall and winter).¹⁸⁸ A commenter on the proposed rule suggested that FWS should allow the purchase of feathers for

¹⁸¹ 16 U.S.C. § 712(a). *See also* U.S.-Japan Treaty, *supra* note 4; U.S.-Russia Treaty, *supra* note 5.

¹⁸² Amended Canada Treaty, *supra* note 2, art. II(4)(b)(i); Amended Mexico Treaty, *supra* note 3, art. I.

¹⁸³ Letter from Warren Christopher, Sec’y of State, to Bill Clinton, President (May 20, 1996), at *4 [hereinafter Amended Canada Letter of Submittal], *in* Amended Canada Treaty, *supra* note 2, <https://www.fws.gov/sites/default/files/documents/treaty-canada-migratory-birds-1995.pdf> [<https://perma.cc/B5M2-76ZE>]. The equivalent letter accompanying the Amended Mexico Treaty did not address the issue of sale. Letter from Madeline Albright, Sec’y of State, to Bill Clinton, President (Aug. 27, 1977), at v–vii, *in* Amended Mexico Treaty, *supra* note 3, <https://www.congress.gov/105/cdoc/tdoc26/CDOC-105tdoc26.pdf> [<https://perma.cc/6RJM-8LUL>].

¹⁸⁴ Amended Canada Letter of Submittal, *supra* note 182, at *5.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *7.

¹⁸⁷ Procedures for Establishing Spring/Summer Subsistence Harvest Regulations for Migratory Birds in Alaska, 67 Fed. Reg. 53511 (Aug. 16, 2002); *see also* 50 C.F.R. pt. 92.

¹⁸⁸ 50 C.F.R. pt. 92; *see also* CRS Report R47563, *Tribal Co-management of Federal Lands: Overview and Selected Issues for Congress*, by Mariel J. Murray (2023).

dance regalia, but FWS noted that “because the purchase and sale of migratory birds and their parts is a violation of the Migratory Bird Treaty Act, it is not in the purview of this rule to allow for the purchase of feathers.”¹⁸⁹ The final regulation stated, “You may not sell, offer for sale, purchase, or offer to purchase migratory birds, their parts, or their egg(s) taken” pursuant to the subsistence hunting allowance.¹⁹⁰ The rule therefore appeared to take a conservative approach to subsistence in comportment with the Japan Convention (and did not incorporate the Secretary of State’s allowance that handicrafts could be sold in “strictly limited situations”).¹⁹¹

In 2017, FWS promulgated a new rule allowing for the sale of handicrafts made with inedible parts of birds taken for food in subsistence hunts.¹⁹² The rule stated that the birds must have been harvested “using nonwasteful taking”¹⁹³ and that only Alaska Natives were eligible to sell the handicrafts.¹⁹⁴ Referencing the language in the amended Canada Treaty referring to “essential needs,” the rule noted that the sales would yield “a small source of additional income that we conclude is necessary for the ‘essential needs’ of Alaska Natives in predominantly rural Alaska.”¹⁹⁵ The rule also addressed how it complied with the underlying treaties. Echoing the Secretary of State’s submittal letter for the amended Canada Treaty, FWS specifically addressed the interaction between the new regulations and the Japan Treaty, noting that the “biggest challenge was developing a list of migratory birds that could be used in handicrafts,” which “required cross-referencing restricted species” in the various treaties.¹⁹⁶ The Japan Convention allowed subsistence hunting only for “food and clothing,” meaning that birds protected under that treaty could not be incorporated into handicrafts for sale notwithstanding the handicrafts allowances in the amended Canada and Mexico Treaties. As such, the handicraft sale rule applies only to those 27 species of birds not subject to the Japan Convention.¹⁹⁷ Therefore, under the 2017 rule, Alaska Natives may sell traditional handicrafts made with non-edible parts of 27 species of migratory birds harvested in a non-wasteful manner for food pursuant to the subsistence exception from the MBTA’s prohibitions on take.

Considerations for Congress

An overarching consideration with respect to any potential legislation on migratory birds is the fact that the underlying treaties are the ultimate source of those birds’ protection.¹⁹⁸ Furthermore, because the MBTA implements those treaties, any regulation or legislation changing the application of the MBTA or otherwise affecting migratory birds could impact whether the United States meets its treaty obligations.¹⁹⁹

¹⁸⁹ 67 Fed. Reg. at 53515.

¹⁹⁰ 50 C.F.R. § 92.6 (2003).

¹⁹¹ Amended Canada Letter of Submittal, *supra* note 182, at *7.

¹⁹² Use of Inedible Bird Parts in Authentic Alaska Native Handicrafts for Sale, 82 Fed. Reg. 34263 (July 24, 2017) (codified at 50 C.F.R. pt. 92).

¹⁹³ *Id.* at 34265.

¹⁹⁴ *Id.* at 34264–65.

¹⁹⁵ *Id.* at 34264.

¹⁹⁶ *Id.*

¹⁹⁷ 50 C.F.R. § 92.6 (2017).

¹⁹⁸ See 16 U.S.C. § 704(a) (DOI permitting authority is “[s]ubject to the provisions and in order to carry out the purposes of the conventions”).

¹⁹⁹ The legal interplay between laws and treaties is beyond the scope of this report, but a more in-depth discussion of the impacts of treaties on U.S. law can be found in CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Steve P. Mulligan (2023).

For example, certain bills introduced in the 119th Congress would authorize individuals to take black vultures without permits from FWS in order to protect livestock.²⁰⁰ Vultures are covered under the Mexico Treaty, which does not specifically allow for take in order to protect property.²⁰¹ While one court has read the Mexico Treaty not to limit take of non-game migratory birds, it also suggested that a contrary reading was “not unreasonable.”²⁰² As with the permit issued in that case, the vulture bills, the bills related to Alaska Native handicrafts discussed below,²⁰³ and any other legislative activity specific to migratory birds will likely raise questions about the United States’ treaty obligations.

