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ALEXANDER K. OBRECHT*

Migrating Towards an Incidental Take Permit Program: Overhauling the Migratory Bird Treaty Act to Comport with Modern Industrial Operations

ABSTRACT

In 1918, Congress passed the Migratory Bird Treaty Act (MBTA) to curb mass avian extermination caused by hunting and poaching. Despite Congress's initial concern with these activities, the U.S. Fish and Wildlife Service (FWS) expanded the scope of MBTA enforcement to include bird deaths caused by industrial activities. This created a glaring split of authority among U.S. Circuit Courts of Appeals, with one side applying strict liability under the MBTA for all deaths of protected birds caused by industrial activities and the other side refusing to apply the MBTA to indirect and unintentional bird deaths.

This article argues that the best solution would be for Congress or the FWS to establish an incidental take permit program that would exempt industrial operators from prosecution for certain indirect, unintentional bird deaths caused by industrial activities. Such a program would provide the best balance between the MBTA's conservation principles and the reality of vital and growing industrial operations. A permit program would provide industrial operators with certainty concerning liability and project planning, and provide the FWS with a tool to fund and ensure conservation of migratory birds, while still allowing the FWS to prosecute those failing to obtain a permit or violating the Act in another way.

INTRODUCTION

"*[N]o living man will see again the onrushing phalanx of victorious birds, sweeping a path for spring across the March skies . . . .*"

—Aldo Leopold[1]

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1. ALDO LEOPOLD, A SAND COUNTY ALMANAC: WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER 116 (1966).

Aldo Leopold's vivid depiction of the disappearance of many of America's original wild birds highlights the tragic success of hunters and poachers in annihilating many abundant species at the turn of the twentieth century.[2] Public outcry led to several early, unsuccessful attempts to restrict commercial hunting of birds.[3] In 1918, Congress passed the Migratory Bird Treaty Act (MBTA), which generally forbids the harassment, killing, and selling of protected birds and their eggs and nests—often generically termed "take."[4]

Initially, courts faced little difficulty applying the MBTA to bird deaths caused by traditional hunting and poaching activities. However, the statutory scheme contains no explicit limitation on the type of conduct that is proscribed by the MBTA.[5] In the 1970s, the U.S. Fish and Wildlife Service (FWS) began to prosecute activities that were outside the MBTA's original scope.[6] The FWS now applies the MBTA to industrial activities for bird deaths caused by wastewater ponds, oil and gas extraction, electricity transmission, logging, pesticide application, communication tower construction, and even wind farms.[7] This expanded

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2. *See infra* notes 14–35 and accompanying text (outlining the destruction of migratory birds caused by hunting and poaching at the turn of the twentieth century).

3. *See infra* notes 30–42 and accompanying text (describing Congress's early attempts to regulate wildlife).

4. 16 U.S.C. § 703(a) (2012). The entire statutory trigger reads:

> [I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . ;

Id.; *see also* 16 U.S.C. § 705 (containing further prohibitions on the transportation and importation of protected birds).

5. *See infra* notes 85–87 and accompanying text (discussing the original aim of the MBTA and how the language actually turned out).

6. *See infra* notes 99–109 and accompanying text (describing the difficulty courts have had in interpreting the MBTA's scope in regard to incidental take caused by industrial activities).

7. *See infra* notes 101–105 and accompanying text (listing industrial activities that the FWS has prosecuted). On November 22, 2013, just as this article headed to publication, Duke Energy Renewables, Inc. pleaded guilty to the first ever MBTA prosecution of a wind farm. Press Release, The U.S. Attorney's Office for the Dist. of Wyo., Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (Nov. 22, 2013), *available at* http://www.justice.gov/usao/wy/news/2013/11november/13-081_nov22.html. From 2009 to 2013, authorities discovered 163 dead protected birds at two of Duke's wind farms

prosecution of industrial incidental take created a glaring split of authority among U.S. Circuit Courts of Appeals, with one side applying strict liability to unintentional bird deaths resulting from industrial activities, limited only by proximate cause,[8] and the other refusing to apply the MBTA to indirect and unintentional deaths that are outside the MBTA's original scope of prohibited conduct—hunting and poaching.[9] The resulting circuit split has led to confusion for the FWS, industry, and lower courts.[10]

Congress should end the confusion by amending the MBTA to authorize an incidental take program, which would allow limited unintentional killings of protected birds upon approval of the FWS. This would provide the clarity that the FWS, industry, and courts require, provide industry with certainty concerning liability and project planning, and provide the best balance between the MBTA's conservation principles and the reality that certain industrial operations inevitably kill protected birds. It would enable the FWS to ensure conservation of migratory birds, while still allowing the FWS to prosecute companies that fail to obtain a permit or violate the Act in some other way.

This article proceeds in three sections. Part I provides the historical backdrop of the MBTA, details the underlying treaties, and illustrates the functional operation of the Act. Part II reviews the varying judicial interpretations of the Act.[11] In Part III, the article considers options to solve the current MBTA confusion, including (1) congressional redefinition of MBTA take, (2) congressional authorization of an incidental take permit program, and (3) FWS implementation of an incidental take permit program without explicit congressional authorization.[12] The article concludes that a congressionally-authorized incidental take permit program would best solve the current confusion surrounding the application and scope of the MBTA.[13]

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in Wyoming. *Id.* As a result, the company agreed to pay $1 million in fines and develop an environmental compliance plan to prevent bird deaths at its other wind farms. *Id.*

8. *See infra* notes 149–182 and accompanying text (outlining the strict liability approach to the MBTA).

9. *See infra* notes 127–148 and accompanying text (highlighting the narrow interpretation of MBTA take).

10. *See infra* notes 203–205 and accompanying text (emphasizing the confusion created by the circuit split and the expansion of the MBTA).

11. *See infra* PART II: JUDICIAL INTERPRETATIONS OF THE MBTA.

12. *See infra* PART III: AUTHORIZING INCIDENTAL TAKE.

13. *See infra* CONCLUSION.

I. THE MBTA: HISTORY, TREATIES, AND OPERATION

A. Historical Backdrop

The MBTA arose in a time of booming commercial trade in and recreational hunting of animals.[14] The 1800s ushered in an expanding frontier economy accompanied by sprawling population growth creeping through the American West.[15] It was the overhunting (and the near extinction) of bison that alerted many in the U.S. to the vulnerability of those species that were subject to commercial hunting.[16] However, overhunting extended far beyond bison to all species of ungulates, large predators, beaver, fish, sea cows,[17] and migratory birds.[18]

Frontier hunters harvested birds to provide for lavish clothing decoration and exotic table-fare in metropolitan restaurants.[19] Hunting for culinary purposes destroyed the Labrador Duck population, causing it to disappear from New England meat markets after 1875.[20] However, the killing extended well beyond hunting for food.[21] The expansion of commercial hunting operations for recreation, feathers, and other bird

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14. Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1176–77 (2008) ("During the 1800s, unchecked overharvesting of migratory birds in North America brought some to extinction and others to the edge of it.").

15. *See* BRIAN CZECH & PAUL R. KRAUSMAN, THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY, AND PUBLIC POLICY 8 (2001) (discussing the development of the frontier economy based first and foremost around bison).

16. *Id.* (At the turn of the twentieth century, one estimate reported only 25 free ranging bison remained.).

17. *Id.* at 9–10 ("Steller's sea cow, the only member of its genus and the largest of all sirenians, was slaughtered into extinction from 1741 to 1768 by Vitus Bering's stranded crew and subsequent visitors to Bering Island.").

18. *See id.* at 10 (outlining America's increasing awareness of losing species, especially birds).

19. *A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds*, U.S. Fish & Wildlife Serv., http://www.fws.gov/migratorybirds/RegulationsPolicies/treatlaw.html (Apr. 11, 2011) [hereinafter *Protecting Migratory Birds*] ("By the late 1800s, the hunting and shipment of birds for the commercial market (to embellish the platters of elegant restaurants) and the plume trade (to provide feathers to adorn lady's fancy hats) had taken their toll on many bird species.").

20. CZECH & KRAUSMAN, *supra* note 15, at 10; EDWARD HOWE FORBUSH ET AL., A HISTORY OF THE GAME BIRDS, WILD-FOWL AND SHORE BIRDS OF MASSACHUSETTS AND ADJACENT STATES 416 (Wright and Potter 1912) ("The last Labrador Duck of which we have record died by the hand of man near Long Island, New York, in 1875 . . . .").

21. Lilley & Firestone, *supra* note 14, at 1178 ("The game business also drove other species, such as the heath hen, golden plover, and Eskimo curlew, to the brink of extinction by 1890.").

products, along with improvements in firearms, led to an increase in the number of hunters and the size of the harvests.[22]

The dramatic impact commercial hunting had on bird populations is best illustrated by the demise of the passenger pigeon.[23] By ornithologists' estimates, the passenger pigeon once represented the most abundant species of bird on Earth.[24] In the late 1700s to early 1800s, the father of American ornithology, Alexander Wilson, estimated the size of one flock of passenger pigeons to be 240 miles long and a mile wide.[25] By Wilson's calculations, the flock "contain[ed] two billion, two hundred and thirty million, two hundred and seventy-two thousand pigeons."[26] Other bird observers echoed Wilson's astonishment at the staggering amount of passenger pigeons in America's skies: "They say that when a flock of passenger pigeons flew across the countryside, the sky grew dark. The air rumbled and turned cold. Bird dung fell like hail. Horses stopped and trembled in their tracks, and chickens went in to roost."[27] But despite the passenger pigeon's original abundance, the intensity of commercial hunting drove the species to extinction in the span of less than three decades.[28] The last known passenger pigeon, named Martha, died on September 1, 1914 in the Cincinnati Zoo. [29]

Public outrage against commercial hunting began to reach to Congress.[30] The first earnest attempt to stop the wholesale slaughter culminated in the Lacey Act of 1900.[31] The Lacey Act sought to prevent interstate and international transportation of illegally killed or captured birds, curb the decline of domestic birds, and prevent the introduction of

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22. JENNIFER PRICE, FLIGHT MAPS: ADVENTURES WITH NATURE IN MODERN AMERICA 4 (Basic Books 1999); Lilley & Firestone, *supra* note 14, at 1178.

23. PRICE, *supra* note 22, at 5 ("[T]he extinction [of the passenger pigeon] finally persuaded many Americans that the continent's wildlife was finite and that much of it had been destroyed.").

24. FORBUSH, *supra* note 20, at 433 ("Once the most abundant species, in flights and on its nesting grounds, ever known in any country, ranging over the greater part of the continent of North America in innumerable hordes, the race seems to have disappeared within the past thirty year, leaving no trace.").

25. *Id.* at 444.

26. *Id.*

27. PRICE, *supra* note 22, at 1–2.

28. FORBUSH, *supra* note 20, at 460 (detailing the drastic decline in passenger pigeon shipments to metropolitan markets during the 1880s and early 1890s); PRICE, *supra* note 22, at 3–5.

