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The Migratory Bird Treaty Act's Limited Wingspan and Alternatives to the Statute Protecting the Ecosystem without Crippling Communication Tower Developmen

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COMMENT

THE MIGRATORY BIRD TREATY ACT'S LIMITED WINGSPAN AND ALTERNATIVES TO THE STATUTE: PROTECTING THE ECOSYSTEM WITHOUT CRIPPLING COMMUNICATION TOWER DEVELOPMENT

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INTRODUCTION

Perfect cellular phone reception and mega-channel digital television are welcome technological advances.¹ These conveniences, however, exact a price. The bird deaths caused by communication towers necessary for this technology are too high a price to pay, according to environmentalists.² The Federal Communications Commission ("FCC") has the authority to decide whether the greater public interest lies in environmental protection or new communications products.³

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1. See Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56 (1996).

2. See THOMAS J. MICELI & KATHLEEN SEGERSON, COMPENSATION FOR REGULATORY TAKINGS: AN ECONOMIC ANALYSIS WITH APPLICATIONS 198 (1996) (reflecting a cost benefit approach, the authors note that sometimes the benefits of preservation do not exceed the costs of preservation, therefore weight should be given to the magnitude of the loss rather than whether viable uses of the land exist).

3. Communications Act of 1934, 47 U.S.C. § 310 (1994) (requiring the FCC to determine that a construction permit will serve the

Environmentalist concerns stem from the Telecommunications Act of 1996,⁴ which paved the way for FCC regulation of rapid tower construction.⁵ Towers range from two hundred feet to over one thousand feet high, with the two hundred foot towers providing emergency services and law enforcement tracking capabilities.⁶ The towers over 1,000 feet high, built for digital television (“DTV”), are of particular concern to environmentalists.⁷ The higher the tower, the greater the risk to migrating birds.⁸

“public interest, convenience, and necessity”). See generally National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C)(ii), (iii) (1994) (requiring that Environmental Impact Statements be drafted in accordance with the National Environmental Policy Act (“NEPA”) in order to delineate “adverse environmental effects” of agency action and “alternatives to the proposed action”).

4. Telecommunications Act of 1996, 47 U.S.C. § 332 (1994 & Supp. III 1997).

5. *Id.* (explaining that the Act’s purpose is “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”). See also Preemption of State and Local Zoning and Land Use Restriction on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, 62 Fed. Reg. 46,241 (proposed Sept. 2, 1997) (to be codified at 47 C.F.R. pt. 1) [hereinafter FCC Proposed Rule] (proposing a “rapid roll-out” of digital television services to facilitate a swift shift from analog to digital technologies and encouraging television stations to promptly return their analog spectrum—a portion or frequency of the electromagnetic spectrum each station currently sends its broadcasting signals over).

6. SHELDON MOSS, DIR. OF GOV’T RELATIONS FOR PERSONAL COMMUNICATIONS INDUSTRY ASS’N, REMARKS ON THE WIRELESS INDUSTRY PERSPECTIVE AT THE 117TH MEETING OF THE AM. ORNITHOLOGIST’S UNION AT CORNELL UNIV. (Aug. 11, 1999), available at <http://migratorybirds.fws.gov/issues/towers/moss.html> (last visited Apr. 5, 2001) [hereinafter Moss Speech].

7. See ALBERT B. MANVILLE, REMARKS FROM THE CONFERENCE OF THE 117TH MEETING OF THE AM. ORNITHOLOGIST’S UNION AT CORNELL UNIV. (Aug. 11, 1999), available at <http://migratorybirds.fws.gov/issues/towers/intro.html> (last visited Apr. 5, 2001) [hereinafter MANVILLE SPEECH]; see also Bill Evans, *USA Towerkill Summary* (asserting that there is wide agreement among ornithologists that the taller a communication tower reaches the more deadly it is for night-migrating songbirds), available at <http://towerkill.com/issues/consum.html> (last visited Apr. 5, 2001) [hereinafter Towerkill.com].

8. Towerkill.com, *supra* note 7.

Varying weather conditions can cause towers to obstruct birds' migratory paths.⁹ On cloudy nights, birds migrate at lower altitudes than on clear nights when they fly at higher altitudes and avoid most towers.¹⁰ The source of bird mortality is a combination of lights and guy wires, which support the towers.¹¹ Scientists believe birds are attracted to the flickering lights atop the towers, which the Federal Aviation Administration ("FAA") requires in areas of navigable airspace.¹² The birds circle the towers in a state of distress and die of exhaustion or from collisions with the towers and supporting guy wires.¹³ An example of these bird killings occurred during a January 1998 snowstorm in western Kansas in which, a flock of five to ten

9. HAWK MOUNTAIN SANCTUARY ASS'N, PROPOSED COMMUNICATION TOWER IN PORT CLINTON, PA. NEAR HAWK MOUNTAIN SANCTUARY, PETITION FOR ENVTL. ASSESSMENT, PREPARATION, PREPARATION OF ENVTL. IMPACT STATEMENT, AND IMPOSITION OF MITIGATION MEASURES 8 (1999) [hereinafter HAWK MT. PETITION] (quoting researchers who say "nocturnal bird kills are virtually certain wherever an obstacle extends into the air space where birds are flying in migration").

10. Ornithological Council, *Deadly Spires in the Night: The Impact of Communications Towers on Migratory Birds*, BIRD ISSUE BRIEF, Oct. 1999, at 1 (describing the bird migration altitudes on clear and cloudy nights), available at <http://www.nmnh.si.edu/BIRDNET/OC/OCinfo/OCBvln8.html> (last visited Apr. 5, 2001) [hereinafter BIRD ISSUE BRIEF].

11. See HAWK MT. PETITION, *supra* note 9, at 9 (noting that towers with red lights and guy wires seem to cause bird deaths more than towers with white lights and no wires). "This combination of lights and guy wires is the source of bird mortality at such towers." *Id.* See also BIRD ISSUE BRIEF, *supra* note 10, at 1.

12. See BIRD ISSUE BRIEF, *supra* note 10, at 1 (explaining that the flashing lights on towers to warn away aircraft attract birds especially in periods of cloudy, foggy weather); see also 47 C.F.R. §§ 17.7, 17.21 (1999) (describing the antenna structures which require FAA notification and lighting, including those structures over 200 feet tall).

13. See *supra* text accompanying note 12; see also U.S. FISH AND WILDLIFE SERV., AVIAN MORTALITY AT COMMUNICATIONS TOWERS (noting that birds are attracted to tower lights for lack of stronger navigational cues and mill about the towers in a state of disorientation), available at http://www.fws.gov/r9mbmo/aou_brochure.html (last visited Apr. 5, 2001). See also Ronald P. Larkin & Barbara A. Frase, *Circular Paths of Birds Flying Near a Broadcasting Tower in Cloud*, J. COMP. PSYCHOL., 1998, at 90 (noting that the birds repeatedly turn back to the towers' lights and can eventually succumb to fatigue or crash into the tower or guy wires).

thousand Lapland Longspurs, a species of songbird, crashed into a four hundred and twenty foot tower and its surrounding structures.¹⁴ Another species of songbird, the endangered Kirtland's Warbler, dodges over 1,500 towers in its migratory path through North Carolina.¹⁵

The problem of bird deaths caused by large constructions is nothing new.¹⁶ Bird deaths by human obstructions date back to lighthouses and continued into the windpower age where birds ensnared themselves in wind turbines.¹⁷ Accounts of avian deaths at radio and television towers were recorded beginning in the 1940's.¹⁸ Today, the electricity industry continues to deal with bird deaths caused when power lines electrocute unwary birds.¹⁹ It is believed

14. See HAWK MT. PETITION, *supra* note 9, at 7 (chronicling that, while birds circled the one tower with red blinking lights, "some birds were impaled by wheat stubble, suggesting they were so disorientated that they couldn't tell which way was up and flew into the ground at full force"); see also MANVILLE SPEECH, *supra* note 7 (stating that the deaths in Kansas occurred at 3 towers, including one 420-foot tall television tower with a light).