The Incidental Take Pendulum

As noted above, different presidential Administrations have taken different views on the scope of the MBTA’s prohibition on taking migratory birds and, in particular, whether the Act prohibits “incidental take.” Future Administrations and courts may continue to disagree about these questions unless the Supreme Court constrains lower courts or Congress amends the law. FWS has recognized what some view as the importance of providing regulatory certainty to regulated entities while balancing statutory and treaty obligations for the long-term conservation of migratory birds.²⁰⁴ For example, in the absence of a formal permitting program for incidental take, wind-energy developers often desire direction on how to address incidental taking of migratory birds protected under the MBTA.²⁰⁵

Members of Congress have introduced legislation on both sides of the issue. A bill introduced in the House in January 2015, H.R. 493, would have added a *mens rea* requirement to the MBTA misdemeanor penalty provision and would have made explicit that the proposed addition of “with intent knowingly” would not include accidental take or take incidental to otherwise lawful activity.²⁰⁶ In June 2015, the House of Representatives passed the Fiscal Year 2016 Commerce, Justice, Science, and Related Agencies Appropriations Bill, which included an amendment prohibiting the use of Department of Justice funds to prosecute or hold liable any person or corporation for a violation of the MBTA.²⁰⁷ The House appropriations bill was reported in the Senate but was not brought to the floor for consideration.²⁰⁸ By contrast, several other bills have sought to clarify that the MBTA does prohibit incidental take but would reserve criminal penalties for reckless or grossly negligent conduct. All other violations would be subject only to civil penalties.²⁰⁹

²⁰⁰ See Black Vulture Relief Act of 2025, S. 1823, 119th Cong.; H.R. 2462, 119th Cong. (2025).

²⁰¹ Compare Amended Mexico Treaty, *supra* note 3, at art. II, with Japan Treaty, *supra* note 4, at art. III (authorizing permitting of take “for the purpose of protecting persons and property”).

²⁰² *Fund for Animals v. Kempthorne*, 538 F.3d 124, 135 (2d Cir. 2008) (examining and rejecting plaintiffs’ claims that FWS’s cormorant depredation order was “contrary to the [Mexico] treaty and therefore in violation of the MBTA”).

²⁰³ See “Handicraft Sales,” *infra* (discussing various bills seeking to expand Alaska Native handicraft sale authority).

²⁰⁴ Migratory Bird Permits Notices, 86 Fed. Reg. 54667, 54668 (Oct. 4, 2021).

²⁰⁵ For information regarding the development of wind energy sources, see CRS Report R40175, *Wind Energy: Offshore Permitting*, by Adam Vann (2023) and CRS Report R46970, *Offshore Wind Energy: Federal Leasing, Permitting, Deployment, and Revenues*, by Laura B. Comay and Corrie E. Clark (2023).

²⁰⁶ H.R. 493, 114th Cong. (2015).

²⁰⁷ H.R. 2578, 114th Cong. § 564 (2015).

²⁰⁸ See DEPARTMENTS OF COMMERCE AND JUSTICE, AND SCIENCE, AND RELATED AGENCIES APPROPRIATIONS BILL, 2016, S. REP. NO. 114-66 (2015).

²⁰⁹ Migratory Bird Protection Act of 2025, H.R. 3188, 119th Cong.; see also Migratory Bird Protection Act of 2021, H.R. 4833, 117th Cong.

Applying MBTA prohibitions to incidental take would not necessarily preclude the operation of wind farms, oil production facilities, or other commercial endeavors that pose risk to migratory birds. Under the Bald and Golden Eagle Protection Act, for example, FWS administers general permit programs authorizing otherwise prohibited incidental take of eagles by wind energy facilities,²¹⁰ power lines,²¹¹ and various other forms of “disturbance.”²¹² The bills cited above that would make explicit the MBTA’s application to incidental take include provisions establishing a similar incidental take program.²¹³

Handicraft Sales

The regulatory developments on Alaska Native handicraft sales described in “Regulatory Treatment of Handicraft Sales” above were unfolding in parallel with legislative proposals. In 2012, when all sales of migratory bird parts were still illegal, the FWS Office of Law Enforcement fined Tlingit artist Archie Cavanaugh \$2,005 for advertising handicrafts online that he had made with raven and flicker feathers.²¹⁴ Shortly thereafter, Alaska Representative Don Young introduced H.R. 3109, a bill that would have amended the MBTA to allow possession and sale of Alaskan Native handicrafts and clothing containing non-edible migratory bird parts.²¹⁵ The committee report accompanying H.R. 3109 noted that the implementing legislation for the subsistence allowance, 16 U.S.C. § 712, “regrettably” did not clearly state that non-edible parts of birds hunted for subsistence could be sold.²¹⁶ The report mentioned the Cavanaugh case in conjunction with the regulatory prohibition on sale or purchase of such parts.²¹⁷ The proposed bill did not specifically require that the bird part be from a bird lawfully taken for subsistence purposes, but it did require that the migratory bird not be taken in a “wasteful manner.” The bill passed the House and was referred to the Committee on Environment and Public Works in the Senate but did not advance.

Similar versions of the same bill have been introduced in subsequent Congresses by members of the Alaskan delegation. The version introduced in the 118th Congress, S. 5258 (dubbed the “Archie Cavanaugh Migratory Bird Treaty Amendment Act”), included two notable additions.²¹⁸ First, the bill changed the proviso that the birds not be taken in a “wasteful manner” to state that the birds must not be taken in a “wasteful or illegal manner.”²¹⁹ Second, the bill added an “Administration” section, requiring the Secretary of State to “work with the Secretary of the Interior to enter into appropriate bilateral procedures, as necessary, with countries that are parties to the treaties” underlying the MBTA “to clarify the treatment of authentic Alaska Native articles of handicraft” containing migratory bird parts.²²⁰

²¹⁰ 50 C.F.R. § 22.250.

²¹¹ *Id.* § 22.260.

²¹² *Id.* § 22.280.

²¹³ *See, e.g.*, H.R. 3188.

²¹⁴ Associated Press, *Tlingit artist told he violated law for using raven, flicker feathers in art*, ORE. LIVE (Oct. 16, 2012 at 18:48 ET), https://www.oregonlive.com/pacific-northwest-news/2012/10/tlingit_artist_told_he_violate.html [<https://perma.cc/PE9E-AAYG>].

²¹⁵ H.R. 3109, 113th Cong. (2014).

²¹⁶ H.R. REP. NO. 113-578 (2014).

²¹⁷ *Id.*

²¹⁸ S. 5258, 118th Cong. (2024).

²¹⁹ *Id.* § 3(a).

²²⁰ *Id.* § 3(b).