29. PRICE, *supra* note 22, at 3.

30. Lilley & Firestone, *supra* note 14, at 1178.

31. Lacey Act, Ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378 (2013)); *see* Lilley & Firestone, *supra* note 14, at 1178.

harmful foreign bird species.[32] Initially, the Act proved ineffective in stopping the illegal trade in birds[33] due to a highly profitable black market and a lack of enforcement officers.[34]

The Lacey Act's inadequacies led to another congressional attempt to stop the unchecked hunting and trafficking in wildlife.[35] In 1913, Congress passed the Weeks-McLean Law.[36] It sought to bring any birds that ever migrated across state lines under federal regulation,[37] despite the traditional authority of the state over the regulation of wildlife. Hunters prosecuted under the Weeks-McLean Law challenged its constitutionality.[38] In general, the defendants argued that the regulation of wildlife fell solely to the states under the Tenth Amendment, absent the express constitutional authorization for Congress to regulate it.[39] Both of the U.S. district courts that heard the challenges based their analyses upon U.S. Supreme Court precedent that states possessed the sole power to regulate wildlife within their borders.[40] Accordingly, both courts held

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32. Lacey Act, Ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378 (2013)); Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND. L. REV. 27, 29 (1995); *see also* Lilley & Firestone, *supra* note 14, at 1178.

33. Anderson, *supra* note 32, at 41; Lilley & Firestone, *supra* note 14, at 1178; *Protecting Migratory Birds*, *supra* note 19.

34. Lilley & Firestone, *supra* note 14, at 1178; *Protecting Migratory Birds*, *supra* note 19.

35. Lilley & Firestone, *supra* note 14, at 1179; *Protecting Migratory Birds*, *supra* note 19.

36. Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (repealed 1918). The Weeks-McLean Law boldly attempted to bring all migratory birds, migrating across state lines, under the control of the federal government. *Id.*

37. *Id.* The act provided:

> All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.

Id. Interestingly for such a novel expansion of federal regulation of wildlife, Congress passed the act through a rider to an appropriation bill for the Department of Agriculture. *Protecting Migratory Birds*, *supra* note 19.

38. *See, e.g.*, Unites States v. McCullagh, 221 F. 288, 290 (D. Kan. 1915); United States v. Shauver, 214 F. 154, 156 (E.D. Ark. 1914).

39. Lilley & Firestone, *supra* note 14, at 1179.

40. *McCullagh*, 221 F. at 293 ("The power of a state to control and regulate the taking of game cannot be questioned.") (citing Geer v. Connecticut, 161 U.S. 519 (1896)), *overruled by* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979)); *Shauver*, 214 F. at 158 (citing Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979)).

the Weeks-McLean Law unconstitutional, as the Constitution granted no authority to Congress to regulate wildlife.[41]

B. The Treaties Underlying the MBTA

Unable to protect migratory birds through its interstate commerce powers, Congress next turned to its treaty powers[42] and succeeded in wresting some of the power to regulate wildlife away from the states.[43] In 1916, the United States entered into the first such treaty with Great Britain.[44] To implement that treaty, Congress enacted the MBTA [45] in 1918. Over the years, the United States passed three more migratory bird treaties with Mexico in 1937, Japan in 1972, the former Soviet Union in 1976,[46] and the MBTA was amended accordingly.[47] Each treaty expresses

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41. *McCullagh*, 221 F. at 294 ("Unless a departure, as radical in theory as it is important in its effects, is to be made from fundamental principles long established by our laws, and long acquiesced in by our people, the act in question must be held incapable of support by any provision of the organic law of our county."); *Shauver*, 214 F. at 160 ("The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional.").

42. Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties*, 77 DEN. U. L. REV. 359, 360–61 (1999) ("Secretary of State Robert Lansing and Senator Elihu Root conceived a constitutional solution to the need for federal proection of migratory birds by invoking the treaty power . . . ."); *Protecting Migratory Birds*, *supra* note 19 ("Following close on the heels of the Lacey Act and the Weeks-McLean Law, the framers of the Migratory Bird Treaty Act were determined to put an end to the commercial trade in birds and their feathers that, by the early years of the 20th century, had wreaked havoc on the populations of many native bird species."); *see* U.S. CONST. art. 2, § 2, cl. 2 (Treaty Clause enabling president to negotiate treaties).

43. *See* Missouri v. Holland, 252 U.S. 416, 434 (1920) ("[W]e cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, *and that but for the treaty the State would be free to regulate this subject itself*." (emphasis added)).

44. Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 [hereinafter Canada Treaty]. The original treaty was enacted with Great Britain as Canada was a British Colony at the time. *See generally 1931–1982: Toward Renewal and Patriation, Constitutional History*, CANADA IN THE MAKING, http://www.canadiana.ca/citm/themes/constitution/constitution15_e.html (last visited Apr. 26, 2013) (outlining the history of Canada after its severance from the British Empire in 1931).

45. Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) [hereinafter MBTA] (codified as amended at 16 U.S.C. §§ 703–712 (2012)).

46. *See* 16 U.S.C. § 703(a) (listing international conventions which the MBTA seeks to implement).

47. *Id.*

slightly different purposes and restraints on its implementation.[48] Specifically, the treaties differ as to what extent and how the signatories may potentially allow for take of migratory birds. [49] Despite the variances between the treaties, their ultimate message rang clear in the MBTA: "[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill" any migratory bird, unless permitted by the FWS.[50]

1. The Canada Treaty

The first treaty went into effect in 1916 between the United States and Great Britain.[51] The parties sought to save birds migrating between Canada and the United States from "indiscriminate slaughter" and to preserve birds "useful to man."[52] Without adequate protection, the parties feared imminent extinction of useful bird species.[53]

In 1995, Canada and the United States reformed the original treaty to reflect growing considerations of indigenous peoples' hunting rights and to better manage and protect migratory birds.[54] The 1995 Protocol replaced the majority of the original treaty's provisions.[55] It reaffirmed the parties' commitment to the long-term conservation of migratory birds and the need to regulate take of migratory birds.[56] The 1995 Protocol thus anticipates that some degree of take coincides with migratory

48. Corcoran & Colbourn, *supra* note 42, at 362; *see* HOLLAND & HART, INGAA FOUND., DEVELOPMENT OF A PERMIT PROGRAM FOR INCIDENTAL TAKE OF MIGRATORY BIRDS 9–14 (2010), *available at* http://www.ingaa.org/File.aspx?id=11062 (comparing and contrasting the terms and authorizations of each treaty).

49. *Compare* HOLLAND & HART, *supra* note 48, at 12 ("Importantly, the Mexico Treaty does not contain any language limiting the ability of the United States or Mexico to establish laws, regulations and provisions beyond these stated prohibitions, so long as such laws, regulations and provisions satisfy the need set forth in the convention."), *with id.* at 10 (discussing the potential regulation of take in accordance with the terms of the Canada treaty).

50. 16 U.S.C. § 703(a) (defining the MBTA's prohibitions, commonly referred to collectively as "take").

51. Canada Treaty, 39 Stat. 1702.

52. Canada Treaty, *supra* note 51, at Proclamation; *see* Corcoran & Colbourn, *supra* note 42, at 362 (characterizing the Canada Treaty's sole purpose as to protect the economic value of birds).

53. Canada Treaty, *supra* note 51, at Proclamation.

54. Protocol Amending the 1916 Convention for the Protection of Migratory Birds, U.S.-Can., Dec. 5, 1995, S. TREATY DOC. NO. 104-28, 1995 WL 877199, at 1 [hereinafter 1995 Protocol].

55. HOLLAND & HART, *supra* note 48, at 9.

56. 1995 Protocol, *supra* note 54, at 3; HOLLAND & HART, *supra* note 48, at 9; *see infra* notes 85–87 and accompanying text (outlining the statutory terms of the MBTA and defining "take" in context).

bird conservation.[57] Specifically, the 1995 Protocol states: "Subject to laws, decrees or regulations . . . , 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."[58] The phrase "other specific purposes" presents potentially unlimited take circumstances, but any authorized take must comply with the 1995 Protocol's conservation principles.[59] The 1995 Protocol grants the authority to the respective parties to accomplish the conservation goals through "monitoring, regulation, enforcement and compliance."[60]

The conservation principles, however, represent somewhat broad goals for the protection of migratory birds.[61] The 1995 Protocol enumerates five conservation principles: (1) management of migratory birds internationally, (2) guaranteeing various sustainable uses, (3) protecting healthy bird populations for harvesting, (4) protecting necessary bird habitat, and (5) restoring diminished bird populations.[62] Ultimately, any taking must not further accelerate the decline of protected birds or destroy necessary habitat.[63] Otherwise, the 1995 Protocol affords the parties and their respective implementing agencies the freedom to regulate take in accordance with the conservation principles.[64]

2. The Mexico Treaty

The United States entered into the next migratory bird treaty in 1937 with Mexico.[65] The Mexico Treaty declares the protection of migratory birds to be "right and proper . . . in order that the species may not be exterminated."[66] The treaty further declares the necessity of employing adequate measures in order to "permit a rational utilization of migratory birds for the purposes of sport as well as for food, commerce and indus-

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57. HOLLAND & HART, *supra* note 48, at 9 ("Thus, the protocol specifically contemplates the regulation of take of migratory birds.").

58. 1995 Protocol, *supra* note 54, at art. II(3), 4 (emphasis added).

59. HOLLAND & HART, *supra* note 48, at 9.

60. 1995 Protocol, *supra* note 54, at art. II(3), 4.

61. *See* HOLLAND & HART, *supra* note 48, at 10 ("[A]uthorized take must generally preserve or contribute to migratory bird habitat necessary for the conservation of migratory birds, and must not contribute to the further decline of depleted populations of migratory birds.").

62. 1995 Protocol, *supra* note 54, at art. II, *4.

63. HOLLAND & HART, *supra* note 48, at 10.

64. *Id.*

65. Convention between the United States of America and Mexico for the protection of migratory birds and game mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311 [hereinafter Mexico Treaty].

66. *Id.* at Proclamation.

try."[67] In comparison to the 1995 Protocol and other MBTA treaties, the Mexico Treaty allows for the broadest use of migratory birds.[68] Further, the Mexico Treaty only requires the parties to address take by establishing closed hunting seasons and potential take-free refugee zones, and banning the killing of insectivorous birds.[69] Outside of these requirements, the Mexico Treaty allows the parties to regulate take of birds so long as the parties prevent the extermination of the species.[70]

3. The Japan Treaty

The United States and Japan signed the next MBTA treaty in 1972.[71] The Japan Treaty recognizes 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."[72] Accordingly, the parties agreed to cooperate in managing, protecting, and preventing the extinction of select birds.[73] The Japan Treaty specifically prohibits the taking of migratory birds except in enumerated circumstances.[74] In language very similar to the 1995 Protocol, the Japan Treaty allows take "[f]or scientific, educational, propagative or other specific purposes not inconsistent with the objectives of this Convention."[75] The Japan Treaty lacks a specific statement of the objectives.[76] However, the Proclamation section of the treaty asserts a desire "to cooperate in taking measures for the management, protection, and prevention of the extinction of certain birds."[77] In the broadest sense, the Japan Treaty au-

67. *Id.*

68. *See* HOLLAND & HART, *supra* note 48, at 12 ("Importantly, the Mexico Treaty does not contain any language limiting the ability of the United States or Mexico to establish laws, regulations and provisions beyond these stated prohibitions, so long as such laws, regulations and provisions satisfy the need set forth in the convention.").