15. Scott Weidensaul, *Tower Lights Can Fatally Attract Migratory Songbirds*, PHILA. INQUIRER, July 27, 1998, at D3.

16. See Charles Kemper, *A Study of Bird Mortality at a West Central Wisconsin TV Tower from 1957-1995*, THE PASSENGER PIGEON, 1996, at 219, 220 (1996) (citing reports of bird deaths at the Washington Monument and the Empire State Building, among many other large buildings).

17. MANVILLE SPEECH, *supra* note 7 (providing that a partnership with the wind industry led to the formation of the Avian Subcommittee of the National Wind Coordinating Committee to respond to bird collisions with wind turbines). Accounts of bird deaths at lighthouses, often anecdotal, date back to 1880. *Id.*

18. U.S. FISH AND WILDLIFE SERVICE, AVIAN MORTALITY AT COMMUNICATIONS TOWERS (Sept. 1, 1999) (noting that documentation of bird kills began in North America in the late 1940's when towers were being constructed for broadcasts of the emerging television medium), available at http://www.fws.gov/r9mbmo/aou_brochure.html (last visited Apr. 5, 2001).

19. See, e.g. *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d. 1070 (D. Colo. 1999) (holding an electric company liable for inadequate wire insulation which resulted in the electrocution of 17 federally protected birds).

that federal legislation designed to increase the telecommunications infrastructure has led to increased bird kills.²⁰

An oft-cited 1979 study found that approximately 1.25 million songbirds were killed every year in collisions with towers in North America.²¹ Today, environmentalists estimate that two to five million bird deaths occur yearly at 75,000 towers above two hundred feet in the United States, although exact figures are unavailable.²² This figure represents a .04-.1% loss out of the five billion birds that migrate across North America.²³ If 100,000 new towers are built in the next decade as expected, bird deaths could reach 4.7-11.7 million, or .09%-.2% of all migrating birds in 2010.²⁴ Taken by itself, the problem appears to be minor, however, continued tower proliferation could likely result in the killing of endangered or threatened migratory birds, which is prohibited by statute.²⁵

Knowledge of the problem is attributable to a few studies and reports prepared by local residents living near towers who report the

20. See BIRD ISSUE BRIEF, *supra* note 10, at 1 (noting concerns of increased bird collisions from the rapid construction of telecommunications towers for cellular phones and digital television use).

21. R.C. BANKS, U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERV. SPECIAL SCIENTIFIC REPORT-WILDLIFE, HUMAN RELATED MORTALITY OF BIRDS IN THE UNITED STATES, REPORT NO. 215, 1-15 (1979). See also Towerkill.com, *supra* note 7.

22. Weidensaul, *supra* note 15 (citing ornithologists who estimate there are two to five million bird deaths yearly at towers above 200 feet in the eastern United States alone); see also Towerkill.com, *supra* note 7 (approximating that annual bird kills might reach over 5 million deaths a year, and stating "we just don't know").

23. Weidensaul, *supra* note 15 (quoting generally accepted estimates that nearly five billion birds migrate across North America yearly, of which tower deaths equate to only a small percentage of the total migrating bird population).

24. See ORNITHOLOGICAL COUNCIL TOWERKILL RES., COMMUNICATIONS TOWERS AND AVIAN MORTALITY (April, 1998) (citing the communications industry's expectation of 100,000 new towers to accommodate DTV and expansion in communications markets). These figures were calculated assuming the rate of bird death remains the same, along with the bird population. *Id.* See also Weidensaul, *supra* note 15 (stating that from 1970 to 1992, 1,000 new towers were built yearly, while today the FAA says 5000 a year are being constructed).

25. MANVILLE SPEECH, *supra* note 7 (determining that, out of 836 species of migratory birds, 90 are listed as endangered species and 15 are listed as threatened, while over 200 are in steep decline).

deaths, thereby verifying the magnitude of environmentalists' concern.²⁶ The problem will increase as additional towers are built to meet the FCC rule requiring all broadcasters to digitize within six years.²⁷ The FCC has proposed rapid DTV tower construction.²⁸ The result of the proposal, however, would eliminate state and local zoning laws and environmental review, leaving environmental monitoring to the FCC.²⁹ The FCC has not adopted the 1997 proposal, but the time-line for digitization remains.³⁰ To avoid possible catastrophic effects of the proliferation of towers on birds and the ecosystem, the government must engage in effective environmental planning.³¹

Environmentalists currently plan to minimize bird deaths at towers through consultation, rather than litigation, with the relevant parties.³² Legal options, however, do exist. Conservation groups could initiate suit on the grounds that an FCC rule facilitating tower construction illegally "takes" protected birds.³³ In wildlife cases, a "taking" is not a Constitutional violation, but is defined by statute.³⁴

26. See Robert Braile, *Proliferation of Towers Poses Threat to Birds*, BOSTON GLOBE, May 23, 1999, at 3 (noting that the Audubon Society fields calls from upset residents who wake up to "find scores of dead birds at the foot of towers, lighthouses, and other tall structures").

27. See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809 (1997) [hereinafter FCC Fifth Report] (requiring all broadcasters digitize on a timeline and a deadline for the year 2010).

28. See FCC Proposed Rule, *supra* note 5 (proposing that broadcast companies be given power to preempt local and state zoning ordinances and environmental assessments for DTV tower construction).

29. *Id.*

30. FCC Fifth Report, *supra* note 27; see also FCC Proposed Rule, *supra* note 5.

31. KENNETH M. MACKENTHUN & JACOB I. BREGMAN, ENVIRONMENTAL REGULATIONS 265 (1992) (discussing mitigating the impacts of environmental threats, best achieved through advanced planning).

32. See, e.g., MANVILLE SPEECH, *supra* note 7 (hoping that a partnership can be developed with the communications industry to encourage voluntarily compliance with environmentalists' recommendations for curbing bird deaths at towers).

33. See generally ROBERT MELTZ ET AL., *The Takings Issue, in WILDLIFE* (1999).

34. See *id.* at 393 (explaining that "take" in the ESA context is not related to the Constitutional 5th Amendment doctrine).