The latest version of the bill, S. 255, was introduced in the 119th Congress and differs from the 2017 FWS handicrafts rule in a number of respects. The bill would not explicitly require that the non-edible bird parts incorporated into handicrafts for sale be derived from birds that were taken as part of the subsistence hunt for food. The bill's proviso that the handicrafts exception does not apply to handicrafts including parts of birds taken "illegally" would seem to achieve a similar end given that the only legal purpose of the subsistence hunt would be for "nutritional and other essential needs."²²¹ That said, given FWS's finding in 2017 that "essential needs" can include the income from handicraft sales, the proposed legislation could have the effect of authorizing migratory bird take specifically for handicraft purposes, as compared with the 2017 rule's limitation that handicrafts include only the inedible parts of migratory birds taken primarily for food.

S. 255 would also not limit the handicraft sale allowance to Alaska Native sellers or to the 27 species of birds listed by FWS in 2017. This represents a significant broadening of the current handicrafts exception insofar as it (1) would allow non-Native sellers to profit from the sale of migratory birds and (2) would allow for the sale of handicrafts incorporating parts of any migratory bird taken legally under United States law, including those whose sale would still be prohibited under the terms of the underlying treaties. For example, because MBTA regulations have long provided for legal hunting seasons of certain game birds, the legislation would allow for the sale of handicrafts incorporating parts of birds not taken pursuant to the subsistence exception at all.

S. 255 would require that, within 180 days of passage, "the Secretary of State shall work with the Secretary of the Interior to enter into appropriate bilateral procedures" with other treaty parties "as necessary ... to clarify the treatment of authentic Alaska Native articles of handicraft."²²² As noted above, the law, if passed, would likely involve renegotiation of at least the Japan Treaty to broaden the subsistence exception in that convention (which currently authorizes subsistence hunting only for food and clothing). It would also likely involve renegotiation of the remaining treaties, as the proposed legislation does not limit the handicraft sale privilege to any particular population with a subsistence tradition, nor does it limit the sale to birds taken for subsistence purposes.

A legislative instruction to the Secretary of State to engage in treaty discussions may raise separation of powers concerns, but at least one environmental statute has followed a similar model. The Magnuson Stevens Fishery Conservation and Management Act of 1976 included a provision on "treaty renegotiation" that instructed the Secretaries of State and the Interior to "initiate ... the renegotiation of any treaty which pertains to fishing" in particular areas and "which is in any manner inconsistent with the purposes, policy, or provisions of this chapter, in order to conform such treaty" to the law.²²³ The provision concluded that it was "the sense of Congress that the United States shall withdraw from any such treaty" in the absence of such renegotiation.²²⁴ A federal court in the District of Alaska held that, because the applicable treaty was never renegotiated, the Act effectively abrogated that treaty to the extent the two were inconsistent.²²⁵ That said, any inquiry of this type is likely to be highly context-specific, and any inconsistencies between proposed MBTA amendments and the underlying treaties are likely to face scrutiny from the courts.

²²¹ 16 U.S.C. § 712(a).

²²² Archie Cavanaugh Migratory Bird Treaty Amendment Act, S. 255, 119th Cong., § 3(b) (2025).

²²³ Pub. L. No. 94-265, § 202(b), 90 Stat. 331, 340.

²²⁴ 16 U.S.C. § 1822(b).

²²⁵ *United States v. Mys Prokofyeva*, 536 F. Supp. 793, 796 (D. Alaska 1982).

Appendix A. U.S. Agreement with Great Britain

Convention Between the United States and Great Britain for the Protection of Migratory Birds (1916)²²⁶

WHEREAS, Many species of birds in the course of their annual migrations traverse certain parts of the United States and the Dominion of Canada; and

Whereas, Many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both the United States and Canada, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds;

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects and to the end of concluding a convention for this purpose have appointed as their respective plenipotentiaries:

The President of the United States of America, Robert Lansing, Secretary of State of the United States; and

His Britannic Majesty, the Right Honorable Sir Cecil Arthur Spring Rice, G. C. V. O., K. C. M. G., etc., His Majesty's Ambassador Extraordinary and Plenipotentiary at Washington;

Who after having communicated to each other their respective full powers which were found to be in due and proper form, have agreed to and adopted the following articles:

ARTICLE I

The high contracting powers declare that the migratory birds included in the terms of this convention shall be as follows:

1. Migratory Game Birds:

- (a) Anatidae or waterfowl, including brant, wild ducks, geese, and swans.
- (b) Gruidae or cranes, including little brown, sandhill, and whooping cranes.
- (c) Rallidae or rails, including coots, gallinules and sora and other rails.
- (d) Limicolae or shorebirds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, phalaropes, plovers, sandpipers, snipe, stilts, surf birds, turnstones, willet, woodcock and yellowlegs.
- (e) Columbidae or pigeons, including doves and wild pigeons.

2. Migratory Insectivorous Birds:

Bobolinks, catbirds, chickadees, cuckoos, flickers, flycatchers, grosbeaks, humming birds, kinglets, martins, meadowlarks, nighthawks, or bull bats, nut-hatches, orioles, robins, shrikes, swallows, swifts, tanagers, titmice, thrushes, vireos, warblers, wax-

²²⁶ Convention between the United States and Great Britain for the Protection of Migratory Birds, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702.

wings, whippoorwills, woodpeckers, and wrens, and all other perching birds which feed entirely or chiefly on insects.

3. Other Migratory Nongame Birds:

Auks, auklets, bitterns, fulmars, gannets, grebes, guillemots, gulls, herons, jaegers, loons, murre, petrels, puffins, shearwaters, and terns.

ARTICLE II

The high contracting Powers agree that, as an effective means of preserving migratory birds, there shall be established the following close seasons during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities.

1. The close season on migratory game birds shall be between March 10 and September 1, except that the close season on the limicolae or shorebirds in the Maritime Provinces of Canada and in those States of the United States bordering on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay shall be between February 1 and August 15, and that Indians may take at any time scoters for food but not for sale. The season for hunting shall be further restricted to such period not exceeding three and one-half months as the high contracting Powers may severally deem appropriate and define by law or regulation.

2. The close season on migratory insectivorous birds shall continue throughout the year.

3. The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murre and puffins, and their eggs, for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

ARTICLE III

The high contracting Powers agree that during the period of ten years next following the going into effect of this convention, there shall be a continuous close season on the following migratory game birds, to wit: —

Band-tailed pigeons, little brown, sandhill and whooping cranes, swans, curlew and all shorebirds (except the black-breasted and golden plover, Wilson or jack snipe, woodcock, and the greater and lesser yellowlegs); provided that during such ten years the close seasons on cranes, swans and curlew in the Province of British Columbia shall be made by the proper authorities of that Province within the general dates and limitations elsewhere prescribed in this convention for the respective groups to which these birds belong.