69. Mexico Treaty, *supra* note 65, at art. II(A)–(F), *1–2.

70. *See* HOLLAND & HART, *supra* note 48, at 12 (commenting on the ability of the parties to regulate take in accordance with the principles of the treaty); Mexico Treaty, *supra* note 65, at art. I, II(A)–(F), *1–2.

71. 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, U.S.-Japan, Mar. 4, 1972, T.I.A.S. No. 7990, [hereinafter Japan Treaty].

72. *Id.* at Proclamation, *1.

73. *Id.*

74. *Id.* at art. III(1), *1; *see* HOLLAND & HART, *supra* note 48, at 10.

75. Japan Treaty, *supra* note 71, at art. III(1)(a), *1; HOLLAND & HART, *supra* note 48, at 11.

76. HOLLAND & HART, *supra* note 48, at 11.

77. Japan Treaty, *supra* note 71, at art. III(1)(a), *1; HOLLAND & HART, *supra* note 48, at 11 (theorizing that the objective of the Japan Treaty is to prevent the extinction of certain species of birds).

thorizes take so long as it does not pose an extinction risk to bird species covered by the treaty.[78]

4. The Russia Treaty

The United States entered into the final MBTA treaty with the Union of Soviet Socialist Republics in 1976.[79] In language similar to the Japan Treaty, the Russia Treaty declares the importance of migratory birds as "a natural resource of great scientific, economic, aesthetic, cultural, educational, recreational and ecological value and that this value can be increased under proper management."[80] The parties recognized the importance of implementing protective measures to curb threats to certain bird species.[81] Accordingly, the parties desired to "cooperate in implementing measures for the conservation of migratory birds and their environment . . . ."[82] The Russia Treaty specifically forbids the taking of migratory birds, except "for scientific, educational, propagative, or other specific purposes not inconsistent with the principles of this Convention."[83] The treaty lacks a specific declaration of its principles, but the term likely refers to the conservation of migratory birds and their environment.[84] Like the Japan Treaty, the Russia Treaty likely allows for take that comports with the conservation of protected species.

C. Operation of the MBTA

At the MBTA's inception in 1918, the conservation focus centered upon population destruction caused by excessive hunting and trafficking

78. HOLLAND & HART, *supra* note 48, at 11 ("The treaty does not prohibit any take for purposes consistent with the objectives of the Japan Treaty.").

79. Convention: Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, T.I.A.S. No. 9073, [hereinafter Russia Treaty]. The Union of Socialist Soviet Republics collapsed at the end of the Cold War in 1991. *See generally* Archie Brown, *Reform, Coup and Collapse: The End of the Soviet State*, BBC, Feb. 17, 2011, http://www.bbc.co.uk/history/worldwars/coldwar/soviet_end_01.shtml (outlining the circumstances around the collapse of the Union of Socialist Soviet Republics which became present day Russia).

80. Russia Treaty, *supra* note 79, at Convention, *1; *see* Japan Treaty, *supra* note 71, at Proclamation, *1 (using wording substantially similar to the Russia Treaty declaring the value of migratory birds).

81. Russia Treaty, *supra* note 79, at Convention, *1.

82. *Id.*

83. *Id.* at art. II(1)(a), *1.

84. HOLLAND & HART, *supra* note 48, at 11; *see* Russia Treaty, *supra* note 79, at Convention, *1.

in birds.[85] Accordingly, the statute uses broad language for what constitutes take.[86] The implementing language contains no explicit limitation that the MBTA applies only to hunting and trafficking.[87]

The MBTA authorizes the Secretary of the Interior, through the FWS, to issue regulations implementing the underlying treaties.[88] Today, these regulations protect nearly 850 species of birds, many of which are common species, like the crow.[89] The MBTA also contemplates that some form of authorized take of protected birds may be allowed under the treaties.[90]

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85. Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 6 n.15 (1996) ("Enactment of the MBTA was a legislative response to the problem of mass destruction of avian life. At the end of the nineteenth century birds were killed in large numbers for food, sport and millinery purposes."); *see* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991) ("The definition describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the [MBTA]'s enactment in 1918."); *see also supra* notes 14–42 and accompanying text (outlining the historical circumstances surround the adoption of the MBTA).

86. 16 U.S.C. § 703(a) (1918, as amended through 2004); Collette L. Adkins Giese, *Spreading its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1161 (2010) ("Using very expansive language, section 703 prohibits taking . . . .").

87. *See* Giese, *supra* note 86, at 1164 ("The MBTA clearly prohibits the taking of migratory birds, but it does not precisely define what activities should constitute a taking."); *but cf.*, *e.g.*, HOLLAND & HART, *supra* note 48, at 4 ("Although the primary purpose of the MBTA is the prevention of hunting of migratory birds, the statute has been applied to industrial operations that inadvertently harm migratory birds."); Benjamin Means, Note, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 823 (1998) (advancing the argument that the public has "[l]ong understood [the MBTA] simply to regulate hunting").

88. See 16 U.S.C. § 712(2) (1978, current through 2013).

89. 50 C.F.R. § 10.13 (1973, as amended through 2013) (listing protected species); U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS (2002), *available at* http://www.fws.gov/birds/mortality-fact-sheet.pdf ("Of the 836 species of birds protected under the Migratory Bird Treaty Act, about a quarter are known to be in trouble.").

90. 16 U.S.C. § 704(a) (1918, as amended through 1998)

> [T]he Secretary of the Interior is authorized and directed, from time to time, having 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, 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, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

The MBTA imposes misdemeanor and felony criminal penalties on the unauthorized take of protected birds.[91] Generally, in the context of industrial development, only the misdemeanor provision applies.[92] It subjects any person, association, or other business entity to a fine of not more than $15,000, imprisonment not to exceed six months, or both.[93] The U.S. Department of Justice may impose this fine for *each* violation, which can add up quickly in the context of large-scale industrial operations.[94] More troublingly for industrial operators, the misdemeanor penalties may apply without requiring that the violator has shown any culpable intent,[95] as the statute contains no *mens rea* element.[96] Therefore, the majority of U.S. Courts of Appeals interpret the MBTA to impose strict liability for misdemeanor violations.[97] A recent body of case law,

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91. 16 U.S.C. §§ 707(a)-(d) (1918, as amended through 1998) (allowing for misdemeanor and felony penalties as well as seizure of instruments used to violate the MBTA).

92. *See* HOLLAND & HART, *supra* note 48, at 2 (outlining industrial activity that has resulted in MBTA misdemeanor liability).

93. 16 U.S.C. §707(a).

94. *See* Press Release, Dep't of Justice (July 10, 2009), *available at* http://www.fws.gov/home/feature/2009/pdf/PacficCorpPressRelease.pdf (announcing a plea deal resolving PacifiCorp's thirty-four misdemeanor violation charges for a $510,000 fine, in addition to restitution and avian protection plans that cost the company nearly $15 million); *see also* HOLLAND & HART, *supra* note 48, at 2 (discussing significant penalties paid by serial violators of the MBTA misdemeanor provisions). *But see United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 527–31 (E.D. Cal. 1978) (limiting charges under the MBTA to one charge per occurrence that kills migratory birds, not basing charges on each bird death); Lilley & Firestone, *supra* note 14, at 1183 ("In other words, even though many birds died, the defendants were found guilty for only one bird death.").

95. *See, e.g.*, United States v. Apollo Energies, Inc., 611 F.3d 679, 685 (10th Cir. 2010) ("At least seven other circuits either had held that MBTA misdemeanors are strict liability crimes or noted the MBTA's lack of *mens rea* in passing.").

96. *See id.* at 684–86 (outlining previous holdings from the Tenth Circuit and other federal courts of appeals addressing the MBTA's lack of a *mens rea* requirement); 16 U.S.C. §§ 703(a), 707(a).

97. *See, e.g.*, *Apollo*, 611 F.3d at 685; United States v. Morgan, 311 F.3d 611, 616 (5th Cir. 2002) ("In light of the above case law, the express intent of Congress, and the nature of the violation, we hold that possessing migratory game birds exceeding the daily bag limit in violation of the MBTA and its attendant regulations is a strict liability offense."); United States v. Pitrone, 115 F.3d 1, 5 (1st Cir. 1997) ("For most of its existence, the MBTA contained no scienter requirement whatever; its felony provision, like its misdemeanor provision . . . imposed strict liability."); United States v. Boynton, 63 F.3d 337, 343 (4th Cir. 1995) ("Since the inception of the Migratory Bird Treaty in the early part of this century, misdemeanor violations of the MBTA . . . have been interpreted by the majority of the courts as strict liability crimes."); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986) ("Scienter is not an element of criminal liability under the Act's misdemeanor provisions."); United States v. FMC Corp., 572 F.2d 902, 907–08 (2d Cir. 1978) (applying strict liability for MBTA violations stemming from waste ponds using a tort justification for ultra-hazardous chemicals).

however, limits the MBTA's misdemeanor provisions to intentional actions directed at migratory birds.[98] The current circuit split creates confusion for the FWS, industry, and district courts in applying the MBTA.

II. JUDICIAL INTERPRETATIONS OF THE MBTA

In the 1970s, the FWS began to extend MBTA prosecutions beyond the traditional realm of hunting and wildlife trafficking, and began to enforce the statute against accidental bird deaths caused by commercial and industrial operations.[99] The current MBTA court battles involve industrial operations that kill birds.[100] To date, the FWS has focused its prosecution of MBTA violations on a handful of industries: wastewater storage,[101] oil and gas,[102] electricity transmission,[103] and pesticide application.[104] Many commentators and industry participants fear wind farms

98. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012) ("This Court expressly finds that the use of reserve pits in commercial oil development is legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act."); United States v. Ray Westall Operating, Inc., No. CR-05-1516-MV, 2009 WL 8691615, at *7 (D.N.M. 2009) ("The Court concludes that Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths."); United States v. Chevron USA, Inc., Criminal No. 09-CR-0132, 2009 WL 3645170, at *3 (W.D. La. 2009) ("These regulations were clearly not intended to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities, as happened here.").

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

100. *See, e.g.*, *Brigham Oil & Gas*, 840 F. Supp. 2d at 1211 (tackling competing case law applying the MTBA to "indirect, unintentional commercial activity").