Every threatened and endangered bird is protected by the Endangered Species Act (“ESA”)³⁵ and all migratory birds are protected by the Migratory Bird Treaty Act (“MBTA”).³⁶ In the strictest sense, a tower could be found to “take” birds from the sky when the base is littered with a dead flock at daybreak.³⁷ Environmental groups can challenge the FCC via agency review under the National Environmental Policy Act (“NEPA”).³⁸ Cases then can be tried in court, where appellants can appeal NEPA decisions and assert ESA and MBTA protections.³⁹

This Comment discusses whether the government has committed a “taking” of migratory and endangered birds by regulations that allow tower construction in mass numbers, resulting in millions of bird deaths. First, this Comment examines how an environmental group disputes a federal agency proposal under NEPA and the MBTA. Second, it traces MBTA case law and discusses who can bring an MBTA claim under the procedural requirements of (1) standing; (2) jurisdiction; and (3) real party in interest. Third, it analyzes the meaning of “take” in the MBTA, as compared to its meaning in the ESA. Fourth, it explores the problems incurred when the involved parties have discretion to limit the scope of the MBTA. Finally, this Comment recognizes that the FCC-regulated towers “take” birds. The question remains whether or not such takings are permitted. Regardless, this Comment suggests that a balance must be struck between environmental protections and communication tower construction. To strike such a balance, this Comment proposes levying a bird tax on the communications industry. This tax would mitigate the liability of federal agencies and the communications industry, provide compensation for any takings, and generate revenues for research and development of bird-friendly towers.

35. Endangered Species Act, 16 U.S.C. §§ 1531-44 (1994).

36. Migratory Bird Treaty Act, 16 U.S.C. §§ 701-12 (1994).

37. See Braille, *supra* note 26 (commenting that birds technically can not be killed under any circumstance, including by towers).

38. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-35 (1994).

39. 42 U.S.C. §§ 4321-35 (1994); 16 U.S.C. §§ 1531-44 (1994); 16 U.S.C. §§ 701-12 (1994).

I. FEDERAL AGENCY RESPONSE TO ENVIRONMENTAL CHALLENGES

A. National Environmental Protection Act

The FCC is required to examine environmental issues under the National Environmental Protection Act.⁴⁰ NEPA requires the FCC to perform Environmental Assessments ("EA") and issue Public Notices to publicize environmental issues that arise from agency regulations.⁴¹ Every federal agency is required to incorporate NEPA into its agency rules.⁴²

1. FCC's Environmental Rules

The FCC is an independent federal agency, responsible for regulating wire and radio communications,⁴³ and licensing communication towers.⁴⁴ When issues involving wildlife arise, the FCC regulations must conform to NEPA, which is codified in the agency's rules.⁴⁵

In reviewing applications, the FCC environmental rules require license applicants to ascertain whether their proposal to build a tower may have a "significant effect" on the environment.⁴⁶ If the "significant effect" falls into one of eight specific circumstances, the applicant must submit an EA describing the potential environmental problems.⁴⁷ These circumstances do not specifically address harm to migratory birds or their flight paths, although environmentalists have asked the FCC to address this problem.⁴⁸ The list, however, does

40. 42 U.S.C. §§ 4321-35 (1994).

41. *Id.*

42. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-35 (1994).

43. Communications Act of 1934, 47 U.S.C. § 151 (1994 & Supp. 2000).

44. Construction Marking and Lighting of Antenna Structures, 47 C.F.R. § 17.1 (1999).

45. 47 C.F.R. §§ 1.1301-1.1319 (1999); *see also* 47 C.F.R. § 17.4(c) (1999); *cf.* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-35 (1994).

46. 47 C.F.R. § 1.1307 (1999).

47. *Id.* § 1.1307(a)(1)-(8).

48. *Id.* *See also* ROBERT WILLIS, REMARKS ON THE ROLE OF THE FISH AND WILDLIFE SERV. AT THE 117TH MEETING OF THE AM.

include harm to threatened and endangered species and their “critical habitats,”⁴⁹ but the paths of non-endangered migratory birds do not fall into this category.⁵⁰ Therefore, a tower license applicant is not always required to draft an EA.⁵¹ Construction affecting threatened and endangered birds requires an EA, but none is required when the construction affects migratory birds and their paths.⁵² Under NEPA’s safeguard provision, non-enumerated situations sometimes can be subject to environmental review, if interested persons petition the FCC.⁵³

If the EA suggests credible environmental concerns, the FCC may request public comment.⁵⁴ On review, the FCC determines whether there is a “finding of no significant impact,” to permit issuance of a

ORNITHOLOGISTS’ UNION AT CORNELL UNIV. (Aug. 11, 1999) (noting that migratory birds are “categorically excluded” from EA requirements which is a point of contention between the FWS and FCC), *available at* <http://migratorybirds.fws.gov/issues/towers/willis.html> (last visited Apr. 5, 2001); *see also* HAWK MT. PETITION, *supra* note 9, at 2 (asking the FCC to add migratory birds to the list of environmental concerns from which an EA would be required, thus making EA’s a licensing requirement for tower construction affecting migratory birds).

49. FCC Procedures Implementing the National Environmental Policy Act, 47 C.F.R. § 1.1307(a)(3) (1999) (stating that an EA is required when the proposal will affect listed threatened or endangered species or designated critical habitat); *see also* Bill Evans, *The Current Situation* (Sept. 16, 2000) (noting that section 1.1307 might be interpreted as potentially applicable to the deaths of threatened and endangered migratory birds at communications towers), *at* <http://towerkill.com/issues/legis.html> (last visited Apr. 5, 2001).

50. 16 U.S.C. § 1533(a)(3) (1994) (requiring protection of an endangered or threatened species’ habitat under the Endangered Species Act). *Cf.* FCC Procedures Implementing the National Environmental Policy Act, *supra* note 49 (requiring an EA be drafted when the proposal “may affect listed threatened or endangered species or designated critical habitats” or proposed critical habitats).

51. *See* Procedures Implementing the National Environmental Policy Act, *supra* note 49.

52. *See supra* text accompanying note 48.

53. 47 C.F.R. § 1.1307(c) (1999) (noting that an interested person can submit a petition to the FCC if an otherwise categorically excluded action will have a significant effect on the environment thereby requiring an EA).

54. *Id.* § 1.1308(b) (providing that assistance in FCC determination of a significant environmental impact may come from outside interested parties and agencies with relevant expertise).

tower construction license, or conversely a "finding of impact," whereby the licensee must eliminate the negative environmental impact or the FCC will file an Environmental Impact Statement ("EIS").⁵⁵

2. Appeals Process: When Environmental Groups and the FCC Disagree

Under NEPA, when the FCC should have prepared an EIS or the preparation of the EIS was inadequate, an environmental group can dispute agency action in an appellate court.⁵⁶ NEPA violations can be brought by anyone with standing⁵⁷ and a jurisdictional basis.⁵⁸

55. *Id.* § 1.1308(c) (allowing an applicant the opportunity to amend its application to "reduce, minimize, or eliminate" the environmental problems and if not eliminated the FCC will prepare an EIS).

56. NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION 103 (1997) (referring to the NEPA as the "grandfather of all environmental statutes" particularly because it can be used to stop a project based on claims that an EIS was inadequate or not prepared at all).

57. *See, e.g.,* *Sierra Club v. Morton*, 405 U.S. 727, 731, 738-40 (1972) (establishing the groundwork for environmental groups to demonstrate standing through their members who have suffered an injury by the controversy). A case brought in the public interest must allege facts that members of the party are adversely affected. The Court required a party have a "sufficient stake" in the controversy rather than a "mere interest." Injuries other than economic harm can be sufficient. *Id.* *See also* *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 898 (1990) (backpedaling slightly in a five to four decision with a lengthy dissent, cautioning environmental groups to identify a "final agency action" as the source of the alleged injuries that falls in the zone of interest protected by the named statute).