ARTICLE IV

The high contracting Powers agree that special protection shall be given the wood duck and the eider duck either (1) by a close season extending over a period of at least five years, or (2) by the establishment of refuges, or (3) by such other regulations as may be deemed appropriate.

ARTICLE V

The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific or propagating purposes under such laws or regulations as the high contracting Powers may severally deem appropriate.

ARTICLE VI

The high contracting Powers agree that the shipment or export of migratory birds or their eggs from any State or Province, during the continuance of the close season in such State or

Province, shall be prohibited except for scientific or propagating purposes, and the international traffic in any birds or eggs at such time captured, killed, taken, or shipped at any time contrary to the laws of the State or Province in which the same were captured, killed, taken, or shipped shall be likewise prohibited. Every package containing migratory birds or any parts thereof or any eggs of migratory birds transported, or offered for transportation from the United States into the Dominion of Canada or from the Dominion of Canada into the United States, shall have the name and address of the shipper and an accurate statement of the contents clearly marked on the outside of such package.

ARTICLE VII

Permits to kill any of the above-named birds which, under extraordinary conditions, may become seriously injurious to the agricultural or other interests in any particular community, may be issued by the proper authorities of the high contracting Powers under suitable regulations prescribed therefor by them respectively, but such permits shall lapse, or may be cancelled, at any time when, in the opinion of said authorities, the particular exigency has passed, and no birds killed under this article shall be shipped, sold or offered for sale.

ARTICLE VIII

The high contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present convention.

ARTICLE IX

The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible and the convention shall take effect on the date of the exchange of the ratifications. It shall remain in force for fifteen years and in the event of neither of the high contracting Powers having given notification, twelve months before the expiration of said period of fifteen years, of its intention of terminating its operation, the convention shall continue to remain in force for one year and so on from year to year.

In faith whereof, the respective plenipotentiaries have signed the present convention in duplicate and have hereunto affixed their seals.

Done at Washington this sixteenth day of August, one thousand nine hundred and sixteen.

[SEAL]

ROBERT LANSING.

[SEAL]

CECIL SPRING RICE.

Appendix B. U.S. Agreement with Canada

Protocol Between the Government of the United States of America 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 in Canada and the United States (1995)²²⁷

The Government of the United States of America and the Government of Canada,

REAFFIRMING their commitment to achieving the purposes and objectives of the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States; DESIRING to amend and update the Convention to enable effective actions to be taken to improve the conservation of migratory birds;

COMMITTED to the long-term conservation of shared species of migratory birds for their nutritional, social, cultural, spiritual, ecological, economic, and aesthetic values through a more comprehensive international framework that involves working together to cooperatively manage their populations, regulate their take, protect the lands and waters on which they depend, and share research and survey information;

AWARE that changes to the Convention are required to ensure conformity with the aboriginal and treaty rights of the Aboriginal peoples of Canada;

ACKNOWLEDGING the intent of the United States to provide for the customary and traditional taking of certain species of migratory birds and their eggs for subsistence use by indigenous inhabitants of Alaska; and

AFFIRMING that it is not the intent of this Protocol to cause significant increases in the take of species of migratory birds relative to their continental population sizes;

HAVE AGREED as follows:

ARTICLE I

In order to update the listing of migratory birds included in the terms of this Convention in a manner consistent with their current taxonomic (Family and Subfamily) status, Article I of the Convention is deleted and replaced by the following: The High Contracting Powers declare that the migratory birds included in the terms of this Convention shall be as follows:

1. Migratory Game Birds:

Anatidae, or waterfowl (ducks, geese and swans); Gruidae, or cranes (greater and lesser sandhill and whooping cranes); Rallidae, or rails (coots, gallinules and rails); Charadriidae, Haematopodidae, Recurvirostridae, and Scolopacidae, or shorebirds (including plovers and lapwings, oystercatchers, stilts and avocets, and sandpipers and allies); and Columbidae (doves and wild pigeons).

2. Migratory Insectivorous Birds:

²²⁷ Protocol Between the Government of the United States of America 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 in Canada and the United States, Can.-U.S., Dec. 14, 1995, S. TREATY DOC. NO. 104-28.

Aegithalidae (long-tailed tits and bushtits); Alaudidae (larks); Apodidae (swifts); Bombycillidae (waxwings); Caprimulgidae (goatsuckers); Certhiidae (creepers); Cinclidae (dippers); Cuculidae (cuckoos); Emberizidae (including the emberizid sparrows, wood-warblers, tanagers, cardinals and grosbeaks and allies, bobolinks, meadowlarks, and orioles, but not including blackbirds); Fringillidae (including the finches and grosbeaks); Hirundinidae (swallows); Laniidae (shrikes); Mimidae (catbirds, mockingbirds, thrashers, and allies); Motacillidae (wagtails and pipits); Muscicapidae (including the kinglets, gnatcatchers, robins, and thrushes); Paridae (titmice); Picidae (woodpeckers and allies); Sittidae (nuthatches); Trochilidae (hummingbirds); Troglodytidae (wrens); Tyrannidae (tyrant flycatchers); and Vireonidae (vireos).

3. Other Migratory Nongame Birds:

Alcidae (auks, auklets, guillemots, murres, and puffins); Ardeidae (bitterns and herons); Hydrobatidae (storm petrels); Procellariidae (petrels and shearwaters); Sulidae (gannets); Podicipedidae (grebes); Laridae (gulls, jaegers, and terns); and Gaviidae (loons).

ARTICLE II

Article II of the Convention is deleted and replaced by the following: The High Contracting Powers agree that, to ensure the long-term conservation of migratory birds, migratory bird populations shall be managed in accord with the following conservation principles:

- To manage migratory birds internationally;
- To ensure a variety of sustainable uses;
- To sustain healthy migratory bird populations for harvesting needs;
- To provide for and protect habitat necessary for the conservation of migratory birds; and
- To restore depleted populations of migratory birds.

