



## The Migratory Bird Treaty Act Explained

The [Migratory Bird Treaty Act](#) of 1918 (MBTA) is a U.S. federal law intended to protect migratory birds in the United States. The [MBTA](#) makes it illegal for anyone to “take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to Federal regulations.” Currently, there are [over 1,000](#) species protected by the MBTA, including birds that migrate between the United States and Canada, Mexico, Japan and Russia.

### History of the MBTA

The MBTA was the culmination of two previous acts set in place to protect wildlife and migratory birds in particular. In 1900, Congress passed [the Lacey Act](#), which banned the illegal hunting and trafficking of wildlife in the United States. The Lacey Act later gave way to [the Weeks-Mclean Act](#) in 1913, a law that made shooting migratory birds illegal and gave the Secretary of Agriculture the authority to regulate hunting seasons nationally. These two acts contributed to the formation of the MBTA in 1918, which has remained relatively intact for almost one hundred years. The Endangered Species Act, passed in 1973, further broadened the scope of the MBTA, specifically in regards to the “take” and “kill” clauses of the Act, which made “harming” and “harassing” ESA-protected birds illegal. In 1982, amendments to the Endangered Species Act also made incidental takes – unintentional harm or death -- of ESA-protected species illegal, even if a lawful activity was taking place. Recently, a court split regarding the MBTA has brought into question the scope and applicability of the law regarding incidental takings.

The following highlights key activities related to the MBTA, including efforts to reform the Act in recent years.

- **1918** - The MBTA is passed by Congress and signed into law.
- **1940** - The Bald Eagle Protection Act is passed to protect and increase the population of the national bird.
- **1973** - The MBTA is amended to protect more native birds, including non-migratory birds.
- **2002** - The U.S. Navy is sued by Earthjustice for not complying with the MBTA and for taking birds during training readiness exercises. Congress responds by passing H.R. 4546, which amends the MBTA and allows for the Department of Defense to make unintentional takings during these types of exercise.
- **2014** - The Department of Justice orders a wind farm operator in Wyoming to pay \$1 million in fines for incidental takings of Golden Eagles.
- **May 2015** - FWS announces a [Notice of Intent](#) to prepare a programmatic environmental impact statement (PEIS) to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds under the Migratory Bird Treaty Act.
- **July 2015** - IPAA and API [submit comments](#) on the Service’s Notice of Intent, expressing concern with the approaches outlined in the notice.

- **January 2017** - Department of the Interior's [Office of the Solicitor](#) issues a memorandum arguing incidental take is prohibited under the MBTA.
- **February 2017** - Interim Office of the Solicitor [withdraws the opinion](#).

### **IPAA's Stance and the Split on Incidental Take**

IPAA supports the conservation of migratory birds, but is concerned the approach described in the Fish and Wildlife Service's [May 2015 proposal](#) and a [January 2017](#) opinion from the Office of the Solicitor singles out the energy industry over a more comprehensive assessment of the threats that avian species face. The [recently withdrawn](#) memorandum from the Solicitor's Office argues that incidental take is prohibited under the MBTA. As [Perkins Coie LLP](#) describes, "the MBTA imposes strict liability, so the government need not show that a defendant intentionally took birds to prove a violation. The opinion applied "to a 'direct' take in which there is a close causal connection between an action and the take of migratory birds."

IPAA, however, contends that Fish and Wildlife does not have the appropriate legal standing to impose regulations on incidental take as the MBTA prohibits only direct human action against migratory birds. For instance, hunting and poaching these birds is illegal under the MBTA, but indirect or "passive" dangers to migratory birds, such as power lines or oil and gas facilities, are otherwise legally operated facilities that sometimes come into incidental conflict with bird movements. A passive take theory would criminalize everyday activities and place undue harm on economic development.

In addition to IPAA's existing comments around the MBTA, a [current court split](#) around the theory of unintentional take continues to pose challenges to how industry is treated under the law. In September 2015, the Fifth Circuit rejected the United States' theory of unintentional take under the 1918 Migratory Bird Treaty Act, reversing a Citgo Petroleum Corporation's conviction related to proposed violations of the Clean Air Act and the Migratory Bird Treaty Act at a facility in Corpus Christi.

According to the Fifth Circuit panel, the scope of takings under the MBTA only prohibits intentional acts that directly kill migratory birds. The decision splits the circuit courts on the issue of enforcement of MBTA in the oil and natural gas sector, placing the Fifth Circuit in agreement with the Eighth and Ninth Circuits, both of which have narrowed the definition of "takes" to hunting and poaching activities and have stated that "taking" is limited to deliberate, intentional acts to migratory birds. Meanwhile, the Second and Tenth Circuits "have read the MBTA broadly" and "hold that because the MBTA imposes strict liability, it must forbid acts that accidentally or indirectly kill birds." This court split and views from [the Office of the Solicitor](#) will continue to impact the oil and gas industry into 2017.

### **Modern Use of the MBTA**

The legislative intent of the MBTA was to prohibit the illegal hunting of birds, yet recent expansion of the rule has brought into question its role and applicability. A [passive take](#) approach would criminalize everyday activities such as the 599 million window strikes and 200 million car strikes that impact migratory birds each year. In fact, one of largest threats to migratory birds is feral cats, with the American Birds Conservancy estimating up to [3 billion birds](#) killed by cats each year.

Instead, the MBTA should follow a commonsense approach that ensures the safety of avian species without the unnecessary criminalization of passive takes. There are many efforts underway to maintain the protection of migratory birds. In the oil and gas industry, for instance, avian protection often includes extensive planning, training, facility inspections, and engineering controls. Common engineering controls include covering or enclosing liquid containment systems and installing fencing, anti-perching devices, and anti-collision devices to limit the exposure of birds from potential operational hazards on site. These steps can ensure the protection of migratory birds while supporting businesses and the economy.