58. *See, e.g.,* *Jones v. Gordon* 792 F.2d 821, 824 (9th Cir. 1986) (permitting a jurisdictional basis for NEPA review through the APA and federal question jurisdiction). Whether this back-door means a jurisdictional basis through the APA can extend to other statutes also lacking statutory authority for a jurisdictional basis, differs among courts and from case to case. *See* Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 937 (1993). *See also* *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301-02 (8th Cir. 1989) (holding that the APA can not provide an independent basis for review of the MBTA when the statute contains no private right of action).

Courts give deference to agency decisions⁵⁹ and are unlikely to disagree if an agency finds no significant environmental impact from an EIS.⁶⁰ Courts hesitate to weigh additional evidence of particular environmental threats overlooked by the agency.⁶¹ Consequently, an agency, rather than the court, can quash an environmental issue.⁶²

Environmental groups can appeal a NEPA decision in the appellate court, or in a district court by asserting Endangered Species Act or Migratory Bird Treaty Act violations simultaneously, when grounds exist for the additional claims.⁶³ Allegations of harm to threatened or endangered species or migratory birds in an EA can trigger concerns of such violations.⁶⁴ Despite the incorporation of other statutory protections within NEPA, agencies must comply with the ESA and MBTA independently.⁶⁵ ESA or MBTA alleged

59. See *Friends of Endangered Species v. Jantzen*, 596 F. Supp. 518, 522 (N.D. Cal. 1984) (arguing that if an agency has a rational basis for its decision the court can not overturn the agency's findings); see also French, *supra* note 58, at 959 (explaining that automatic judicial deference to agency decisions is unwarranted because all federal agencies are required to implement NEPA and few have the environmental expertise to properly judge environmental threats).

60. French, *supra* note 58 (noting that agencies have little incentive to adequately weigh EISs because the purpose of an EIS is to expose the risks of an agency's proposal).

61. *Id.* at 950-53 (examining how circuits differ over whether to allow extra-record evidence into proceedings in NEPA cases where only the agency decision's reasonableness is actually under review, not the facts from which the decision was derived).

62. 5 U.S.C. § 701 (1994). *Cf. supra* text accompanying note 58.

63. *Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1338 n.4 (D. Minn. 1988) (accepting MBTA and ESA based claims for review, but dismissing NEPA claim); see also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (noting that the case began as an unsuccessful NEPA challenge and advanced to a successful ESA suit following discovery of an endangered species in the river, which was controversially being dammed).

64. See *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989) (requiring that an agency acting under a statute must simultaneously be in compliance with the ESA); see also *Conservation Law Found. v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979) (noting that the ESA acts "of its own force").

65. See *supra* text accompanying note 64; see also Karen Anderson, *Running a-Fowl of Towers*, BROADCASTING & CABLE, Aug. 30, 1999, at 48 (quoting statement that broadcasters should be briefed about the bird death problem before it spawns legal or regulatory action).

violations do not require agency review and litigants can proceed straight to district court.⁶⁶

3. The Present Dispute

In 1997, the FCC issued a rule requiring broadcasters in the United States to digitize by the year 2006.⁶⁷ It then put forth a Notice of Proposed Rule Making advancing a rapid roll-out plan for immediate construction of one thousand new television towers through federal preemption of state and local regulatory powers.⁶⁸ Three and a half years later, the FCC has not adopted the preemption proposal. Environmentalists have challenged its legality.⁶⁹

The National Audubon Society ("Audubon") filed a petition at the FCC opposing the proposed rule.⁷⁰ Audubon argued that the rule "significantly affects" the environment and requested an EIS pursuant to NEPA.⁷¹ The FCC addressed Audubon's concern in a 1998 Public Notice and asked for further public comment.⁷² It did not honor Audubon's request and has since abandoned this proposed rule.⁷³

Environmentalists have asked the FCC to draft an across-the-board EIS to assess the negative effect towers have on all migratory birds and appraise viable prevention options.⁷⁴ They have suggested

66. 16 U.S.C. § 1540(g) (1994) (noting that "the district courts shall have jurisdiction" over claims of ESA violations).

67. FCC Fifth Report, *supra* note 27 (setting the year 2006 as the target date for all broadcasters to digitize). *See also* FCC Proposed Rule, *supra* note 5.

68. FCC Proposed Rule, *supra* note 5.

69. *See* FED. COMMUNICATIONS COMM'N, PUBLIC NOTICE, COMMENTS INVITED ON ENVTL. IMPACT OF POSSIBLE PREEMPTION OF LOCAL LAND USE AND ZONING LAWS REGARDING THE SITING AND CONSTRUCTION OF DIGITAL TELEVISION TOWERS (Mar. 6, 1998) [hereinafter AUDUBON PETITION].

70. *Id.*

71. *Id.*

72. *Id.*

73. *See* Edward Warner, *Towers Threaten Birds*, WIRELESS WK., Aug. 17, 1998 (citing an FWS opinion that suggests the FCC will not approve Audubon's request to require an across-the-board EIS as a prerequisite for all future tower construction).

74. *Id.*; *see also* BIRD ISSUE BRIEF, *supra* note 10, at 3 (suggesting that the FCC require tower owners to permit research at their towers so as

that the FCC require avian mortality research at towers as a condition precedent to granting a license.⁷⁵ They have also urged the FCC to require tower companies to co-locate their antennas together on communal towers or existing buildings.⁷⁶

Avian mortality is rarely an issue in decisions to license towers.⁷⁷ There is little statistical data of bird mortality collected over an extended period of time or scientifically proven prevention devices with which towers can be equipped.⁷⁸ Evidence of bird death at towers is incomplete because most of them are unmonitored.⁷⁹ Scientists are unsure if different lighting techniques can curb the deaths.⁸⁰ In the meantime, tower construction is responding to market demand for better reception and increased service.⁸¹

to assist in collecting enough data to draft a nationwide EIS and assess bird death prevention methods).

75. See, e.g., BIRD ISSUE BRIEF, *supra* note 10, at 3 (noting that requiring research would permit researchers to collect dead birds under towers in large numbers across the country and enable researchers to test prevention methods); see also County of Leelanau Michigan, 94-282 (Federal Communications Commission Nov. 4, 1994) (conditioning a radio tower license on use of special lighting and continual monitoring of the site for migratory bird and endangered species casualties).

76. BIRD ISSUE BRIEF, *supra* note 10, at 3 (commenting how tower companies do not always share facilities, and therefore more towers are built than are actually necessary to fill a region's needs). See also 47 C.F.R. § 1.1306 n.1 (1999) (encouraging, but not requiring, the environmentally conscious use of preexisting buildings and towers to co-locate).

77. *Id.* at 2 (noting that possible bird deaths are rarely considered and the FCC issues tower construction permits on a case-by-case basis).

78. *Id.* (commenting that there is "almost no research on the mechanism by which birds are attracted to lighted towers"). "The cumulative impact of occasional kills at many towers needs to be determined." *Id.*

79. See HAWK MT. PETITION, *supra* note 9, at 8 (suggesting that the number of bird deaths at towers is understated because a majority of towers are not monitored for bird carcasses).

80. See ROBERT C. BEASON, REMARKS ON THE BIRD BRAIN AT THE 117TH MEETING OF THE AM. ORNITHOLOGIST'S UNION AT CORNELL UNIV. (Aug. 11, 1999) (noting that there is no conclusive evidence of whether any lighting technique could be bird-friendly), available at <http://migratorybirds.fws.gov/issues/towers/beason.html> (last visited Apr. 5, 2001).