Means to pursue these principles may include, but are not limited to:

- Monitoring, regulation, enforcement and compliance;
- Co-operation and partnership;
- Education and information;
- Incentives for effective stewardship;
- Protection of incubating birds;
- Designation of harvest areas;
- Management of migratory birds on a population basis;
- Use of aboriginal and indigenous knowledge, institutions and practices; and
- Development, sharing and use of best scientific information.

1. Except as provided for below, there shall be established the following close seasons during which no hunting shall be done:

- (a) The close season on migratory game birds shall be between March 10 and September 1, and the season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation; and
- (b) The close season on migratory insectivorous birds and other migratory nongame birds shall continue throughout the year.

2. Except as provided for below, migratory birds, their nests, or eggs shall not be sold or offered for sale.

3. Subject to laws, decrees or regulations to be specified by the proper authorities, the taking of migratory birds may be allowed at any time of the year for scientific, educational, propagative, or other specific purposes consistent with the conservation principles of this Convention.
4. Notwithstanding the close season provisions in paragraph 1 and the prohibition on the taking of eggs in Article V, and respecting aboriginal and indigenous knowledge and institutions:
 - (a) In the case of Canada, subject to existing aboriginal and treaty rights of the Aboriginal peoples of Canada under section 35 of the Constitution Act, 1982, and the regulatory and conservation regimes defined in the relevant treaties, land claims agreements, self-government agreements, and co- management agreements with Aboriginal peoples of Canada:
 - (i) Migratory birds and their eggs may be harvested throughout the year by Aboriginal peoples of Canada having aboriginal or treaty rights, and down and inedible by-products may be sold, but the birds and eggs so taken shall be offered for barter, exchange, trade or sale only within or between Aboriginal communities as provided for in the relevant treaties, land claims agreements, selfgovernment agreements, or co-management agreements made with Aboriginal peoples of Canada; and
 - (ii) Migratory game and non-game birds and their eggs may be taken throughout the year for food by qualified non-aboriginal residents in areas of northern Canada where the relevant treaties, land claims agreements, self- government agreements, or co-management agreements made with Aboriginal peoples of Canada recognize that the Aboriginal peoples may so permit. The dates of the fall season for the taking of migratory game birds by qualified residents of Yukon and the Northwest Territories may be varied by law or regulation by the proper authorities. The birds or eggs taken pursuant to this sub-paragraph (ii) shall not be sold or offered for sale.
 - (b) In the case of the United States:
 - (i) Migratory birds and their eggs may be harvested by the indigenous inhabitants of the State of Alaska. Seasons and other regulations implementing the non-wasteful taking of migratory birds and the collection of their eggs by indigenous inhabitants of the State of Alaska shall be consistent with the customary and traditional uses by such indigenous inhabitants for their own nutritional and other essential needs; and
 - (ii) Indigenous inhabitants of the State of Alaska shall be afforded an effective and meaningful role in the conservation of migratory birds including the development and implementation of regulations affecting the non-wasteful taking of migratory birds and the collection of their eggs, by participating on relevant management bodies.
5. Murres may be taken by non-aboriginal residents of the province of Newfoundland and Labrador for food, subject to regulation, during the period from September 1 to March 10, but the murres so taken shall not be sold or offered for sale. The season for murre hunting shall be further restricted to such period not exceeding three and one-half months as the proper authorities may deem appropriate by law or regulation.

ARTICLE III

Article III of the Convention is deleted and replaced by the following:

The High Contracting Powers agree to meet regularly to review progress in implementing the Convention. The review shall address issues important to the conservation of migratory birds, including the status of migratory bird populations, the status of important migratory bird habitats, the effectiveness of management and regulatory systems and other issues deemed important by either High Contracting Power. The High Contracting Powers agree to work cooperatively to resolve identified problems in a manner consistent with the principles underlying this Convention and, if the need arises, to conclude special arrangements to conserve and protect species of concern.

ARTICLE IV

Article IV of the Convention is deleted and replaced by the following: Each High Contracting Power shall use its authority to take appropriate measures to preserve and enhance the environment of migratory birds. In particular, it shall, within its constitutional authority:

- (a) seek means to prevent damage to such birds and their environments, including damage resulting from pollution;
- (b) endeavour to take such measures as may be necessary to control the importation of live animals and plants which it determines to be hazardous to the preservation of such birds;
- (c) endeavour to take such measures as may be necessary to control the introduction of live animals and plants which could disturb the ecological balance of unique island environments; and
- (d) pursue cooperative arrangements to conserve habitats essential to migratory bird populations.

ARTICLE V

Article V of the Convention is deleted and replaced by the following:

The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific, educational, propagating or other specific purposes consistent with the principles of this Convention under such laws or regulations as the High Contracting Powers may severally deem appropriate, or as provided for under Article II, paragraph 4.

ARTICLE VI

This Protocol is subject to ratification. This Protocol shall enter into force on the date the Parties exchange instruments of ratification, shall continue to remain in force for the duration of the Convention and shall be considered an integral part of the Convention particularly for the purpose of its interpretation.

IN WITNESS WHEREOF the undersigned representatives, being duly authorized by their respective Governments, have signed the present Protocol.

DONE at Washington, this 14th day of December, 1995, in duplicate, in the English and French languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA: [Signature]

FOR THE GOVERNMENT OF CANADA: [Signature]

Appendix C. U.S. Agreement with Mexico

Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals (1936)²²⁸

Whereas, some of the birds denominated migratory, in their movements cross the United States of America and the United Mexican States, in which countries they live temporarily;

Whereas, it is right and proper to protect the said migratory birds, whatever may be their origin, in the United States of America and the United Mexican States, in order that the species may not be exterminated;

Whereas, for this purpose it is necessary to employ adequate measures which will permit a rational utilization of migratory birds for the purpose of sport as well as for food, commerce and industry;

The Governments of the two countries have agreed to conclude a Convention which will satisfy the above mentioned need and to that end have appointed as their respective plenipotentiaries: The Honorable Josephus Daniels representing the President of the United States of America, Franklin D. Roosevelt and the Honorable Eduardo Hay, representing the President of the United Mexican States, General Lázaro Cárdenas, who, having exhibited to each other and found satisfactory their respective full powers, conclude the following Convention:

ARTICLE I. In order that the species may not be exterminated, the high contracting parties declare that it is right and proper to protect birds denominated as migratory, whatever may be their origin, which in their movements live temporarily in the United States of America and the United Mexican States, by means of adequate methods which will permit, in so far as the respective high contracting parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce and industry.