101. *See, e.g.*, *FMC Corp.*, 572 F.2d at 904–05 (laying out the factual background of FMC's manufacturing of pesticides and the attendant wastewater ponds); *see infra* notes 102, 104 (listing a few representative cases of MBTA prosecutions of oil and gas wastewater operations and the pesticide industry).

102. *See, e.g.*, *Apollo*, 611 F.3d at 682–83 (addressing migratory bird deaths in oil and gas heater-treaters); *Brigham Oil & Gas*, 840 F. Supp. 2d at 1203–06 (describing oil and gas operations that killed protected birds); *Ray Westall Operating*, 2009 WL 8691615, at *1–2 (outlining how protected birds were killed in oil and gas waste water ponds); *Chevron USA*, 2009 WL 3645170, at *1 (discussing how Chevron's oil and gas operations killed protected birds).

103. *See, e.g.*, United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999) (laying out the factual background of MTBA violations caused by a rural electrical cooperative's transmission system).

104. *See, e.g.*, United States v. Rollins, 706 F. Supp. 742, 743–44 (D. Idaho 1989) (describing a how the application of pesticides killed migratory birds); United States v. Corbin Farm Serv., 444 F. Supp. 510, 514–15 (E.D. Cal. 1978) (discussing pesticide application to an alfalfa field that killed migratory birds).

may be subject to prosecution under the MBTA, and indeed the first ever prosecution of a wind farm for violations of the MBTA occurred in late 2013.[105] In fact, many industry groups and critics of the MBTA claim the statute technically applies to any conduct that results in the death of a protected bird,[106] such as driving a car, owning a car, or even owning a home window into which a protected bird flies.[107] To limit the potentially absurd exposure that strict liability for MBTA violations entails, some courts began applying a proximate causation element to MBTA prosecutions.[108] The resulting state of MBTA case law presents a deep circuit division with conflicting precedent from numerous district courts, creating uncertainty among industrial companies and potentially the FWS.[109]

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105. Press Release, The U.S. Attorney's Office for the Dist. of Wyo., Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (Nov. 22, 2013), *available at* http://www.justice.gov/usao/wy/news/2013/11november/13-081_nov22.html; Lilley & Firestone, *supra* note 14, at 1186–93 (predicting whether court will apply the MBTA to wind farms with each author reaching a different conclusion); John Arnold McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of its Own, the Environmental Protection Movement*, 28 ENERGY L.J. 71, 85–88 (2007) (discussing three different wind farm projects that have faced environmental pressure and litigation to shut down, one under the MBTA); *see* THOMAS R. LUNDQUIST ET AL., THE MIGRATORY BIRD TREATY ACT: AN OVERVIEW 2 (2012), *available at* http://www.crowell.com/files/the-migratory-bird-treaty-act-an-overview-crowell-moring.pdf (using Lilley and Firestone's article to illustrate the uncertainty in how far the MBTA may be extended to cover industrial activities); *see also* Flint Hills Tallgrass Prairie Heritage Found. v. Scottish Power, 147 F. App'x 785 (10th 2005) (per curiam) (The court in *Scottish Power* tackled a scatter-gun approach by environmental groups to obtain a temporary restraining order against a Kansas wind farm. 147 F. App'x at 786–87. The plaintiffs alleged violations of the MBTA, but the district court threw out the challenge because the MBTA provides no citizen suit provision. *Id.* at 787. The circuit court summarily affirmed the district court and chastised the state of the plaintiffs' record. *Id.* "On the state of the record, we need not comment on the district court's further observation that to hold otherwise, would somehow be 'tilting at windmills,' a la Don Quixote." *Id.* (citation and footnote omitted)).

106. Lilley & Firestone, *supra* note 14, at 1182, 1186 (discussing MBTA defendants' arguments that the MBTA may apply to an unsuspecting motorist that kills a bird or to bird collisions with building windows); *see* U.S. FISH & WILDLIFE SERV., *supra* note 89 at 2 (presenting data claiming window collisions kill "97 to 976 million birds annually" and cars account for "60 million" deaths a year).

107. *See Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d at 1084 ("As its final argument regarding the MBTA's proper scope, Moon Lake contends that the government's interpretation leads to absurd results."); Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, human caused bird deaths*, 77 DEN. U. L. REV. 315, 340–41 (1999) (addressing the *Moon Lake* court's treatment of the absurdity argument).

108. *Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d at 1085 ("[T]o obtain a guilty verdict under § 707(a), the government must prove proximate causation . . . ."); *see* United States v. Apollo Energies, Inc., 611 F.3d 679, 690 (10th Cir. 2010) (endorsing *Moon Lake*'s application of proximate causation to MBTA prosecutions).

109. *See generally* Sandra A. Snodgrass, *It's for the Birds—Recent Developments Under the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act*, in FEDERAL REGULATION OF

A. Early Application of the MBTA to Industrial Activities

The first time the MBTA was applied to non-hunting-related industrial activities occurred in a series of three cases in 1973 and 1975 that prosecuted bird deaths caused by open "toxic oil sludge" wastewater ponds.[110] For example, in *United States v. Union Texas Petroleum*, the district judge denied the defendants' motions to dismiss alleging the Government interpreted the MBTA too expansively, commenting "we doubt that the statute was intended to be limited to hunting or other purposeful killing alone."[111] But despite their new, expansive interpretation of the MBTA's scope, the three initial cases offered little guidance as to the limitations of MBTA liability, as the courts simply denied the defendants' motions to dismiss and the defendants subsequently entered pleas.[112] However, the cases likely established the FWS's authority to regulate incidental take by industrial operators under the MBTA.[113]

The U.S. Court of Appeals for the Second Circuit first tackled an incidental industrial take issue in 1978.[114] In *United States v. FMC Corp.*, inspections of a pesticide and chemical company's wastewater ponds revealed several separate instances of bird deaths due to toxic chemical exposure in the ponds.[115] The company, FMC Corporation, failed to mitigate the exposure problems and the FWS filed charges.[116] A jury convicted FMC for misdemeanor violations of the MBTA, and FMC appealed.[117] The court first established that "FMC's product . . . killed the

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CULTURAL RESOURCES, WILDLIFE, AND WATERS OF THE UNITED STATES, Paper No. 10A, 10A-2 (Rocky Mt. Min. L. Fdn. 2012) ("But this reliance on the exercise of prosecutorial discretion provides little comfort or certainty to project developers who are trying to obtain financing and manage project risks.").

110. Lilley & Firestone, *supra* note 14, at 1181–82 (discussing the first applications of the MBTA to incidental taking); *see also* United States v. Union Tex. Petroleum, No. 73-CR-127, 1973 U.S. Dist. LEXIS 15616, at *8 (D. Colo. July 11, 1973) (rejecting defendants' motion to dismiss charges under the MBTA).

111. *Union Tex. Petroleum*,1973 Dist. LEXIS 15616, at *3.

112. George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treat Act*, 50 U. COLO. L. REV. 165, 184 (1979) ("These cases are not of much value as precedent as each was decided without trial and went unreported, and each court failed to make its premises explicit."); *accord* Lilley & Firestone, *supra* note 14, at 1182 ("It is difficult to determine the exact[ ]significance of these decisions, as they were 'not officially reported.'").

113. Lilley & Firestone, *supra* note 14, at 1182 ("Yet, one can surmise that these prosecutions set the stage for future FWS regulation of incidental take.").

114. *See generally* United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

115. *Id.* at 904–05.

116. *Id.* at 905. ("FMC employed guards to keep the birds away, but the guards were derelict in their duties, *sometimes sleeping on the job*, and the bird deaths continued.") (emphasis added).

117. *Id.* at 904.

birds"[118] then turned to the issue of intent.[119] FMC argued that it took no affirmative action to kill the birds and also had no intent to kill,[120] but the court rejected this argument by reasoning that FMC took an "affirmative act [when] it engaged in the manufacture of a pesticide known to be highly toxic,"[121] then FMC "failed to act" when the chemical reached a pond where it could come into contact with protected birds.[122] The court analogized this reasoning to general principles of tort law and strict liability for toxic substances.[123] The court dismissed FMC's argument that it lacked knowledge of the bird deaths by pointing out that "the statute does not include as an element of the offense 'willfully, knowingly, recklessly, or negligently.'"[124] Ultimately, commentators and other courts criticized the Second Circuit's application of criminal strict liability based on tort principles.[125] However, *FMC Corp.* laid the groundwork as the first major circuit court decision upholding strict liability for industrial activities under the MBTA.[126]

B. The Rogue Circuits

In the 1990s, the Eighth and Ninth Circuits each tackled incidental take stemming from another industrial activity—logging.[127] In both *Seattle Audubon Society v. Evans* and *Newton County Wildlife Association v. U.S.*

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118. *Id.* at 906.
119. *Id.*
120. *Id.*
121. *Id.* at 907.
122. *Id.*
123. *Id.* ("The principle here is the same as in the tort situation even though in this case the carbofuran remained on the property of FMC, and the birds found their way to the attracting FMC pond.").
124. *Id.* at 908.
125. Corcoran, *supra* note 107, at 333 ("Commentators have observed that the Second Circuit relied upon the ultra hazardous nature of pesticide manufacture, and that in future MBTA cases the Second Circuit may not deem criminal seemingly less-hazardous activities that result in unintended deaths of migratory birds."); Means, *supra* note 87, at 837 ("Both FMC and Corbin have been distinguished in subsequent MBTA litigation on the grounds that they constituted an exception to the normal operation of the MBTA—a gentle way of dispensing with a quasi-tort principle that finds no support in the law.").
126. Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579, 598 (2012) ("While this case has been highly regarded and often cited—after all, until [2010] it was the only appellate case on the matter—it is also well over three decades old . . . .").
127. *See generally* Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991); Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997).

Forest Service, environmental groups challenged the sale of logging permits, in part because the logging could potentially kill migratory birds.[128]

The holding in *Seattle Audubon Society* represents the first major limitation on liability under the MBTA. Two Audubon societies challenged the sale of timber permits because the logging would destroy northern spotted owl habitat and thereby kill protected birds.[129] The court determined the definition of take in the MBTA and FWS regulations "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."[130] The court rejected the contention that the MBTA applied to "habitat modification or destruction."[131]

In support of this position, the court compared the MBTA's definition of "take" to the same term used in Endangered Species Act (ESA).[132] When Congress enacted the ESA, it included the term "harm" in the definition of "take."[133] The FWS further defined ESA "harm" "to include habitat modification or degradation."[134] Therefore, the court reasoned, the ESA's definition encompassed a broader range of take than the MBTA, which does not include "harm" under the definition of take.[135] The court bolstered this conclusion by pointing out that Congress had not amended the MBTA after the enactment of the ESA to include the ESA's more expansive definition of "harm."[136]

The court then turned to the holdings in *FMC Corp.* and *United States v. Corbin Farm Services*, which had applied the MBTA to industrial activities, pesticide wastewater ponds, and pesticide application respectively.[137] Even though these two cases applied the MBTA to the "direct,

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128. *See Seattle Audubon Soc'y*, 952 F.2d at 298–99, 302; *Newton Cnty. Wildlife Ass'n*, 113 F.3d at 111.