81. See Informal Objections by KNOW (AM) Minneapolis, MN, to the Construction Permit Extension Request, FCC File No. BP-

Environmentalists understand that halting tower construction is as unrealistic as capping technological advance.⁸² They hope to work with the communications industry to minimize avian mortality.⁸³ However, if these efforts should fall short, bird protection is statutorily mandated and can be pursued in court.⁸⁴

B. The Migratory Bird Treaty Act

The Migratory Bird Treaty Act specifically protects migratory birds.⁸⁵ It is a codified version of multiple treaties with Canada, Great Britain, Japan, and the former Soviet Union.⁸⁶ Drafted in 1918, it is one of the oldest conservation statutes.⁸⁷

Unlike the Endangered Species Act, the MBTA's procedural dictates are unclear.⁸⁸ There are no provisions to establish (1)

900405AN (Sept. 1, 1994) (objecting to a tower construction permit and discussing an AM radio station's business decision to disregard potential environmental impacts); *see also* HOLLY BERLAND, REMARKS ON THE FCC PERSPECTIVE AT THE 117TH MEETING OF THE AM. ORNITHOLOGISTS' UNION (Aug. 11, 1999) (noting that the FCC yearly processes 70,000 license applications for new and co-located radio facilities), *available at* <http://migratorybirds.fws.gov/issues/towers/berland.html> (last visited Apr. 5, 2001).

82. *See* Weidensaul, *supra* note 15, at D3.

83. *See supra* text accompanying note 32.

84. 16 U.S.C. §§ 701-12 (1994); *see also* 16 U.S.C. §§ 1531-44 (1994).

85. 16 U.S.C. § 701 (1994) (stating that the purpose of the Act is to "aid in the restoration of [game and wild] birds in those parts of the United States . . . where the same have become scarce or extinct"); 16 U.S.C. § 703 (1994) (noting the treaties incorporated in the MBTA are for the "protection of migratory birds").

86. 16 U.S.C. § 703 (1994) (listing the Act as beginning on August 16, 1916 with a treaty between the United States and Britain and ending with the last treaty incorporated in 1976 signed between the United States and the Union of Soviet Socialist Republics).

87. SUSAN J. BUCK, UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW 120, 125 (1996) (noting that the original act was drafted in 1918 to implement a treaty made with Great Britain on behalf of Canada to federally protect migratory birds as part of President Roosevelt's conservation movement).

88. *See, e.g.,* Defenders of Wildlife v. EPA, 882 F.2d 1294 (8th Cir. 1989) (concluding that the court had no jurisdiction to consider an MBTA claim and reversing a lower court ruling); *see also* Sierra Club v.

standing; (2) jurisdictional basis; or (3) who can be sued. This creates many procedural hurdles for environmental groups before they can argue the substantive law at issue.⁸⁹ There is no provision for citizen suits and the federal government is not mentioned in the MBTA's list of parties subject to suit.⁹⁰ Consequently, the MBTA might not apply to federal agencies.⁹¹ To date, the Supreme Court has not addressed the issue.

Consequently, challenges to standing, jurisdiction, and who can be sued often confront the court, instead of substantive law issues.⁹² If substantive law issues are implicated, they are rarely addressed in the holding.⁹³ In considering MBTA section 707(a), the majority of circuit courts of appeal have held it to be a strict liability clause.⁹⁴ As such, it is not necessary to establish intent to take or kill.⁹⁵

Martin, 110 F.3d 1551 (11th Cir. 1997) (holding on procedural grounds that the case lacked a jurisdictional basis to bring a MBTA suit).

89. *See, e.g.*, *Defenders of Wildlife*, 882 F.2d at 1302 (reversing a lower court on procedural grounds that the MBTA precludes private rights of action; concluding that "the district court had no jurisdiction to consider these claims").

90. 16 U.S.C. § 707(a) (1994) (providing that "any person, association, partnership, or corporation" can be sued for alleged violations of the MBTA).

91. *See* Martin, 110 F.3d at 1556 (holding that the MBTA by its plain language does not include the government as a party able to be sued); *cf. Humane Soc'y v. Glickman*, No. 98-1510, 1990 U.S. Dist. LEXIS 19759, at *14-15 (D.D.C. 1999) (citing Supreme Court dictum that appears to acknowledge that the MBTA includes federal agencies).

92. *See supra* text accompanying notes 89-91.

93. *See* *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (discussing the plain reading and interpretation of "take" and "kill" in the MBTA, yet finding on procedural grounds that plaintiffs lacked a jurisdictional basis).

94. *See* *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1073 (D. Colo. 1999) (explaining that intent to cause the deaths of seventeen protected birds is irrelevant to prosecuting a case under the MBTA and finding that the majority of circuit courts of appeal have held the MBTA to be a strict liability statute); *see also* *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997) (holding in accord with the majority of appellate courts that the MBTA is a strict liability statute).

95. *See supra* text accompanying note 94.

1. Standing

Unlike the ESA, the MBTA does not provide for private rights of action.⁹⁶ Litigants must prove standing.⁹⁷ For an environmental group to do so, it must have the authority to act as a “trustee” for a species, or it must represent the group’s members.⁹⁸ Environmental groups can assert standing through their members, but must also identify their injury and imminent harm.⁹⁹

Read literally as a criminal statute, only the Secretary of the Interior’s Fish and Wildlife Service (“FWS”) has jurisdiction over migratory birds and standing to bring suit.¹⁰⁰ Only the FWS, through the Department of Justice, can prosecute criminal charges unless a statute empowers other parties with standing.¹⁰¹ To remedy this situation environmental groups have sought to establish standing to sue via the Administrative Procedure Act (“APA”).¹⁰²

2. Jurisdictional Basis

For a party to assert standing, the litigant must have a jurisdictional basis for review.¹⁰³ Environmental groups have asserted independent sources of jurisdiction in MBTA cases by combining the APA and federal question jurisdiction.¹⁰⁴ The Ninth Circuit has allowed this jurisdictional basis in NEPA cases.¹⁰⁵

96. *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989).

97. *See supra* text accompanying note 57.

98. *See supra* text accompanying note 57.

99. *See supra* text accompanying note 57.

100. *See* ROBERT WILLIS, REMARKS ON THE ROLE OF THE FISH AND WILDLIFE SERV. AT THE 117TH MEETING OF THE AM. ORNITHOLOGISTS’ UNION AT CORNELL UNIV. (Aug. 11, 1999) (noting that the FWS has legal jurisdiction over migratory birds and the environmental expertise that other agencies need to guide agencies such as the FCC through the NEPA process), *available at* <http://migratorybirds.fws.gov/issues/towers/willis.html> (last visited Apr. 5, 2001).

101. *See supra* text accompanying note 57.

102. *See supra* text accompanying note 58.

103. *See supra* text accompanying note 56-57.

104. 28 U.S.C. § 1331 (1994); *compare* *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1302 (8th Cir. 1989), *with* *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 114 (8th Cir. 1997). These Eighth Circuit cases generally support the proposition that the APA cannot

In *Defenders of Wildlife v. EPA (Defenders II)*,¹⁰⁶ the Eighth Circuit held that the APA “does not provide an independent source of jurisdiction or create a cause of action when none previously existed.”¹⁰⁷ The court in *Defenders II* agreed with the defendants’ assertion that the MBTA could only be enforced by agency discretion, not judicial review.¹⁰⁸ The defendants argued that the MBTA is primarily a law enforcement and wildlife management statute, enforced by government actions through EIS and NEPA requirements, rather than by private parties.¹⁰⁹

The Supreme Court articulated the circumstances under which agency review is permissible under the APA in *Heckler v. Chaney*.¹¹⁰ A final agency action can be reviewed when there is no other judicial remedy, except where (1) statutes preclude judicial review, or (2) agency action is committed to agency review.¹¹¹ The Supreme Court has not ruled on whether environmental groups can bring suit under the APA in MBTA cases.¹¹²

3. Can the Federal Government be Sued?

The Supreme Court has not decided whether the MBTA applies to the federal government.¹¹³ According to the statute itself, the MBTA

provide review for the MBTA.; *cf.* *Alaska Fish & Wildlife Fed’n and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987).