ARTICLE II. The high contracting parties agree to establish laws, regulations and provisions to satisfy the need set forth in the preceding Article, including:

A) The establishment of close seasons, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, their products or parts, except when proceeding, with appropriate authorization, from private game farms or when used for scientific purposes, for propagation or for museums.

B) The establishment of refuge zones in which the taking of such birds will be prohibited.

C) The limitation of their hunting to four months in each year, as a maximum, under permits issued by the respective authorities in each case.

D) The establishment of a close season of wild ducks from the tenth of March to the first of September.

E) The prohibition of the killing of migratory insectivorous birds, except when they become injurious to agriculture and constitute plagues, as well as when they come from reserves or game farms: provided however that such birds may be captured alive and used in conformity with the laws of each contracting country.

²²⁸ Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Mex.-U.S., Feb. 7, 1936, 50 Stat. 1311.

F) The prohibition of hunting from aircraft.

ARTICLE III. The high contracting parties respectively agree, in addition, not to permit the transportation over the American-Mexican border of migratory birds, dead or alive, their parts or products, without a permit of authorization provided for that purpose by the government of each country, with the understanding that in the case that the said birds, their parts or products are transported from one country to the other without the stipulated authorization, they will be considered as contraband and treated accordingly.

ARTICLE IV. The high contracting parties declare that for the purposes of the present Convention the following birds shall be considered migratory:

Migratory game birds.-Familia Anatidae, Familia Gruidae, Familia Rallidae, Familia Charadriidae, Familia Scolopacidae, Familia Recurvirostridae, Familia Phalaropodidae, Familia Columbidae.

Migratory non-game birds.-Familia Cuculidae, Familia Caprimulgidae, Familia Micropodidae, Familia Trochilidae, Familia Picidae, Familia Tyrannidae, Familia Alaudidae, Familia Hirundinidae, Familia Paridae, Familia Certhiidae, Familia Troglodytidae, Familia Turdidae, Familia Mimidae, Familia Sylviidae, Familia Motacillidae, Familia Bombycillidae, Familia Ptilonotidae, Familia Laniidae, Familia Vireonidae, Familia Compothlypidae, Familia Icteridae, Familia Thraupidae, Familia Fringillidae.

Others which the Presidents of the United States of America and the United Mexican States may determine by common agreement.

ARTICLE V. The high contracting parties agree to apply the stipulations set forth in Article III with respect to the game mammals which live in their respective countries.

ARTICLE VI. This Convention shall be ratified by the high contracting parties in accordance with their constitutional methods and shall remain in force for fifteen years and shall be understood to be extended from year to year if the high contracting parties have not indicated twelve months in advance their intention to terminate it.

The respective plenipotentiaries sign the present Convention in duplicate in English and Spanish, affixing thereto their respective seals, in the City of Mexico, the seventh day of February of 1936.

(Signed)

Josephus Daniels.

Eduardo Hay.

December 1, 1964

Appendix D. Amendment of the U.S. Agreement with Mexico

Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals (1997)²²⁹

The Government of the United States of America and the Government of the United Mexican States, hereinafter the Parties,

REAFFIRMING their commitment to achieving the purposes and objectives of the Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, signed at Mexico City February 7, 1936, as supplemented by the agreement effected by exchange of notes at Mexico March 10, 1972, hereinafter “the Convention”,

ENCOURAGED by the desire to amend the convention to enable effective actions to be taken to improve the conservation of migratory birds;

COMMITTED to the long-term conservation of shared species of migratory birds for their nutritional, social, cultural, spiritual, ecological, economic, and aesthetic values through a more comprehensive international framework that involves working cooperatively to manage their populations;

ACKNOWLEDGING the desire of the United States to provide for the customary and traditional taking of certain species of migratory birds and their eggs for subsistence use by indigenous inhabitants of the State of Alaska in designated subsistence areas;

HAVE AGREED as follows:

ARTICLE I

Article II (D) of the Convention shall be replaced by the following:

- D) The establishment of a closed season for wild ducks from the tenth of March to the first of September, except in the state of Alaska, United States of America, where wild ducks and their eggs may be harvested by the indigenous inhabitants thereof provided that seasons and other regulations implementing the non-wasteful taking of wild ducks and their eggs in such cases shall be consistent with the customary and traditional uses by such indigenous inhabitants for their own nutritional and other essential needs.

ARTICLE II

1. This Protocol shall enter into force on the date the Parties exchange instruments of ratification.

²²⁹ Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals, May 5, 1997, S. TREATY DOC. NO. 105-26.

2. This Protocol shall continue in force for the duration of the Convention and shall be considered an integral part of the Convention.

IN WITNESS WHEREOF the undersigned representatives, being duly authorized by their respective Governments, have signed the present Protocol.

DONE at Mexico City, this 5th day of May, 1997, in duplicate, in the English and Spanish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA: BRUCE
BABBITT, Secretary of the Interior

FOR THE GOVERNMENT OF THE UNITED MEXICAN STATES: JULIA CARABIAS
LILLO, Secretary of Environment, Natural Resources and Fisheries

Appendix E. U.S. Agreement with Japan

Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment (1972)²³⁰

The Government of the United States of America and the Government of Japan,

Considering that birds constitute a natural resource of great value for recreational, aesthetic, scientific, and economic purposes, and that this value can be increased with proper management,

Considering that many species of birds migrate between areas of the United States of America and of Japan, where such birds live temporarily,

Considering that island environments are particularly susceptible to disturbance, that many species of birds of the Pacific Islands have been exterminated, and that some other species of birds are in danger of extinction, and

Desiring to cooperate in taking measures for the management, protection, and prevention of the extinction of certain birds,

Therefore, have agreed as follows:

ARTICLE I

This Convention shall apply:

- (a) For the United States of America, to all areas of the United States of America and its possessions including the Trust Territory of the Pacific Islands;
- (b) For Japan, to all areas under the administration of Japan.

ARTICLE II

1. In this Convention, the term “migratory birds” means:

- (a) The species of birds for which there is positive evidence of migration between the two countries from the recovery of bands or other markers; and
- (b) The species of birds with subspecies common to both countries or, in the absence of subspecies, the species of birds common to both countries. The identification of these species and subspecies shall be based upon specimens, photographs or other reliable evidence.

2. (a) The list of the species defined as migratory birds in accordance with paragraph 1 of this Article is contained in the Annex to this Convention.