129. *Seattle Audubon Soc'y*, 952 F.2d at 298–99, 302. The Ninth Circuit consolidated cases involving challenges from both Seattle and Portland Audubon Societies. *Id.* at 298–99. The respective district courts denied injunctive relief to each society. *Id.*

130. *Id.* at 302. (citing 50 C.F.R. § 10.12). The court neglected to provide a date for the Code of Federal Regulations cited. However, the definition of "take" remained the same from the *Seattle Audubon Society* decision to today. *See generally* Revision of Regulations Implementing Convention on International Trade in Endangered Species Wild Fauna and Flora, 50 CFR Parts 10, 13, 17, and 23, 72 Fed. Reg. 48402-01, 48404 (Aug. 23, 2007) (outlining changes to 50 C.F.R. § 10.12 in the 2007 revisions, the only revisions after the *Seattle Audubon Society* decision).

131. *Seattle Audubon Soc'y*, 952 F.2d at 302.

132. *Id.* at 303.

133. *Id.*

134. *Id.* (citing 50 C.F.R. § 17.3 (no date provided)).

135. *Id.*

136. *Id.* ("We agree with the Seattle district court that the differences in the proscribed conduct under the ESA and the MBTA are 'distinct and purposeful.'").

137. *Id.*

though unintended" killing of protected birds, the Ninth Circuit rejected the extrapolation that these holdings covered indirect, unintended bird deaths.[138] Ultimately, the court determined "habitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA."[139]

Building upon the Ninth Circuit's holding in *Seattle Audubon Society*, the Eighth Circuit also declined to adopt an expansive definition of take for indirect, unintentional bird deaths.[140] In *Newton County Wildlife Ass'n v. U.S. Forest Service*, several plaintiffs sought review of timber sales, alleging that the sales would "disrupt nesting migratory birds, killing some," in violation of the MBTA.[141] As the plaintiffs put it, these potential killings would "violate [the] MBTA's absolute prohibition against killing or taking nesting birds."[142]

The court disagreed. First, it declared the MBTA only proscribed "conduct directed at migratory birds."[143] "Hunters and poachers" may face strict liability for bird deaths, but the court refused to extend MBTA liability any further.[144] "[I]t 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."[145] The Eighth Circuit based this judicial limitation of the MBTA on the Ninth Circuit's interpretation of the MBTA's take prohibition in *Seattle Audubon Society*.[146]

Newton County Wildlife Ass'n and *Seattle Audubon Society* paved the way for judicial limitations on liability under the MBTA.[147] Under these holdings, if a company or federal agency undertook actions that indirectly and unintentionally killed protected birds, they were not liable.[148]

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138. *Id.*
139. *Id.*
140. Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* (quoting Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991)).
147. Helen M. Kim, *Chopping Down the Birds: Logging and the Migratory Bird Treaty Act*, 31 ENVTL. L. 125, 129 (2001) (referencing a circuit split in the application of the MBTA driven, in part, by the Eighth and Ninth Circuits' limitations on indirect conduct prosecutions).
148. *See, e.g.*, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1213 (D.N.D. 2012) ("This Court believes that it is highly unlikely that Congress ever intended to impose criminal liability on the acts or omissions of persons involved in lawful commercial

C. The Modern Strict Liability Approach

In 2010, the Tenth Circuit's decision in *United States v. Apollo Energies, Inc.* set a new course. It firmly established strict liability under the MBTA, even for unintentional killings.[149] The defendants were oil field operators in Kansas that used devices called "heater-treaters" at their well sites to separate contaminants (like water) from hydrocarbons.[150] Birds had a tendency to make nests inside heater-treater exhaust pipes and louvers.[151] After receiving a tip, the FWS inspected the heater-treaters of companies in the region and discovered roughly 300 dead birds, 10 of which the MBTA protected.[152] The FWS did not initially prosecute, but instead allowed the companies a "grace period" and began an education program aimed at preventing the bird deaths.[153] The campaign reached one of the operators but not the other.[154]

After the public education program's grace period terminated, the FWS inspected the operators' equipment again.[155] The search yielded five dead birds that were protected by the MBTA.[156] This time, FWS prosecuted and the operators challenged the application of strict liability under the MBTA, as well as the statute's constitutionality on due process grounds.[157]

The Tenth Circuit addressed the strict liability issue first.[158] The court established the MBTA's take provision lacked a *mens rea* requirement, using another Tenth Circuit case, *Unites States v. Corrow*, for support.[159] The *Corrow* court had declared: "Simply stated, then, 'it is not

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activity which may indirectly cause the death of birds protected under the Migratory Bird Treaty Act.").

149. United States v. Apollo Energies, Inc., 611 F.3d 679, 684-86 (10th Cir. 2010).

150. *Id.* at 682–83; *see Oil Treating*, KW INTERNATIONAL, http://www.kwintl.com/oil-treating.html (last visited May 7, 2013) (describing how KW International's vertical heater-treater separates out water, gas, and oil); CO. DEP'T OF PUB. HEALTH & ENV'T - AIR POLLUTION CONTROL DIV., HEATER-TREATER SOURCE CATEGORY 1, 5–6, *available at* http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Heater+Treaters.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251808868243&ssbinary=true (describing heater-treaters and providing various diagrams).

151. *Apollo*, 611 F.3d at 682.

152. *Id.*

153. *Id.*

154. *Id.* at 682–83.

155. *Id.* at 683.

156. *Id.*

157. *Id.*

158. *Id.* at 684.

159. *Id.* (citing United States v. Corrow, 119 F.3d 796, 805 (10th Cir. 1997)).

necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge.'"[160] The court in *Apollo* interpreted *Corrow*'s holding to mean that the MBTA's misdemeanor provisions lacked the need to establish "any particular state of mind or scienter,"[161] noting also that *Corrow* followed seven other circuits at the time in applying strict liability to MBTA misdemeanor violations.[162] The operators argued their conduct was passive, and that, in the words of the court, "they merely failed to bird-proof the heater-treaters."[163] The operators sought for the court to apply the Eighth Circuit's holding in *Newton*,[164] but the Tenth Circuit rejected the application of *Newton* because the panel believed it only applied to adverse modification of bird habitat, rather than the clear take of protected birds.[165] The court thus definitively declared its stance on the MBTA: strict liability, period.[166]

> While the MBTA's scope, like any statute, can test the far reaches in application, we do not have that case before us. The question here is whether unprotected oil field equipment can take or kill migratory birds. It is obvious the oil equipment can. Simply put, the take and kill provisions of the Act are not outside the holding of *Corrow*.[167]

The court then turned to the operators' constitutional challenge that the MBTA was a violation of due process.[168] The court distilled the operators' due process argument into two issues: an alleged lack of fair notice as to what conduct the statute prohibits, and the operators' alleged inability to know their actions would lead to the deaths of protected birds.[169] First, the court acknowledged that due process requires citizens be given fair notice of what conduct is criminalized by a statute.[170] The operators contended they were without notice of the conduct prohibited by the MBTA,[171] but the court rejected this argument because

160. *Corrow*, 119 F.3d at 805.
161. *Apollo*, 611 F.3d at 684 (citing *Corrow*, 119 F.3d at 805).
162. *Id.* at 685.
163. *Id.*
164. *Id.* at 686 (citing Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997) (refusing to apply the MBTA to potential take caused by the sale of logging permits)).
165. *Id.*
166. *Id.* ("As a matter of statutory construction, the 'take' provision of the [MBTA] does not contain a scienter requirement.").
167. *Id.*
168. *Id.* at 682.
169. *Id.* at 687.
170. *Id.*
171. *Id.* at 688.

in its view the MBTA clearly criminalized all conduct that "will lead to the death or captivity of protected migratory birds . . . ."[172] The court further explained "[t]he actions criminalized by the MBTA may be legion, but they are not vague."[173] Ultimately, the court found the MBTA afforded fair warning of its prohibitions.[174]

Addressing the second prong of the operators' constitutional challenge, the court also acknowledged that it is unconstitutional to criminalize acts that a defendant does not cause.[175] The second issue came down to whether the operators received "notice of predicate acts"—in this case, whether the operators knew their heater-treaters could kill migratory birds.[176] The court analogized notice to proximate causation:[177]

> We agree with the district court's assessment of proximate cause. Central to all of the Supreme Court's cases on the due process constraints on criminal statutes is foreseeability—whether it is framed as a constitutional constraint on causation . . . and mental state . . . , or whether it is framed as a presumption in statutory construction. 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.[178]

Thus, the proximate cause issue rested on notice—whether the industry was on notice that its operations could kill birds.[179] The FWS had warned one of the operators about the risks heater-treaters posed, but had only notified the other operator after a charge had been filed.[180] The Tenth Circuit thus affirmed the convictions for which the FWS had provided notice, but overturned the one conviction of the operator that had not been notified that the heater-treaters could kill migratory birds.[181] Thus, the *Apollo* decision, as the most recent circuit court MBTA decision, stands for two important propositions: first, the MBTA misdemeanor provisions are strict liability offenses; second, a conviction under the MBTA requires a showing of proximate cause—essentially demonstrat-

172. *Id.* at 688 (quoting 16 U.S.C. § 703).
173. *Id.* 689.
174. *Id.* at 698–99.
175. *Id.* at 687.
176. *Id.* at 688, 691.
177. *Id.* at 689–690.
178. *Id.* at 690.
179. *Id.* at 691.
180. *Id.*
181. *Id.*

ing that the offender was on notice that his conduct may violate the MBTA.[182]

D. The District Court Revolt

Despite the persuasiveness of *Apollo*, district courts have been reluctant to extend or follow its reasoning.[183] The most notable decision, *United States v. Brigham Oil and Gas, L.P.*, comes from the District of North Dakota, in the Eighth Circuit.[184] In *Brigham*, the court was deciding on a motion to dismiss from three oil field operators who faced MBTA misdemeanors for dead birds found in wastewater reserve pits.[185] The court adopted a narrow reading of the MBTA's take prohibition that only encompassed intentional acts directed towards migratory birds.[186] The court ultimately declared that Congress did not intend to criminalize conduct "which may indirectly cause the death of birds protected under the Migratory Bird Treaty Act."[187]

The court took the view that the MBTA's prohibition of take was limited to direct acts of bird killing, not indirect acts that caused accidental deaths.[188] "In the context of the Act, 'take' refers to conduct *directed* at birds, such as *hunting* and *poaching*, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths."[189] The court turned to the dictionary definition of take and concluded, "the definition involves deliberate, not accidental, conduct. It refers to a purposeful attempt to possess wildlife through capture, not incidental or accidental taking through lawful commercial activity."[190] It further sup-

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182. *Id.*; *see* Robbins, *supra* note 126, at 601 ("The *Apollo Energies* court took the expectation that parties be on notice of the potential for regulation of their activities and twisted it into a requirement that the government provide individualized written notice of each particular risk of harm in order to hold the parties responsible for that harm.").