105. *Jones v. Gordon*, 792 F.2d 821, 824 (9th Cir. 1986) (providing that NEPA, APA, and federal question jurisdiction can combine to form an independent basis for jurisdiction for a NEPA claim, as in this case where the court thought an EIS should have been prepared when Sea World sought permission to capture killer whales and the Marine Mammals Protection Act could not provide the requisite jurisdictional basis).

106. 882 F.2d 1294 (8th Cir. 1989).

107. *Id.* at 1302 (quoting *Billops v. Dep’t of the Air Force*, 725 F.2d 1160, 1163 (8th Cir. 1984)).

108. *Id.*

109. *Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1349 (D. Minn. 1988).

110. 470 U.S. 821 (1985).

111. *Id.* at 828.

112. *See supra* text accompanying notes 104-11.

113. *See, e.g., Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992) (suggesting in dictum only that the federal government might be vulnerable to an MBTA suit).

applies to “any person, association, partnership, or corporation.”¹¹⁴ The federal government is not mentioned.¹¹⁵ Recent Eighth and Eleventh Circuit decisions have held that federal agencies cannot be prosecuted under the MBTA based on the statute’s plain meaning.¹¹⁶

The *Defenders of Wildlife v. EPA (Defenders I)*¹¹⁷ district court raised this procedural question and determined that a federal agency should not have absolute discretion over whether it can take a protected species.¹¹⁸ On appeal, the Eighth Circuit made a preliminary finding that the environmental group had no basis for jurisdiction under the APA, never reaching the issue of whether the MBTA applies to federal agencies.¹¹⁹ The court’s final decision never answered this question directly, but did bind a federal agency to the MBTA’s prohibitions.¹²⁰ The Eleventh Circuit in *Sierra Club v. Martin*¹²¹ explained that the Forest Service, as a federal agency, could not violate the MBTA and could therefore not be enjoined under the APA.¹²²

Supreme Court dicta cited recently in a district court opinion, however, suggests that the MBTA *might* apply to the federal government. The District Court for the District of Columbia cited the Supreme Court case *Robertson v. Seattle Audubon Society*¹²³ in which the Court seemed to acknowledge that the MBTA applied to

114. 16 U.S.C. § 707(a) (2000).

115. Compare Endangered Species Act, 16 U.S.C. §1532(a)(13) (2001) (defining the term “person” to include the federal government), with Migratory Bird Treaty Act, 16 U.S.C. § 707 (2000) (including no such definition).

116. *Sierra Club v. Martin*, 110 F.3d 1551, 1556 (11th Cir. 1997) (finding no jurisdictional basis under the APA to permit suit and no imbued federal compliance requirement mandated by the MBTA); *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 114 (8th Cir. 1997) (holding that the government’s duty comes from the treaty, not the MBTA).

117. 688 F. Supp. 1334 (D. Minn. 1988).

118. *Id.* at 1349 (explaining that a federal agency should not retain absolute discretion over a taking of a protected species through an enforcement action).

119. *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1302 (8th Cir. 1989).

120. *Id.*

121. 110 F.3d 1551 (11th Cir. 1997).

122. *Id.* at 1556.

123. 503 U.S. 429 (1992).

the federal government, stating in dicta that “the [federal] agencies could satisfy their MBTA obligations in two ways”¹²⁴ Though the Supreme Court’s comment is not binding, it provides insight into the highest court’s presumption of how the MBTA can be interpreted.¹²⁵

The district court cited *Robertson* dicta in *Humane Society of the U.S. v. Glickman*¹²⁶ which recently held that the MBTA could apply to federal agencies in a case where the Secretary of Agriculture authorized the killing of migratory geese in an effort to control population.¹²⁷ The court stated that: (1) circuit courts had not addressed the Supreme Court’s *Robertson* dictum, (2) the government itself had long assumed it was bound by the MBTA, and (3) as a signer of the treaties that created the MBTA, the government is obligated to conserve migratory birds.¹²⁸ The government, in defense, has argued that it cannot violate the MBTA because of its signatory status, which mandates that the government adhere to treaties, unlike the statute which protects birds from everyday citizens.¹²⁹

124. *Id.* at 437, *quoted in* *Humane Soc’y v. Glickman*, No. 98-1510, 1999 U.S. Dist. LEXIS 19759 at *9, *19. (D.D.C. 1999) (commenting, with surprise, that *Newton* and *Martin* had not cited *Robertson* in either opinion).

125. *See* *Glickman*, 1999 U.S. Dist. LEXIS 19759 at *7, *9-11 (noting that a court must first check Supreme Court cases for a resolution or suggested answer to the issue in analyzing whether the MBTA applies to federal agencies).

126. *Id.*

127. *Id.* at *2, *19 (explaining that local homeowners’ association, businesses, and others could request the government round-up Canadian geese from their property, later to be killed by euthanasia).

128. *Id.* at *16, *17, *19, *21.

129. *See* *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 114 (8th Cir. 1997) (citing part of the original bird treaty signed with Britain to explain that the government’s duty arises from the treaty itself while the statute simply extends the duty to private persons); *see also* *Glickman*, 1999 U.S. Dist. LEXIS 19759, at *17 (interpreting an extension of the government’s obligations arising from the treaty to the legislation codifying those obligations).

II. JUDICIAL REVIEW OF ENVIRONMENTAL ISSUES UNDER THE MBTA: GAUGING THE MBTA'S SCOPE AND THE ESA'S INFLUENCE

Once an environmental group meets the procedural requirements, the substantive issue is whether accelerated tower construction, regulated by the FCC, amounts to a taking under the MBTA.¹³⁰ Under the MBTA it is illegal to "pursue, hunt, *take*, capture, kill, *attempt to take*, capture, or kill" any migratory bird or "any part, nest, or egg of any such bird . . . by any means or in any manner."¹³¹ A wildlife taking is further defined as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect" any migratory bird.¹³²

A. Methods of Defining 'Take'

The debate focuses primarily on the meaning of "take" and "kill."¹³³ The term "take" within the MBTA is not defined, but rather is listed among a chain of action verbs including the term "kill."¹³⁴ In ordinary usage, the term "kill" connotes liability simply from a resultant death without regard to the method of death.¹³⁵ Under the MBTA, a "take" and "kill" are both prohibited.¹³⁶

130. See Braille, *supra* note 26 (noting that the MBTA technically prohibits bird killings under any circumstance if the perpetrator does not have a permit to "take," thus including a taking by towers).

131. Migratory Bird Treaty Act, 16 U.S.C. § 703 (1994) (emphasis added).

132. 50 C.F.R. § 10.12 (1999) (reading the word "take" under the MBTA to be further defined by the Secretary of the Interior [or FWS] definition). The Moon Lake court deemed the Department of the Interior's definition of "take" a reasonable interpretation of the term in the MBTA, when the term is not defined in the statute. See *United States v. Moon Lake Elec. Ass'n* 45 F. Supp. 2d 1070, 1073 (D. Colo. 1999).