(b) The competent authorities of the Contracting Parties shall review from time to time the Annex and, if necessary, make recommendations to amend it.

²³⁰ Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Japan-U.S., Mar. 4, 1972, 25 U.S.T. 3329.

(c) The Annex shall be considered amended 3 months after the date upon which the two Governments confirm, by an exchange of diplomatic notes, their respective acceptance of such recommendations.

ARTICLE III

1. The taking of the migratory birds or their eggs shall be prohibited. Any sale, purchase or exchange of these birds or their eggs, taken illegally, alive or dead, and any sale, purchase or exchange of the products thereof or their parts shall also be prohibited. Exceptions to the prohibition of taking may be permitted in accordance with the laws and regulations of the respective Contracting Parties in the following cases:

(a) For scientific, educational, propagative or other specific purposes not inconsistent with the objectives of this Convention;

(b) For the purpose of protecting persons and property;

(c) During open hunting seasons established in accordance with paragraph 2 of this Article;

(d) With respect to private game farms;

(e) Taking by Eskimos, Indians, and indigenous peoples of the Trust Territory of the Pacific Islands for their own food and clothing.

2. Open seasons for hunting migratory birds may be decided by each Contracting Party respectively. Such hunting seasons shall be set so as to avoid their principal nesting seasons and to maintain their populations in optimum numbers.

3. Each Contracting Party shall endeavor to establish sanctuaries and other facilities for the protection or management of migratory birds.

ARTICLE IV

1. Both Contracting Parties agree that special protection is desirable for the preservation of species or subspecies of birds which are in danger of extinction.

2. Whenever either Contracting Party has determined the species or subspecies of birds which are in danger of extinction and prohibited the taking thereof, the Contracting Party shall inform the other Contracting Party of such determination, and of any cancellation thereafter of such determination.

3. Each Contracting Party shall control the exportation or importation of such species or subspecies of birds as are determined in accordance with paragraph 2 of this Article, and of the products thereof.

ARTICLE V

1. The Contracting Parties shall exchange data and publications regarding research on migratory birds and birds in danger of extinction.

2. The Contracting Parties shall encourage the establishment of joint research programs on, and conservation of, migratory birds and birds in danger of extinction. Each Contracting Party shall endeavor to take appropriate measures to preserve and enhance the environment of birds protected under Articles III and IV. In particular, it shall:

(a) Seek means to prevent damage to such birds and their environment, including, especially, damage resulting from pollution of the seas;

(b) Endeavor to take such measures as may be necessary to control the importation of live animals and plants which it determines to be hazardous to the preservation of such birds; and

(c) Endeavor to take such measures as may be necessary to control the introduction of live animals and plants which could disturb the ecological balance of unique island environments.

ARTICLE VII

Each Contracting Party agrees to take measures necessary to carry out the purposes of this Convention.

ARTICLE VIII

Upon the request of either Government, the two Governments shall hold consultations regarding the operation of this Convention.

ARTICLE IX

1. This Convention shall be ratified and the instruments of ratification shall be exchanged at Washington as soon as possible.

2. This Convention shall enter into force on the date of the exchange of the instruments of ratification. It shall remain in force for 15 years and shall continue in force thereafter until terminated as provided herein.

3. A Contracting Party may, by giving one year's written notice, terminate this Convention at the end of the initial 15 year period or at any time thereafter.

IN WITNESS WHEREOF the representatives of the two Governments have signed this Convention.

DONE in duplicate, in the English and Japanese languages, both equally authentic, at Tokyo, this fourth day of March, 1972.

For the Government of the United States of America: [SEAL]

For the Government of Japan: [SEAL]

Appendix F. U.S. Agreement with Russia

Convention Between the United States of America and the Union of Soviet Socialist Republics [Russia] Concerning the Conservation of Migratory Birds and Their Environment (1976)²³¹

The Government of the United States of America and the Government of the Union of Soviet Socialist Republics,

Considering that migratory birds are a natural resource of great scientific, economic, aesthetic, cultural, educational, recreational and ecological value and that this value can be increased under proper management;

Recognizing that many species of birds migrate between the United States and the Soviet Union or that species of birds which occur in the United States and the Soviet Union have common flyways, breeding, wintering, feeding or moulting areas which should be protected;

Considering that effective protection of migratory birds and their environment requires substantial national effort, but recognizing that international cooperation in this area can provide significant assistance;

Recognizing that certain species of birds in both countries are endangered and in need of particular protective measures;

Desiring to cooperate in implementing measures for the conservation of migratory birds and their environment and other birds of mutual interest;

Have agreed as follows:

ARTICLE I

1. In this Convention, the term “migratory birds” means:

(a) The species or subspecies of birds for which there is evidence of migration between the Soviet Union and the United States derived as a result of banding, marking or other reliable scientific evidence; or

(b) The species or subspecies of birds, populations of which occur in the Soviet Union and the United States and have common flyways or common breeding, wintering, feeding, or moulting areas, and for these reasons there exists or could exist an exchange of individuals between such populations. The identification of such species or subspecies will be based upon data acquired by banding, marking, or other reliable scientific evidence.

2. In this Convention, the term “competent authority” means a national scientific or management agency authorized by the Contracting Party to implement the activities under this convention. At the time of entering into force of this Convention, the Contracting Parties shall notify each other of their competent authorities for migratory birds pursuant to this Convention.

3. (a) A list of species and subspecies of birds by families, determined to be migratory in accordance with Paragraph I of this Article, is set forth in an Appendix to this Convention entitled “Migratory Birds”;

²³¹ Convention Between the United States of America and the Union of Soviet Socialist Republics [Russia] Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 26, 1976, 29 U.S.T. 4674.

(b) The competent authority of each Contracting Party shall be authorized by its government to review the “Migratory Birds” Appendix, and, if necessary, make recommendations for amendments thereto. The Appendix shall be considered amended upon the date when such recommendations are accepted by the competent authority of the other Contracting Party.

4. This Convention shall apply:

(a) For the United States of America: To all areas under the jurisdiction of the United States of America.

(b) For the Union of Soviet Socialist Republics: To all territories under the jurisdiction of the Union of Soviet Socialist Republics.

