Migratory Bird Treaty Act (MBTA) Strategy White Paper

Introduction

This paper provides an initial approach for how the Department of Interior (DOI) and other stakeholders could address the risks presented by the Migratory Bird Treaty Act (MBTA or Act) and the inability, at present, to obtain relief from strict criminal liability for “incidental take”, at least in the jurisdictions of courts of appeals that have rejected or not yet addressed that liability. This is a non-legal, non-exhaustive analysis that is merely intended to help frame the issue and potential solutions.

History

MBTA is one of three foundational wildlife laws in the United States, with its enforcement long focused on illegal hunting and trading of migratory birds. However, starting in the 1970s, the U.S. Fish and Wildlife Service (USFWS) Office of Law Enforcement (OLE) and the Department of Justice (DOJ) changed their posture, likely in part due to the enactment of the Endangered Species Act (ESA) and its related take prohibitions. As a result, the federal government began considering incidental take of migratory birds from non-purposeful activities of a variety of industries (e.g., oil and gas, timber, mining, chemical, and electric power and delivery) as violations of the Act. In these cases and other public documents, DOJ indicated its intent to notify companies of a violation and work with them to correct it, but has also indicated, that if the companies “ignore, deny, or refuse to comply” with the recommendations to reduce the documented impact, then the “matter may be referred for prosecution.” It is through this “prosecutorial discretion” that the USFWS has claimed to: a) assert its authority over incidental take related to otherwise lawful commercial activities; and b) to avoid potentially absurd results of applying strict-liability criminal enforcement for every possible human caused source of avian mortality.

Over the past several decades the electric power sector has relied on voluntary guidelines and agency discretion to avoid, minimize, and mitigate the impacts to migratory bird species from their facilities in an attempt to minimize liability and avoid prosecution for violations of the Act. Most notable examples include electric companies through APLIC’s Avian Protection Plan (APP) Guidelines developed in cooperation with USFWS (2005), and more recently wind developers, through the promulgation of the Land-based Wind Energy Guidelines in 2012. Both of these programs have relied on the discretion of the USFWS to not refer MBTA violations to DOJ and the prosecutorial discretion of DOJ for any MBTA violations that come to its attention.

Problem Statement

The issue of what constitutes “take” under the MBTA, whether “take” applies to deaths or injuries caused by actions not directed at migratory birds (“incidental take”), and whether USFWS has the right to enforce against entities that cause non-purposeful or incidental take is unsettled. At present, case law on the matter is split, with the Second and Tenth U.S. Circuit Courts of Appeals finding that incidental take does constitute a violation of the Act and the Fifth,
Eighth, and Ninth Circuit Courts finding that incidental take does not apply.\(^1\) Therefore, in those seventeen states where the courts have held that there is no incidental take, companies have no liability for incidental mortalities associated with their commercial activities under federal, and in some cases, state laws. However, in the remaining states where the courts have not opined on the subject or held counter positions, companies face legal uncertainty and could be held liable if favorable prosecutorial discretion is not exercised, without any means of seeking liability relief under a permitting program or similar authorization.

As currently interpreted and selectively applied by the USFWS and enforced by the DOJ, the MBTA constitutes an extreme exercise of regulation by prosecutorial discretion. This ad hoc and selective regulation via criminal prosecution among industries and persons is inappropriate, especially due to the broad authority granted by the MBTA for USFWS to formally promulgate implementing regulations.\(^2\) However, in spite of possessing such authority, USFWS has never promulgated a rule defining what the terms “take” or “kill” mean under the MBTA and specifically how they would apply, if at all, to incidental take. Likewise, USFWS has never created a permitting program to authorize incidental take under the MBTA.