133. See Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 826-27 (1998) (noting that the debate focuses on the meaning of "take" and "kill" wildlife).

134. *Id.* at 828. See also 16 U.S.C. § 703 (1994).

135. BLACK'S LAW DICTIONARY 782 (5th ed. 1979) (defining "kill" as "to deprive of life"); cf. BLACK'S LAW DICTIONARY 1303 (5th ed. 1979) (defining "take" as "to lay hold of; to gain or receive into possession; to seize").

136. 16 U.S.C. § 703 (1994) (asserting that such actions shall be unlawful "at any time, by any means or in any manner").

1. Defining 'Take' By Regulations Pursuant to the MBTA

Some courts have further defined "take" using the Fish and Wildlife Service ("FWS") definition codified separately from the MBTA.¹³⁷ The FWS definition of "take," requires an additional act, such as pursuit, hunting, or an attempt to do so.¹³⁸ These terms suggest that a "take" first requires containment of an animal, which thereby causes its death.¹³⁹ A more imminent kill is described in the verbs "wound, trap, capture, shoot, and collect," which denote a controlled state just before a kill.¹⁴⁰ In all, "kill" is the only term of finality within the meaning of "take." If "take" simply meant "kill," the seven other words in the FWS definition describing methods of a kill would be meaningless.¹⁴¹ The definition of "take," therefore, suggests that the statute includes more than a mere kill.¹⁴² It places importance on the method of the kill, contrary to a literal reading of the MBTA.¹⁴³

137. 50 C.F.R. § 10.12 (1999). *See also* Moon Lake, 45 F. Supp. 2d at 1073 (incorporating the FWS "take" definition as a reasonable agency interpretation of the MBTA and noting that the defending Association did not challenge the definition as arbitrary, capricious, or manifestly contrary to the MBTA).

138. 50 C.F.R. § 10.12 (1999) (defining "take" as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect").

139. *See id.*

140. *Id.*

141. *See Means, supra* note 133, at 829 (asserting by analogy that words must be construed together; noting that "take" and "kill" are interpreted by the words surrounding them).

142. *See* Babbit v. Sweet Home Chapter of Cmty. for Greater Or., 515 U.S. 687, 708, 717 (1995) (Scalia, J., dissenting) (affirming that the ESA definition of "harm" is reasonable). "To take when applied to wild animals means to reduce those animals by killing or capturing to human control." *Id.* The Supreme Court noted that the term "take" is read in federal legislation and treaties, such as the MBTA, in the same manner. *See id.*; *but cf.* United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999) (finding strict liability in reading the FWS "take" definition with the MBTA, by determining that the term "killing" overrides the terms "pursuing, hunting, capturing, shooting, wounding, trapping, collecting, possessing, selling, bartering," and concluding that the "MBTA does not seem overly concerned with how captivity, injury, or death occurs").

143. *See supra* text accompanying notes 141, 142.

2. Interpreting 'Take' Without MBTA Guidance

The MBTA itself does not define the term "take,"¹⁴⁴ though it does prohibit a "take" and a "kill" in the same sentence.¹⁴⁵ Even though a "take" has less of a sense of finality than does "kill," for the purposes of the statute "take" and "kill" can be interpreted as equally susceptible to liability, since both are prohibited.¹⁴⁶ Taken literally, anyone that "kills" a migratory bird could be held liable.¹⁴⁷ Further supporting the breadth of the statute, "take" and "kill" are prohibited "by any means and any manner."¹⁴⁸ The method of death takes a backseat to the resultant kill, which exacts liability.¹⁴⁹

3. Explaining 'Take' By Comparing the MBTA with the ESA

Litigants have drawn from the ESA's definition of "take" to suggest another reading of the MBTA that would infer the term "harm" in the MBTA's definition.¹⁵⁰ No court, however, has accepted this premise.¹⁵¹ The MBTA on its face lacks the term "harm" in its chain of verbs defining a "take."¹⁵² Unlike the Endangered Species Act, Congress has not broadened the MBTA's definition. Defined within the ESA, the term "take" means "to harass, harm, . . . wound, kill, trap, capture, . . . or attempt to engage in any such conduct" that affects a listed species on either private or

144. 16 U.S.C. §§ 703-712 (1994); *see also* *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997) (stating that the MBTA "should be read as a whole" to derive plain meaning).

145. 16 U.S.C. § 703 (1994).

146. *Id.*

147. *Id.* § 703, § 707 (declaring it is unlawful for "any person, association, partnership, or corporation" to take or kill a migratory bird "at any time, by any means or in any manner").

148. *Id.*

149. *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999) (noting that the method of kill is not the MBTA's foremost concern). The majority of circuit courts read section 703(a) of the MBTA to be a strict liability crime. *See id.* at 1073.

150. *See Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302-03 (9th Cir. 1992) (stating that the two defendant Audubon societies argue that timber sales destroy, or harm, the owl's habitat).

151. *See, e.g., id.* (noting that harm is not included in the MBTA and should not be read in because the ESA and MBTA govern different conduct).

152. 50 C.F.R. § 10.12 (1999).

public land.¹⁵³ The ESA further defines the term “harm” to extend liability for “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”¹⁵⁴

The oft-cited Eleventh Circuit *Seattle Audubon Soc’y v. Evans*¹⁵⁵ decision asserted that the differences in the MBTA and ESA definitions of “take” are “distinct and purposeful.”¹⁵⁶ Congress could have changed the MBTA when it amended the MBTA only one year after Congress enacted the ESA and included the broadened definition of “take,” but it did not.¹⁵⁷ In *Seattle*, the court refused to issue an injunction to prevent logging during owls’ nesting season, asserting that habitat destruction causes ‘harm’ to the owls under the ESA but does not ‘take’ them within the meaning of the MBTA.¹⁵⁸ The court reasoned that habitat modification indirectly harms birds and the MBTA required an actual killing.¹⁵⁹

Both the ESA and the MBTA provide a permit process to allow an incidental “take” of a migratory bird when the Secretary of the Interior approves.¹⁶⁰ The MBTA simply requires authorization¹⁶¹ while the ESA requires prior written approval to “take” a species.¹⁶² The ESA further states that incidental takes are allowed under specified conditions.¹⁶³

153. 16 U.S.C. § 1532(19) (1994).

154. *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 698, 700 (1995).

155. 952 F.2d 297 (9th Cir. 1991).

156. *Id.* at 303.

157. *See id.*

158. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1992).

159. *Id.* (noting that plaintiffs requested injunction to prevent timber sales, in the belief that injury and death to owl habitat was imminent).

160. 16 U.S.C. § 704 (1994); *cf.* 16 U.S.C. § 1539(a) (1994) (authorizing incidental takes in some situations).

161. 16 U.S.C. § 704 (1994).

162. *See Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1300 (8th Cir. 1989) (determining that permission for an incidental take under the ESA cannot be pursued retroactively); *see also* 16 U.S.C. § 1539(a) (1994).