ARTICLE II

1. Each Contracting Party shall prohibit the taking of migratory birds, the collection of their nests and eggs and the disturbance of nesting colonies. Also, any sale, purchase or exchange of these birds, whether dead or alive, or their nests or eggs, and any sale, purchase or exchange of their products or parts, shall be prohibited. The importation and exportation of migratory birds and their nests, eggs, parts, and products shall also be prohibited. Exception to these prohibitions may be made on the basis of laws, decrees or regulations of the respective Contracting Parties in the following cases:

(a) For scientific, educational, propagative, or other specific purposes not inconsistent with the principles of this Convention;

(b) For the establishment of hunting seasons in accordance with Paragraph 2 of this Article;

(c) For the taking of migratory birds and the collection of their eggs by the indigenous inhabitants of the Chukchi and Koryak national regions, the Commander Islands and the State of Alaska for their own nutritional and other essential needs (as determined by the competent authority of the relevant Contracting Party) during seasons established in accordance with Paragraph 2 of this Article; and

(d) For the purpose of protecting against injury to persons or property.

2. The hunting seasons for migratory birds provided for in Paragraph 1 (b) of this Article, and the seasons during which the indigenous inhabitants mentioned in Paragraph 1 (c) of this Article may take such birds and collect their eggs for their own nutritional and other essential needs (as determined by the competent authority of the relevant Contracting Party), shall be determined by the competent authority of each Contracting Party respectively. These seasons shall be set so as to provide for the preservation and maintenance of stocks of migratory birds.

3. With regard to a particular species of migratory bird, if the need arises, the competent authorities of the Contracting Parties may conclude special agreements on the conservation of these species and on the regulation of their taking. Such agreements shall not be inconsistent with the principles of this Convention.

ARTICLE III

Each Contracting Party agrees to take, as soon as possible, the measures necessary to insure the execution of this Convention and its purpose.

1. To the extent possible, the Contracting Parties shall undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of that environment.

2. Among other things, each Contracting Party shall:

(a) Provide for the immediate warning of the competent authority of the other Contracting Party in case of substantial anticipated or existing damage to significant numbers of migratory birds or the pollution or destruction of their environment. The competent authorities of the Contracting Parties will establish necessary procedures for such warnings and will cooperate to the maximum possible degree in preventing, reducing, or eliminating such damage to migratory birds and their environment and in providing for the rehabilitation of their habitat.

(b) Undertake measures necessary for the control of the import, export and establishment in the wild of live animals and plants that may be harmful to migratory birds or their environment.

(c) Identify areas of breeding, wintering, feeding, and moulting which are of special importance to the conservation of migratory birds within the areas under its jurisdiction. Such identification may include areas which require special protection because of their ecological diversity or scientific value. These special areas will be included in list number I on the Appendix to this Convention entitled "Migratory Bird Habitat". The initial identification of areas shall be prepared within one year from the date of this Convention's entry into force. This list may be augmented or revised by the competent authority of each Contracting Party in relation to the areas under its jurisdiction. Such amendment enters into force upon notification of the competent authority of the other Contracting Party. Each Contracting Party shall, to the maximum extent possible, undertake measures necessary to protect the ecosystems in those special areas described on list number I against pollution, detrimental alteration and other environmental degradation.

3. The competent authorities of the Contracting Parties may by mutual agreement designate areas of special importance to the conservation of migratory birds outside the areas under their jurisdiction. These areas of special importance shall be included on list number II on the "Migratory Bird Habitat" Appendix to this Convention. This list number II may be amended by mutual agreement of the competent authorities of the Contracting Parties. Each Contracting Party shall, to the maximum extent possible, undertake measures necessary to ensure that any citizen or person subject to its jurisdiction will act in accordance with the principles of this Convention in relation to such areas. The Contracting Parties will take measures to disseminate information about the significance of these areas to the conservation of migratory birds.

ARTICLE V

1. The Contracting Parties agree that, for the conservation of those species and subspecies of migratory birds which are in danger of extinction, special protective measures are necessary and should be taken.

2. If one Contracting Party has decided that a species, subspecies or distinct segment of a population of migratory birds is in danger of extinction, and has established special measures for its protection, the competent authority of that Contracting Party shall inform the competent authority of the other Contracting Party of the decision and of any subsequent modification of such decision.

3. Upon notification, the other Contracting Party will take into account such protective measures in the development of its management plans for the conservation of migratory birds.

ARTICLE VI

1. The Contracting Parties shall promote research related to the conservation of migratory birds and their environment, and agree to coordinate their national bird banding programs. In cases where it is desirable, such research may be conducted under agreed upon programs coordinated by the competent authorities of the Contracting Parties.

2. The competent authorities of the Contracting Parties shall exchange scientific information and publications related to the conservation of migratory birds and their environment.

ARTICLE VII

Each Contracting Party shall to the maximum extent possible, undertake measures necessary to establish preserves, refuges, protected areas, and also facilities intended for the conservation of migratory birds and their environment, and to manage such areas so as to preserve and restore the natural ecosystems.

ARTICLE VIII

In addition to those species and subspecies of birds named on the “Migratory Birds” Appendix, each Contracting Party may implement within the area s under its jurisdiction or with regard to any citizen or person subject to its jurisdiction, as it deems appropriate and necessary, any and all of the protective measures under this Convention for any species or subspecies of birds not listed in the “Migratory Birds” Appendix but belonging to the same family as a species or subspecies listed in the “Migratory Birds” Appendix.

ARTICLE IX

This Convention shall in no way affect the right of the Contracting Parties to adopt stricter domestic measures which are deemed to be necessary to conserve migratory birds and their environment.

APPENDIX X [sic]

The competent authorities of the Contracting Parties shall consult regarding the implementation of this convention upon the request of the competent authority of either of the Contracting Parties.

APPENDIX XI [sic]

If necessary to improve the conservation of migratory birds or their environment, this Convention may be amended by the agreement of the Contracting Parties.

ARTICLE XII

1. This Convention shall be subject to ratification or confirmation pursuant to the domestic laws of each Contracting Party and shall enter into force on the day that instruments of ratification or confirmation are exchanged in agreement with international procedures.

2. This Convention shall remain in force for a period of 15 years from the date of its entry into force. Thereafter, it shall be renewed automatically on an annual basis, provided that any Contracting Party may terminate its rights and obligations under this Convention. Such termination shall take effect on the next expiration date of this Convention and may be accomplished by transmitting written notification of termination to the other Contracting Party at least six months prior to that expiration date.

Done in Moscow this 19th day of November, 1976, in duplicate, in the English and Russian languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS:

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