**Recent Developments**

In an attempt to resolve the aforementioned issues, former USFWS Director Dan Ashe announced on June 17, 2014, at APLIC’s 25th anniversary celebration that USFWS would be seeking to resolve the incidental take liability issue by creating a first-of-its-kind migratory bird permitting program. In his remarks, Director Ashe noted this would be a simple program where one would self-certify that the company had designed or retro-fitted its equipment to be bird-safe, pay a simple fee, and receive a permit. It subsequently became apparent, however, that the concept had not been fully vetted within USFWS before being announced publicly. From an outsider’s perspective, once USFWS began internal discussions, this seemingly simple permitting concept evolved into what would be a full-fledged discretionary permitting program if implemented. Meaning that rather than a simple “general” permit, as initially contemplated by Director Ashe, the proposed program would be more akin to the more complex and burdensome individual permitting structure for incidental take under ESA and Bald and Golden Eagle Protection Act (BGEPA), where the applicant would need to conduct field studies and assess the risk of the project in a given location, design the project to avoid and minimize the impacts, provide compensatory mitigation, conduct post-construction mortality monitoring, and undergo NEPA and Section 7 analyses during the application process.

In an effort to address the concerns raised by the regulated community regarding the implementation of such a program, and recognizing the paucity of resources available to USFWS to effectively manage the new MBTA permit program, USFWS suggested that they would create a bifurcated program including both general and individual permits. USFWS noted they would

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\(^1\) The Fifth Circuit focused on direct mortality while the Eighth and the Ninth Circuits focused on indirect mortality related to habitat modification/destruction. The most recent of these judicial decisions, *U.S. v. CITGO Petroleum Corp.* from the Fifth Circuit in 2015, included a thorough analysis and exposition of why the MBTA does not prohibit incidental take. See, e.g. *United States v. Citgo Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015) (CITGO); *U.S. v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202, 1210 (D. N.D. 2012); *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 at 303.

\(^2\) Memorandum at 5; 16 U.S.C. §§ 704(a), 712(2).
establish the general permit program initially based on those industries that have adopted best practices in which the USFWS has concurred, such as those developed by APLIC designed to avoid and minimize impacts to migratory species. However, USFWS was silent on how those sectors that did not have any best practices to rely upon would obtain take authorization (i.e., would they need to go through individual permitting, continue to rely on prosecutorial discretion, or something else?) and were unclear as to what the criteria would be in determining who would be eligible for a general permit and who would need to obtain an individual permit – making the entire conceptual program’s implementation highly questionable.

Industry repeatedly expressed to DOI leadership and the White House concerns over such issues as the likely complexity of the permit program, availability of resources to develop and effectively implement the program, and validity (or utility) of the program where courts have found that incidental take is not a violation of the MBTA. For that and perhaps other reasons, USFWS never moved beyond the Notice of Intent (NOI) phase of the proposed rulemaking. The NOI stated that USFWS was considering the development of regulations to provide legal authorization for incidental take in certain circumstances. The anticipated rulemaking had two or, arguably, three parts (two, if the first and second or second and third steps were combined): first, to set up the permit system (called the “foundational” rule); second, to define take under the MBTA to include incidental take and explain the legal rationale for that conclusion (referred to as the definitional rule); and third to develop sector specific permit programs. As a result, in the final months of the Obama Administration, with the prospects for a permit rule diminishing and an incoming Administration that would be unlikely to pick the permit program back up, the collective regulated sector view of the risk of this complex permit program moving forward and being formally noticed for public comment dropped dramatically.

However, on January 10, 2017, in the absence of a permit program or take definition, the outgoing DOI Solicitor attempted to resolve the matter by issuing a 30-page Memorandum Opinion (M. Opinion), outlining the Office of Solicitor’s (and general USFWS) interpretation of the prohibitions of the MBTA; namely, whether the MBTA prohibits incidental take associated with commercial activities. The M. Opinion concludes that the MBTA’s broad prohibitions on taking and killing migratory birds apply to any activity and are not limited to hunting, poaching, or any factual contexts. Therefore, in the opinion of the outgoing Solicitor, the prohibition extends generally to unauthorized take of migratory birds, including take that is incidental to industrial or commercial activities, and that MBTA imposes strict liability, so the government need not show a defendant intentionally “took” birds to prove a violation of the Act had occurred.