183. *See*, *e.g.*, United States v. Chevron USA, Inc., Criminal No. 09-CR-0132, 2009 WL 3645170, at *5 (W.D. La. Oct. 30, 2009) ("To the extent that the court's decision in *Apollo* is inconsistent with the reasoning in this case, the undersigned *simply declines to adopt the reasoning and rationale of that decision*." (emphasis added)); *but see* United States v. CITGO Petroleum Corp., 893 F. Supp. 2d 841, 847 (S.D. Tex. 2012) ("After a thorough review of the relevant case law, the Court agrees with the Tenth Circuit's holding in *Apollo Energies* that it is obvious that 'unprotected oil field equipment can take or kill migratory birds.'" (quoting *Apollo*, 611 F.3d at 686)).

184. United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202 (D.N.D. 2012).

185. *Id.* at 1203.

186. *Id.*

187. *Id.* at 1213.

188. *Id.* at 1208.

189. *Id.* (emphasis added).

190. *Id.* 1208–09 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 2329–30 (1986)).

ported its reading of take by relying upon the Eighth and Ninth Circuits' opinions in *Newton* and *Seattle Audubon Society*,[191] interpreting them to forbid prosecution under the MBTA for any indirect activity that kills protected birds.[192]

The court also relied upon an unreported case from the District of New Mexico (Tenth Circuit) that was decided prior to *Apollo*.[193] In *United States v. Ray Westall Operating*, the district court declined to extend the MBTA to bird deaths in an oil and gas wastewater pond.[194]

> The Court finds that it is highly unlikely that Congress intended to impose criminal liability on every person that indirectly causes the death of a migratory bird. The Court concludes that Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths.[195]

The *Brigham* court noted "reserve pits are not directed at birds or their habitat."[196] The court acknowledged the contrary precedent in other circuits set by *FMC Corp.* and *Apollo*, but adhered to the interpretation of *Newton*.[197]

> This Court expressly finds that the use of reserve pits in commercial oil development is legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act. Like timber harvesting, oil development and production activities are not the sort of physical conduct engaged in by hunters and poachers, and such activities do not fall under the prohibitions of the Migratory Bird Treaty Act. The Eighth Circuit Court of Appeals' decision in *Newton C[ou]nty* is controlling precedent which this Court is obligated to follow.[198]

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191. *Id.* at 1209–10 (citing Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997) and Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991)).

192. *Id.* ("Other courts have recognized that lawful commercial activity, such as logging, that is unrelated to hunting or poaching and not directed at birds does not constitute a crime under the federal Migratory Bird Treaty Act.").

193. *Id.* at 1210–11 (citing United States v. Ray Westall Operating, Inc., No. CR-05-1516-MV, 2009 WL 8691615 (D.N.M. Feb. 25, 2009)).

194. *Ray Westall Operating, Inc.*, 2009 WL 8691615.

195. *Id.* at *7 (quoted by *Brigham Oil & Gas*, 840 F. Supp. 2d at 1210).

196. *Brigham Oil & Gas*, 840 F. Supp. 2d at 1211.

197. *Id.* (citing United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) and United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978)).

198. *Id.*

Ultimately, the *Brigham* court found that if the MBTA were interpreted to encompass any conduct that proximately caused a bird death, the statute would impose liability on commonplace activities like pruning trees, reaping crops, driving a car, owning windows, or even owning a cat.[199] The court cited a 2002 FWS study on causes of bird mortality, which estimated 100 million to one billion birds were killed each year from collisions with building windows.[200] The court rejected the government's argument that all of these activities were open to prosecution under the MBTA.[201] "[T]he Government would have to criminalize driving, construction, airplane flights, farming, electricity and wind turbines, which cause bird deaths, and many other everyday lawful activities."[202]

No clear consensus exists among commentators, FWS personnel, industry, or the courts on how to apply the MBTA.[203] The current MBTA atmosphere results in varying judicial approaches from circuit to circuit and from district to district.[204] The confusion creates an extremely difficult atmosphere for industry to operate within.[205] However, a solution

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199. *Id.* at 1212–13.

200. *Id.* (quoting U.S. FISH & WILDLIFE SERV., *supra* note 89, at 2).

201. *Id.* at 1213.

202. *Id.* ("In summary, the Federal Migratory Bird Treaty Act, as broadly interpreted by the Government, offers unlimited potential for criminal prosecutions. The U.S. Fish & Wildlife Service has recognized countless numbers of ways in which otherwise lawful actions may result in the unintended death of migratory birds.").

203. *See, e.g.*, *id.* (restricting the MBTA to conduct directed at birds like hunting and poaching); Means, *supra* note 87, at 841 ("The MBTA's plain meaning and legislative history require a restrained interpretation."); *but see, e.g.*, United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010) (upholding MBTA convictions for unintentional and indirect actions causing protected bird deaths); Julie Lurman, *Agencies in Limbo: Migratory Birds and Incidental Take by Federal Agencies*, 23 J. LAND USE & ENVTL. L. 39, 60 (2007) ("Incidental taking by land clearance must not be allowed to continue unchecked and unmonitored."); Robbins, *supra* note 126, at 581 ("The strict liability offenses found in the Migratory Bird Treaty Act (MBTA) should be enforced with the purest form of strict liability . . . ."); *see also* LUNDQUIST, *supra* note 105, at 4 ("Many commentators and companies are not comfortable with fuzzy potential MBTA liability and with reliance on uncertain prosecutorial discretion to avoid criminal liability for an otherwise-lawful land use.").

204. *Compare Apollo*, 611 F.3d at 686 (imposing strict liability, limited by proximate cause, to industrial activities that unintentionally and indirectly caused protected bird deaths), *with* United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1213 (D.N.D. 2012) (limiting the MBTA to apply only to intentional conduct directed towards protected birds, and specifically allowing lawful industrial activity to kill birds). *See* Scott W. Brunner, *The Prosecutor's Vulture: Inconsistent MBTA Prosecution, its Clash with Wind Farms, and How to Fix It*, SEATTLE J. ENVTL. L., 2013, at 27, http://www.sjel.org/images/pdf/2013/brunner_prosecutors%20vulture.pdf ("A judicial carve-out is an ill-fit fix to the MBTA's inconsistent application because carve-outs have already been utilized by some courts, and MBTA application has simply been made less uniform as a result.").

205. HOLLAND & HART, *supra* note 48, at 2 ("Although actions under the MBTA have not historically been brought against developers of natural gas pipelines projects, without any

does exist—at least a solution to bring industrial projects into compliance with the MBTA while still furthering the original goals of the statute. Congress and the FWS should authorize and develop an incidental take program for industrial projects.

III. AUTHORIZING INCIDENTAL TAKE

Congress and the FWS should act to alleviate the confusion surrounding the MBTA. There are essentially two options for this. First, Congress could amend the statute, redefining the MBTA's take prohibition to specifically include or exclude incidental take. Second, Congress could authorize an incidental take permit program. Alternately, the FWS may be able to implement an incidental take permit program under its existing powers without congressional approval. The first option comes with significant political and administrative drawbacks, while the second option—an incidental take permit program—could be tailored to eliminate the confusion surrounding the MBTA without reducing the protective power of the MBTA.

A. Congressional Amendment to the MBTA

In an ideal political climate, the fastest and most effective option to provide certainty for the FWS and industrial operators rests with Congress.[206] Congress has two viable options to reform the MBTA to allow for incidental take. First, Congress can amend the statutory language of the MBTA to apply only to intentional takings.[207] This would result in more certainty as to whether industrial operators face liability, but the amendment may also place migratory birds in greater danger from in-

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permit mechanism to allow the incidental take of migratory birds as a result of natural gas pipeline construction activities, pipeline companies have no assurance they can abide by the Act and avert lawsuits."); Lilley & Firestone, *supra* note 14, at 1209 ("[T]he exercise of prosecutorial discretion and lack of enforcement action by FWS and state agencies fails to provide wind farm operators with proper incentives to prevent or minimize wildlife impacts."); McKinsey, *supra* note 105, at 89 ("The uncertainty brought on by reliance on selective enforcement of the MBTA is perhaps the most difficult risk to precisely assess.").

206. *See* Lilley & Firestone, *supra* note 14, at 1210 ("Congress should amend the MBTA to grant incidental-take permits and require FWS to adopt regulations specifying the criteria for issuing such permits and standards for compliance with them.").

207. *See* Brunner, *supra* note 204, at 29–32 (discussing options to amend the statutory language of the MBTA to prevent confusion); McKinsey, *supra* note 105, at 91 (advocating for a statutory limitation of the MBTA's take definition to exempt wind farms).

creased industrial development, be it wind, oil and gas, transmission, pesticides, or even skyscraper construction.[208]

Second, Congress can require the FWS to implement an incidental take permit program.[209] An incidental take program would allow the FWS to approve permits for a regulated number of bird deaths caused by permittees. Such a program would provide more protection to industry operators that accidentally kill protected birds, but it would also allow the FWS to regulate migratory birds deaths and provide for more effective mitigation measures.[210] There could be some disadvantages, however. Delays may result from an over-stretched FWS and a lack of manpower. The permit program could also prove too costly for some project managers, and some may opt to risk the chance of killing protected birds and potential MBTA prosecution.[211] Considering the relative merits of each system, the implementation of an incidental take permit program would best provide certainty to industry and uphold the conservation ideals of the MBTA and its implementing treaties.

1. Redefining "Take" to Exclude Incidental and Unintentional Actions

Congress could resolve the confusion in the circuits by simply clarifying the scope of the word "take."[212] The majority of redefinition proposals focus on exemptions for wind farms, but few call for exemptions for all other industrial operations.[213] For example, one commentator recommends the 16 U.S.C. § 703(a) take provision should read:

> [I]t shall be unlawful at any time, by any means or in any manner, *excepting therein incidental harm or death to birds occurring from birds striking structures, including rotating or stationary*

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208. *See* Brunner, *supra* note 204, at 25 (suggesting that a statutory redefinition of take to exclude incidental commercial activities represents a fair and balanced approach to industrial take).

209. Lilley & Firestone, *supra* note 14, at 1210 (arguing for congressional amendment authorizing incidental take).

210. *See* HOLLAND & HART, *supra* note 48, at 2–3 (listing the benefits of an incidental take permit program including certainty, lack of lawsuits, habitat restoration, and conservation).

211. *See id*. at 37 (reasoning the incidental take permit program must be easy to implement to ease the workload on the FWS); Lurman, *supra* note 203, at 58 (discussing the difficulties posed to the FWS by implementing and managing a federal incidental take permit).

212. Brunner, *supra* note 204, at 29; *see* 16 U.S.C. § 703(a) (2011) (providing the MBTA's misdemeanor statutory trigger); 50 C.F.R. § 10.12 (2013) (defining FWS interpretation of take); *see generally supra* notes 127–182 and accompanying text (explaining the circuit split in detail).

