

# Migratory Bird Treaty Act: U.S. Fish and Wildlife Service Proposal Addressing Definition of "Take"



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The United States Fish and Wildlife Service ("Service") announced the proposal of a rule that would define a key issue regarding the scope of the Migratory Bird Treaty Act ("MBTA").

The proposed rule is focused on the MBTA terms "take" and "kill" and whether or not they extend to conduct resulting in the unintentional (i.e., incidental) injury or death of protected birds.

The MBTA makes it illegal 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 Federal permit.

The protected species are listed in the Code of Federal Regulations found at 50 CFR 10.13. The statutory authority and responsibility for enforcement is placed on the Service.

The MBTA is a key federal law in protecting migratory birds. Other statutes protecting certain bird species are the Endangered Species Act and Bald and Golden Eagle Protection Act.

The Service states in announcing the MBTA proposal that its purpose is to provide regulatory certainty to the public, industries, states, tribes and other stakeholders. Such clarification is stated to include a conclusion that the scope of the MBTA only extends to conduct intentionally injuring birds. Consequently, it proposes that conduct resulting in the unintentional (incidental) injury or death of migratory birds is not prohibited under the MBTA.

The proposed rule codifies a 2017 Department of the Interior Solicitor's Office Opinion which addressed these issues and determined that the MBTA only applies to the intentional take of migratory birds and that the take of birds resulting from an activity is not prohibited when the underlying purpose of that activity is not to take birds. See Opinion M-37050.

Organizations such as the Center for Biological Diversity have challenged the previously referenced Opinion in federal court. One can assume that this and other organizations will challenge the Service's proposed rule when it is finalized.

A copy of the proposed rule can be downloaded [here](#).