Given that the USFWS was unable to develop regulations providing legal authorization for incidental take in certain circumstances, the Solicitor’s opinion filled that void and effectively defined take under the MBTA to include incidental take and explained the legal rationale for that conclusion. While portions of the legal analysis are long-established and undisputed (namely, that the MBTA is a strict-liability criminal statute), other aspects mischaracterized the body of

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case law with respect to incidental take and attempted to minimize the fundamental and meaningful federal Circuit Court split on the incidental take issue.

On February 6, 2017, the Acting DOI Solicitor issued a Memorandum temporarily suspending several M. Opinions issued between November 6, 2016 and January 20, 2017, including the January 10th M. Opinion on MBTA incidental take. While temporarily suspended pending review and reconsideration, this M. Opinion is unlikely to be supported by the current Administration. However, pending formal rescission, the issue needs to be addressed with finality and a permanent solution found to address the legal uncertainty caused by the lack of clarity on incidental take.

**Potential Options**

Given the complexity of these issues, there will need to be adequate time devoted to developing viable options and advocating for their implementation with both DOI/USFWS and external supportive parties (e.g., States/Association of Fish and Wildlife Agencies (AFWA), key eNGOs and other stakeholders). An essential element of this strategy will be to employ both short and long-term regulatory approaches.

1. **Short-term Option: Rescind and Issue New M. Opinion**

   According to the February 6th memorandum ordering the suspension of certain Obama-era Solicitor M. Opinions, the reason for suspension of the previous M. Opinion was “to enable agency officials appointed or designated by the President . . . to review the opinions and the underlying regulations or decisions to which they apply.” While helpful in the short-term, if this M. Opinion is never fully rescinded and replaced with a new opinion stating the contrary position, namely, that incidental take is not a violation of the MBTA, it could continue to be viewed by USFWS OLE as supporting their position that they can initiate enforcement actions against entities causing incidental take of migratory birds. Further, a future administration could easily reinstate the prior opinion, further solidifying this position.

   Given these potential damaging effects stemming from the Obama Solicitor’s M. Opinion, if not fully rescinded and reversed, and the fact that rescission can be accomplished relatively easily and quickly, the initial effort should be to discuss the issues presented by this memo with key DOI officials and request that the Solicitor’s Office issue a new M. Opinion stating that MBTA prohibitions do not apply to incidental take from commercial activities. While this appears to be a straight forward objective, there is no formal rescission process and there are underlying legal issues.

   While meaningful, this solution has limited durability as it could be reversed by a future administration if, like the current situation, its Solicitor disagreed with the opinion of his predecessor. However, rescinding the M. Opinion effectively would alter the view that incidental take is prohibited under the MBTA and pave the way for one or more of the following long-term solutions.

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2. Long-term Option(s)

The following represents the range of longer-term solutions that can be pursued. The discussion of each solution contains an analysis of potential and likelihood for success:

a. Rule Clarifying Incidental Take is Not Subject to MBTA

In the previous NOI/rulemaking attempt by USFWS to develop regulations to provide legal authorization for incidental take in certain circumstances, the USFWS anticipated a two to three-part rulemaking. As previously noted, the first rule would be a “foundational” rule whereby the basis for the permit program would set forth and then separately or collectively take would be defined under MBTA through a “definitional” rule, which would define incidental take and provide a legal rationale for that conclusion. An option worth exploring is pushing USFWS to consider a similar “definitional” rulemaking where take is defined under the MBTA, without the accompanying “foundational” rule or sector specific permit programs. The difference being that while establishing what is considered take—those instances that constitute a violation of the MBTA and would be prosecutable—the rule would, at the same time, find that incidental take is not prohibited and provide the legal rationale for that conclusion. Such a rule would obviate the need for a permit program and codify a new M. Opinion, which, in turn, would lay out the legal basis for the administration’s stance for finding that incidental take is not a violation of MBTA. There would be no prosecutorial discretion; rather only purposeful take of migratory birds would be evaluated for criminal enforcement. This approach avoids the pitfalls of seeking a legislative solution where MBTA would be amended to exclude incidental take—a solution fraught with significant hurdles, a low likelihood for success and a high likelihood for drawing negative attention and creating negative publicity.