213. *See* McKinsey, *supra* note 105, at 91; Brunner, *supra* note 204, at 29–31 (criticizing the narrow approach only allowing incidental take from wind farms).

> *wind energy turbine blades reasonably designed to minimize such collisions*, to pursue, hunt, take, capture, kill . . . any migratory bird . . . .[214]

Notably, the definition appears to only exempt wind farms and potential collisions with *structures*.[215] The scope of liability then turns on the definition of "structure."[216] Narrowly construed, "structure" might not cover oil reserve pits,[217] logging and logging permits,[218] electrocutions from transmission lines,[219] or bird deaths resulting from nesting in heater-treaters.[220] Certainly, the term "structure" will not cover deaths from pesticide applications,[221] or, at the logical extreme, cars and cats.[222] Therefore, while this proposed redefinition may encourage wind energy production, it does little to protect other industrial operators from MBTA liability.[223] Furthermore, this sort of narrow redefinition ineffectively addresses the larger ambiguities in the MBTA.

A broader redefinition of take—one that excludes liability for incidental bird killings more generally—would likely cure the MBTA's ambiguity, but it would also eviscerate the MBTA's protections against

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214. McKinsey, *supra* note 105, at 91 (emphasis added), *quoted in* Brunner, *supra* note 204, at 29–30.

215. McKinsey, *supra* note 105, at 91 ("Logically, Congress should either withdraw its support of renewable energy values or complete its promotion and clear the left over environmental policy of the MBTA."); Brunner, *supra* note 204, at 30 ("McKinsey's language successfully relieves wind-turbine operators (that meet certain design requirements) from MBTA liability.").

216. Brunner, *supra* note 204, at 30.

217. *See* United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012) (holding that wastewater pits were outside the MBTA's reach).

218. *See* Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) (limiting the definition of take to apply only to hunting and poaching, or activities directed at protected birds).

219. *See* United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999) (convicting a rural electricity cooperative for protected bird electrocutions).

220. *See* United States v. Apollo Energies, Inc., 611 F.3d 679, 682 (10th Cir. 2010) (upholding MBTA convictions for bird deaths in oil field equipment).

221. *See* United States v. Rollins, 706 F. Supp. 742, 745 (D. Idaho 1989) (overturning a magistrate judge's conviction for application of pesticides).

222. *See generally Brigham Oil & Gas*, 840 F. Supp. 2d at 1212–13 (highlighting the staggering number of bird deaths caused by cars and cats and how the government chooses not to prosecute those cases); U.S. FISH & WILDLIFE SERV., *supra* note 89, at 2 (outlining the various causes of protected bird deaths, many of which are everyday activities like driving cars and owning pets).

223. Brunner, *supra* note 204, at 30 ("But McKinsey's language leaves open the likeliness that other industry-types incidentally killing migratory birds, such as oil companies and pesticides users . . . , would remain subject to the MBTA: oil pits and crop fields could incidentally lead to bird deaths, and these items do not expressly meet the characterization of a 'structure.'").

incidental activities that severely impact protected bird populations. For example, one commentator, in rejecting a narrow definition, suggests broader language:

> It shall be unlawful at any time, by any means or in any manner, *excepting therein incidental harm or death to birds*
> (1) occurring from birds striking structures *reasonably* designed to minimize such collisions, or
> (2) resulting from commercial or industrial operations unrelated to hunting, gaming, or poaching practices if the commercial or industrial operations are *reasonably* designed to minimize such harm or death to birds.[224]

This redefinition would explicitly exempt wind farms and industrial operators from liability for incidental deaths.[225] However, the interjection of a "reasonable" standard may complicate future prosecution and subject the MBTA to further ambiguity.[226] For example, the number of bird fatalities caused by wind farms is often staggering.[227] Yet, from the perspective of proponents of wind development, the number of turbine collisions may seem reasonable,[228] while a lower number of bird deaths caused by oil reserve pits may not seem reasonable.[229] In either case, the environmental community would likely lobby strongly against such a broad redefinition of MBTA take and the FWS may oppose the amendment as well.[230] Furthermore, this sort of redefinition would likely jetti-

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224. Brunner, *supra* note 204, at 31 (emphasis added).

225. *Id.* ("This language would capture, for example, oil pits that are designed in a way that can reasonably prevent bird deaths.").

226. *See generally* McKinsey, *supra* note 105, at 90 ("In essence then, the policy question is one of how much energy a bird is worth, and whether it is worth more renewable energy than non-renewable energy.").

227. *See, e.g.*, Hadassah M. Reimer & Sandra A. Snodgrass, *Tortoises, Bats, and Birds, Oh My: Protected-Species Implication for Renewable Energy Projects*, 46 IDAHO L. REV. 545, 563 (2010) (discussing bird mortality from direct collisions with wind farms using 2001 numbers based upon 15,000 operating wind turbines in the United States); Cappiello, *supra* note 223 (referencing a 2013 study placing the number of birds killed annually by wind farms at 573,000).

228. *See* McKinsey, *supra* note 105, at 90 ("The wind energy industry would emphasize that a bird killed for a megawatt-hour of renewable, non-foreign wind energy is much more acceptable than a bird killed for a unit of foreign[-]purchased or non-renewable energy.").

229. *See id.*

230. *Id.* at 90 ("Resolution to this conflict is perhaps stymied by the failure of an important ally to renewable energy, the environmental protection collective, to consider softening any environmental law."); *see* HOLLAND & HART, *supra* note 48, at 37 (discussing the FWS's belief that any regulatory take permit must "provide conservation benefits to, and protect, migratory birds").

son most of the MBTA's current protections that go beyond direct and intentional killings to conserve an already strained U.S. bird population.[231] Although the broad redefinition might provide certainty to industry, the diminished protections for migratory birds makes such a congressional amendment unlikely.

2. Congressionally Mandated Incidental Take Permit Program

Alternately, Congress could amend the MBTA and require the FWS to implement an incidental take permit program. This would have certain advantages over a program developed by the FWS under its own authority, as discussed below. Explicit congressional authorization of an incidental take program would prevent administrative obstacles that would arise in FWS rulemaking, including the foundational question of whether the FWS even has the power to authorize an incidental take program, without congressional approval, according to its delegation of authority under the MBTA.[232] Congress may also be able to authorize an incidental permit program more quickly than if the FWS were to create the program through its cumbersome rulemaking process.[233] Finally, congressional authorization would remove ambiguity and potential litigation over the validity of an incidental take program developed by the FWS.[234] Although congressional action presents the cleanest route to authorizing incidental industrial take, Congress has not taken action to implement such a broad program in the MBTA's 96-year history.[235]

Congress has, however, acted to implement a narrower incidental take permit under the MBTA for military training exercises that may serve as a model for a more expansive program.[236] In 2002, the U.S. Dis-

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231. HOLLAND & HART, *supra* note 48, at 2 (referencing studies showing "widespread declines in bird populations in the United States").

232. Pursuant to 16 U.S.C. § 704(a) (2011), the Secretary of the Interior, and not merely FWS, has authority to permit take or killing of migratory birds in certain circumstances so long as the take is not inconsistent with the treaties. *But see* HOLLAND & HART, *supra* note 48, at 1 (commenting on the vulnerability of agencies violating the MBTA to citizen suits under the APA).

233. McKinsey, *supra* note 105, at 91.

234. *Id.*; HOLLAND & HART, *supra* note 48, at 27 (mentioning how no judicial challenges arose after the FWS implemented an incidental take program for military training after congressional authorization).

235. *See* Brunner, *supra* note 204, at 28 ("However, since 1918, the MBTA has only been altered to reflect more bilateral treaties that the United States entered, or to update monetary fine amounts." (footnote omitted)).

236. *See generally* 16 U.S.C. § 703 (2011) (statutory note) (directing the Secretary of the Interior to develop regulations allowing incidental take for military training exercises); HOLLAND & HART, *supra* note 48, at 30 (arguing that the military incidental take provision provides a base framework upon which a broader program may be based on).

trict Court for the District of Columbia held that live-fire military training exercises that killed protected birds violated the MBTA.[237] Finding this limitation on military preparedness unacceptable, Congress responded by authorizing the FWS, in conjunction with the military, to implement incidental take permits for military readiness activities.[238] The rule placed certain limitations upon the military's activities, including requiring mitigation, minimization, and monitoring of migratory bird take during the training exercises.[239] The FWS may issue permits authorizing incidental take to the extent the agency believes the take conforms with the MBTA and the original treaties' terms.[240]

The military incidental take program could be used as a model for a broader incidental take program. The congressional conference report explicitly states that the military training incidental take permit amendment comports with the United States' treaty obligations underlying the MBTA,[241] and the FWS has acknowledged this.[242] Although these affirmations arise in the context of military training exercises because Congress and FWS believe that incidental take comports with the underlying trea-

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237. Ctr. For Biological Diversity v. Pirie (*Pirie I*), 191 F. Supp. 2d 161, 163–64 (D.D.C. 2002) (finding the military in violation of the MBTA), *superseded by statute*, 16 U.S.C. § 703 (2011) (statutory note), *as recognized in* Ctr. For Biological Diversity v. England, No. 00cv03044, 2003 WL 179848, at *1 (D.C. Cir. Jan. 23, 2003).; Ctr. For Biological Diversity v. Pirie (*Pirie II*), 201 F. Supp. 2d 113, 123 (D.D.C. 2002) (granting the injunction after a separate remedies hearing and briefing to *Pirie I*); Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931-01, 8933 (Feb. 28, 2007) (codified at 50 C.F.R. § 21.15 (2007)); *see also* HOLLAND & HART, *supra* note 48, at 24 ("The need for this permit program arose, in part, from a 2002 federal district court ruling that held that military training exercises of the Department of the Navy that resulted in incidental take of migratory birds without a permit violated the MBTA.").

238. Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931-01, 8933 (Feb. 28, 2007) (codified at 50 C.F.R. § 21.15).

239. *Id.*

240. *Id.*; HOLLAND & HART, *supra* note 48, at 25 ("As an initial matter, the Service recognized broad authority under the MBTA to promulgate regulations allowing for the take of migratory birds when compatible with the terms of the migratory bird treaties.").

241. H.R. Rep. No. 107-772, at 624 (2002) (Conf. Rep.); *see also* HOLLAND & HART, *supra* note 48, at 25 (quoting H.R. Rep. No. 107-722, at 625 (2002) (Conf. Rep.)); News Release, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service Proposes Rule to Allow Defense Department To Take Migratory Birds (May 28, 2004), *available at* http://www.fws.gov/mountain-prairie/pressrel/dc%20408.htm ("The 2003 Defense Authorization Act conference report notes specifically that Congress found the authorization for incidental take to be consistent with the underlying treaty obligations of the United States.").

242. Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931-01, 8932 (Feb. 28, 2007) (codified at 50 C.F.R. § 21.15) ("In passing the Authorization Act, Congress itself determined that allowing incidental take of migratory birds as a result of military readiness activities is consistent with the MBTA and the treaties."), *quoted in* HOLLAND & HART, *supra* note 48, at 25.

ties, the groundwork has been laid for subsequent amendments to MBTA incidental take.[243] Congress's finding that the killing of protected birds by military exercises is permissible under the MBTA shows Congress does not believe incidental take will breach the underlying treaties, which would subject the treaties to cancellation by the partner countries.[244] Therefore, the military training incidental take legislation and subsequent rulemaking has laid the groundwork for a broader revision to the MBTA allowing for general incidental take.[245] However, given the current political deadlock in Congress, congressional action may be unlikely and, even if attempted, untimely.[246]

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243. HOLLAND & HART, *supra* note 48, at 30 ("[A]uthorization of incidental take of migratory birds as a result of military readiness activities lays the foundation for a permit program for non-federal entities because it shows that Congress and the Service believe that certain incidental take is consistent with the United States' treaty obligations.").

244. *Compare* CONG. RESEARCH SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 193 (2001), *available at* http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf ("[A] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty in whole or in part."), *with* HOLLAND & HART, *supra* note 48, at 13 ("The Senate has made clear that the United States is to interpret the treaty in accordance with the common understanding of the treaty shared by the President and the Senate *at the time the Senate gave its advice and consent*." (emphasis added)). This limitation upon the interpretation of treaties arguably supports the courts that have found the MBTA to only apply to hunting and like activities that were the focus in 1918. *See supra* notes 128–148 and accompanying text (discussing the Eighth and Ninth Circuits' limitation upon the MBTA's applicability based in part on the scope of the treaties only reaching hunting and poaching activities); *supra* notes 183–202 and accompanying text (outlining the current district court trend away from allowing MBTA prosecutions for commercial activities). However, even if the MBTA's original intent only covered hunting, the implementing language undoubtedly covers any "take" of migratory birds. *See* Brunner, *supra* note 204, at 38–39 ("The plain language of the MBTA provides, however, that everyday commercial and industrial operators subject themselves to prosecution."); *id.* at 39 ("In effect, the legislative history suggests that the MBTA was designed to preserve migratory bird population in lieu of hunting practices, not everything under the sun."). Therefore, the disconnect in interpretation requires legislative action to clarify the implementing statute one way or the other. *Id.* at 40.

245. HOLLAND & HART, *supra* note 48, at 30.

246. *Contra* McKinsey, *supra* note 105, at 91 (arguing congressional modification of the MBTA would take less time than the regulatory rule making process). Given the recent partisan divide in Congress, any immediate action is unlikely. *See generally*, *e.g.*, *The New Congress: Historical Relationship Between Congress and the Presidency and Important Issues Facing the 113th Congress and the Obama Administration*, U.S. DEP'T OF STATE (Mar. 21, 2013), http://fpc.state.gov/206369.htm ("I'd like to talk about why we have deadlock. You know fully well that we have deadlock in the United States over the budget, over gun control, over a variety of issues facing the 113th Congress . . . .").

B. FWS Development of an Incidental Take Permit

If Congress declines to amend the MBTA, the FWS may be able to implement an incidental take permit program on its own. Although the regulatory process may take longer than congressional action, there is authority for the FWS to implement a general incidental take permit.[247]

One industry group, the Interstate Natural Gas Association of America (INGAA), issued a report arguing for the FWS to implement a "permit-by-rule" incidental take program[248] without waiting for explicit congressional authorization.[249] First, the INGAA study emphasizes that the MBTA confers authority on the Secretary of the Interior, through FWS, to "determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow . . . taking . . . of any [protected] bird . . . , and to adopt suitable regulations permitting and governing the same."[250] Accordingly, the MBTA alone, without explicit congressional approval, allows FWS to regulate take of protected birds.[251] In fact, the FWS has already implemented narrow permits for direct and incidental take,[252] though none of the existing permits cover industrial incidental take.[253]

As the INGAA study points out, the second consideration for a viable, FWS-implemented incidental take permit program is compatibility with the MBTA's underlying treaties.[254] Under those treaties, the incidental take permit program would contribute to the conservation of migratory birds and their habitat.[255] Three of the four treaties[256] allow take for "other specific purposes" consistent with the conservation of mi-

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247. *See generally* HOLLAND & HART, *supra* note 48, at 46 ("Based on the analysis in this report, nothing in the four migratory bird treaties, the MBTA, its regulations, Executive Order 13186, the MOUs, or Service guidance should preclude development or implementation of an incidental take permit program for migratory birds, so long as the permit program is developed consistent with the four migratory bird treaties.").

248. Snodgrass, *supra* note 109, at 10A-27 to -28; *see generally* HOLLAND & HART, *supra* note 48 (containing the INGAA report); *see generally* INGAA, http://www.ingaa.org/ (last visited May 16, 2013) ("Representing Interstate Natural Gas Pipeline Companies").

249. *See generally* HOLLAND & HART, *supra* note 48, at 5–27 (outlining authority for a FWS-developed incidental take permit program); *see* Snodgrass, *supra* note 109, at 10A-27.

250. 16 U.S.C. § 704(a) (2011); *see* HOLLAND & HART, *supra* note 48, at 6 (quoting 16 U.S.C. § 704(a)).

251. HOLLAND & HART, *supra* note 48, at 6.

252. 50 C.F.R. pt. 21 (2013); *see* HOLLAND & HART, *supra* note 48, at 6–8 (outlining the existing incidental take permits).

253. *See* HOLLAND & HART, *supra* note 48, at 30.

254. *Id.* at 6; Snodgrass, *supra* note 109, at 10A-27.

255. *See* HOLLAND & HART, *supra* note 48, at 28–29 (discussing the four treaties and their general provisions that the take of migratory birds must be consistent with conservation principles).

gratory birds.[257] But these treaties limit those other purposes to "scientific, educational, [and] propagative" purposes.[258] The plain meaning of "other specific purposes" presents a potentially unlimited set of circumstances allowing take,[259] so long as the take comports with the treaties' conservation principles. An incidental take permit program for industrial activities hardly comports with science, education, or species propagation. Thus, a court could find industrial incidental take falls outside the "other specific purposes" for which the FWS may allow take.

Despite the potential for litigation, the FWS could build an incidental take program modeled on Congress's military exercises exception. In evaluating the narrower military training incidental take program, the FWS found that the program was compatible with the treaties.[260] The INGAA study argues the military training permit program paves the way for a broader incidental take program.[261] However, the study qualifies this conclusion: "Whether the Service's regulations implementing the program for incidental take by the Armed Forces are consis-

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256. Notably, only the Mexico Treaty mentions the possibility of industrial take. Mexico Treaty, *supra* note 65, at art. I. The Mexico Treaty contains no explicit limitation upon take permits except for the establishment of take-free "refugee zones" and a prohibition on taking insectivorous birds. *Id.* at art. II. The Mexico Treaty allows the United States and Mexico to implement laws authorizing take of protected birds "rationally for purposes of sport, food, *commerce and industry*." *Id.* at art. I; *see* HOLLAND & HART, *supra* note 48, at 12 (highlighting the lack of specific limitations in the Mexico Treaty).

257. 1995 Protocol, *supra* note 54, at *4 ("[T]he 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*.") (emphasis added); Russia Treaty, *supra* note 79, at art. II(1)(a) (allowing take for "scientific, educational, propagative, or *other specific purposes not inconsistent with the principles of this Convention*.") (emphasis added); Japan Treaty, *supra* note 71, at art. III(1)(a) (permitting take for "scientific, educational, propagative or *other specific purposes not inconsistent with the objectives of this Convention*.") (emphasis added); *see* HOLLAND & HART, *supra* note 48, at 9–13 (outlining the provisions of the treaties).

258. 1995 Protocol, *supra* note 54, at *4; Russia Treaty, *supra* note 79, at art. II(1)(a); Japan Treaty, *supra* note 71, at art. III(1)(a).

259. *See generally* Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991) ("By itself, the phrase 'all other law' indicates no limitation."). See Medellin v. Texas, 552 U.S. 491, 506 (2008) ("[T]he interpretation of a treaty, like the interpretation of a statute, begins with its text.").

260. Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931-01, 8946 (Feb. 28, 2007) (to be codified at 50 C.F.R. pt. 21) ("Thus, the authorization in this rule . . . provides for compliance with the requirements of the treaties."); HOLLAND & HART, *supra* note 48, at 26 (discussing the FWS's interpretation of the treaties).

261. HOLLAND & HART, *supra* note 48, at 27 ("As demonstrated by the Service's development and implementation of a permit program for take incidental to military readiness activities, the Service believes it has general authority to develop permit programs for incidental take of migratory birds.").

tent with the Canada, Japan, Mexico, and Russia treaties *was not tested in court* and can no longer be challenged, but the Service believes them to be consistent."[262] If the FWS acts alone to undertake an incidental take program, the agency exposes itself to a challenge that it acted outside its congressionally granted authority, issued regulations inconsistent with the conservation principles of the underlying treaties, and interpreted the phrase "other specific purposes" too expansively. Therefore, although the FWS may be able to implement an incidental take program without congressional authorization,[263] the best option remains a congressional mandate for an incidental take program.

CONCLUSION

The MBTA arose out of the gun smoke of hunters and poachers who annihilated abundant migratory bird species across the United States.[264] Despite Congress's clear concern with hunting and poaching when it enacted the MBTA, the statute contains no explicit limitation on the type of conduct it covers.[265] The seemingly expansive MBTA language, and FWS enforcement of it, has now ensnared industrial activities originally outside the scope of the MBTA.[266] The FWS's expansion of liability under the MBTA to include incidental industrial take created a significant circuit split: one side applying strict liability to industrial activities limited only by proximate cause,[267] and the other refusing to apply the MBTA to indirect and unintentional take outside the original scope of hunting and poaching.[268] The divergent approaches created an atmosphere of confusion for the FWS, industry, and lower courts—confusion that requires congressional or FWS attention.

Without congressional intervention, the MBTA will continue to be stuck with varying interpretations from court to court, preventing the effective and uniform conservation of migratory birds. Congress can

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262. *Id.* (citing 16 U.S.C. § 703 (limiting judicial review of FWS regulations under the MBTA to 120 days after publication)) (emphasis added).

263. *Id.* at 33.

264. *See supra* notes 14–35 and accompanying text (outlining the destruction of migratory birds caused by hunting and poaching at the turn of the twentieth century).

265. *See supra* notes 85–87 and accompanying text (discussing the original aim of the MBTA and how the language actually turned out).

266. *See supra* notes 99–109 and accompanying text (describing the difficulty courts have had in interpreting the MBTA's scope in regard to incidental take caused by industrial activities).

267. *See supra* notes 149–182 and accompanying text (outlining the strict liability approach to the MBTA).

268. *See supra* notes 127–148 and accompanying text (highlighting the narrow interpretation of MBTA take).

eliminate the confusion by amending the MBTA. A congressional mandate authorizing an incidental take permit program would provide the clarity that the FWS, industry, and courts require.