b. New Programmatic Permit Rule

In response to the flawed permitting program concept pursued by the Obama-era USFWS staff over the last several years, industry suggested that USFWS create a simple permit program that would operate similar to the Duck Stamp or the U.S. Army Corps of Engineers Nationwide Permits. In this concept, an applicant would, through an online or similar electronic application, estimate the number of birds it was expected to impact in a given year, calculate a “fee” per bird (e.g. $10/common passerines, $25/waterfowl, $50/water birds, and $100/raptors), and self-certify that the company would employ sector-specific suggested practices (such as the APLIC Suggested Practices and Wind Energy Guidelines) to avoid and minimize impacts to migratory species. An alternate approach would establish fees upon either a per MW basis for generation facilities or per mile of line basis for transmission and distribution facilities. Either way, these fees would go into a dedicated fund to conserve migratory bird habitat (similar to the Duck Stamp program), and would likely be an essential component to garnering support from the states and conservation community.

As envisioned, the USFWS would not conduct any evaluation/analysis and, so long as the conditions were met, the issuance of the permit would not be discretionary. Additionally, compliance could be demonstrated through a company-developed and driven monitoring program, with end-of-year reporting of the monitoring results and documentation that the suggested practices were employed. Again, this would be similar to harvesting information
collected from hunters under the Duck Stamp program, and would use estimates based on the company-specific monitoring programs, not 3rd party mortality monitoring.

Notably, in order to direct the collected permit fees directly to fund migratory bird conservation, there likely would need to be complementary legislation to establish the funding mechanism for the permitting program (otherwise the fees would go into the General Fund). As the legislation would only serve to establish the conservation fund and not affect any element of the MBTA itself, this should not be controversial and would hopefully pass without issue.

c. Special Purpose Utility Permit (SPUT) Option

Another potentially less complicated permit option may be available under the current SPUT program (50 CFR 21.27). The MBTA contains language allowing for a permit program and there are two permits in 50 CFR 21 supporting the position that the MBTA can provide for “incidental take” of unknown numbers and species (50 CFR 21.15) and that specific industries can have a unique permit process (50 CFR 21.27). The USFWS could promulgate regulations to provide for a take permit that would allow specific industries, when in compliance with a set of known best management practices, to be provided with a take exception (i.e., absolution of liability) for an unknown number of unknown species of birds protected under MBTA. There is a vacated location within 50 CFR at 21.28 that could be utilized for this new, unique permit process.

To that end, USFWS may currently issue a SPUT permit which authorizes utilities to collect, transport, and temporarily possess migratory birds found dead on utility property, structures, and rights-of-way for avian mortality monitoring or disposal purposes. The permits require that the company maintain records of mortalities and injuries, and that they report the information to the Service. The permits are valid for three years. SPUT regulations could be amended and a new section created that, while not authorizing the lethal take or injury of migratory birds, would absolve the permittee from liability for all take that is reported under this permit. With this change, along with a new fee schedule, USFWS could provide a permit path that provides utilities with absolution of liability for an effort they already under take willingly. It is possible that the fee for this type of permit could be scaled to the utility applying for the permit at some ratio or factor that may provide enhanced conservation benefit to bird species.

While any of these permit program rulemaking options would need to set aside the argument that incidental take does not apply, each provides a sounder pathway than seeking legislative clarification. In summary, this approach would: 1) be consistent with the new pro-business policy landscape; 2) likely garner the support of key States, eNGOs, and other stakeholders; 3) would be potentially more durable beyond a single administration; 4) lend credibility to and reinforce the electric power sector’s sustainability practices, and 5) potentially be received more favorably by DOI and external stakeholders.