163. *See* 16 U.S.C. § 1536(h)(i)(A)(i)-(iv), (1)(B). (1) there are no reasonable alternatives to agency action, (2) the benefits of action outweigh other action in the public interest, (3) the action is regionally or nationally significant, (4) the action will not make an irreversible

B. The MBTA's Plain Meaning: Treaty Incorporation, Hunters Only?

Courts consistently refuse to read habitat "harm" into the MBTA's "take" provision, but disagree over how broadly to apply the MBTA.¹⁶⁴ Courts who have read the MBTA narrowly interpret "take" and "kill" as physical conduct associated with hunters and poachers, "conduct which was undoubtedly a concern at the time of the statute's enactment in 1918."¹⁶⁵ Courts who have interpreted the MBTA broadly conclude the MBTA has evolved to encompass protections from additional threats to migratory birds.¹⁶⁶ Courts have adapted the MBTA over time to mean more than the treaty from which it was derived.¹⁶⁷ The resulting issue is whether habitat destruction moves too far beyond the intent of the treaty and whether the MBTA is a protection of birds generally, or solely a protection from hunters.

commitment of resources, and (5) the action will include reasonable mitigation efforts. *Id.*

164. See *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1992) (limiting the MBTA's prohibitions to the conduct of hunters); see also *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.2d 110, 115 (8th Cir. 1997); *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1076-79 (D. Colo. 1999) (expressing no opinion on habitat modification but choosing to interpret the MBTA broadly as applicable to conduct beyond hunting); Means, *supra* note 133, at 825 (noting that courts disagree over the statute's breadth as it applies to accidental bird death).

165. See *Seattle Audubon Soc'y*, 952 F.3d at 302; see also *Newton County Wildlife Ass'n*, 113 F.2d at 115.

166. See *Moon Lake*, 45 F. Supp. 2d at 1079 (rejecting a limited MBTA interpretation for a broader reading prohibiting actions beyond hunting).

167. See *Cerritos Gun Club v. Hall*, 96 F.2d 620, 627-28 (9th Cir. 1938). In the MBTA, Congress expanded on the seasonal restrictions on hunting from the treaty adding terms that prohibited any manner and means a bird could be killed, beyond the scope of the treaties. "It . . . appears Congress intended to invoke its own powers to accomplish other purposes than those enabled by the treaty, and that it has done so." *Id.* at 628. The original MBTA drafted in 1918, was an implementation of the US-Canadian-British Migratory Bird Treaty to protect birds by restricting their killing to non-breeding seasons. See *Moon Lake*, 45 F. Supp. 2d at 1079-80.

*United States v. Moon Lake Electric Association*¹⁶⁸ broadly interpreted Congress' use of the term "kill" in the definition of "take" as prohibiting conduct beyond that of hunters and poachers.¹⁶⁹ The *Moon Lake* court cited extensive congressional records to conclude that the legislative history of the MBTA supported differing interpretations.¹⁷⁰ The court decided *Moon Lake*'s electric wires killed MBTA protected birds and suggested that "Congress intended the MBTA to regulate more than just hunting and poaching."¹⁷¹ The court then found broader liability, beyond the actions of hunters, in the MBTA's wording that "it shall be unlawful at any time, by any means or in any manner, to . . . kill . . . any migratory bird."¹⁷²

Moon Lake cited cases where the court found MBTA violations, concerning pesticide use, waste water dumping, and poorly built oil pits, unrelated to hunting.¹⁷³ These cases, however, can be narrowly construed as cases where actual bird deaths had already occurred.¹⁷⁴ In comparison, if birds die at towers post-construction, a court might interpret actual deaths as an MBTA violation, similarly to *Moon Lake*.¹⁷⁵ If the threat of towers prompts suit without evidence of bird death, the case may be premature and a court favoring a hunters-only interpretation would advocate a finding of no liability where actions merely threaten birds' habitat.

C. The MBTA as a Criminal Statute: Strict Liability

The MBTA renders both civil and criminal penalties.¹⁷⁶ Courts have debated whether Congress intended the otherwise silent misdemeanor provision of the MBTA to be one of strict liability in

168. 45 F. Supp. 2d 1070 (D. Colo. 1999).

169. *Id.* at 1074, 1080. The judge found that "history leads me to believe that [the MBTA] is capable of supporting broad interpretations." *Id.* at 1079.

170. *See id.* at 1080-82.

171. *Id.* at 1080-81.

172. *Id.* at 1074.

173. *Id.* at 1083.

174. *Id.* (distinguishing *Seattle Audubon Society* as a "narrow holding" in a case where no actual injury occurred and habitat destruction was the basis of the MBTA claim).

175. *Id.* at 1076.

176. 16 U.S.C. § 707(a),(b)(2) (1994).

all situations.¹⁷⁷ In evaluating this issue, a court considers whether a statute (1) is regulatory; (2) protects public welfare; (3) originates in common law; and (4) whether the penalties are relatively minor.¹⁷⁸

The Supreme Court has suggested that regulatory statutes can be an indication of strict liability crimes.¹⁷⁹ The MBTA has a regulatory function¹⁸⁰ and section 703 refers to MBTA rules as "regulations."¹⁸¹ In its regulatory function, the MBTA protects migratory birds in the public welfare for the aesthetic enjoyment they provide and the destruction of insects, which injure forests, plants, and agricultural crops.¹⁸²

The MBTA divides violations into two criminal categories: misdemeanors and felonies.¹⁸³ The misdemeanor fine of \$500 and six months imprisonment is noticeably lighter when compared with the felony fine of \$2,000 and up to two years imprisonment.¹⁸⁴ The severity of penalties often serves as an additional indication of congressional intent.¹⁸⁵

177. See 16 U.S.C. § 707(a) (1994); see also *Moon Lake*, 45 F. Supp. 2d at 1073 (noting that the majority of Circuit Courts of Appeal have held the MBTA to be a strict liability statute); but see *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (determining that strict liability, which may be appropriate in hunting situations, is not applicable in situations of habitat destruction); cf. *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991) (distinguishing cases which applied strict liability for situations *directly* leading to bird death, from *indirect* causes of death such as habitat destruction where strict liability would be inapplicable).

178. See *Morissette v. United States*, 342 U.S. 246, 256-59 (1952).

179. See *Staples v. United States*, 511 U.S. 600, 606, 608 (1994).

180. See 16 U.S.C. § 701 (1994) (stating that the Secretary of the Interior shall make any rules and regulations to advance the purpose of the MBTA).

181. 16 U.S.C. § 703 (1994).

182. See *Humane Soc'y v. Glickman*, No. 98-1510, 1999 U.S. Dist. LEXIS 19759, at *16 (noting that many bird species are of great value in destroying insects harmful to forests and crops); see also *Convention for the Protection of Migratory Birds*, U.S.-Gr. Brit., 39 Stat. 1702 (Aug. 16, 1916) (declaring that Congress also passed the MBTA to preserve the aesthetic good of annual bird migrations).

183. 16 U.S.C. § 707 (1994).

184. *Id.*

185. See *Morissette v. United States*, 342 U.S. 246, 261-63 (1952).

The felony provision requires one to "knowingly" take a bird with intent to sell or to execute a sale.¹⁸⁶ The misdemeanor provision, on the other hand, lacks any mental state specification.¹⁸⁷ Consequently, courts have construed the misdemeanor provision as evidence of congressional intent to impose strict liability on those causing bird deaths accidentally or unintentionally.¹⁸⁸

An example of this expansive reading is found in *United States v. FMC Corp.*,¹⁸⁹ in which the defendants were held strictly liable for dumping wastewater, which inadvertently killed birds.¹⁹⁰ The court compared the actions in this case to strict tort liability for using inherently dangerous substances.¹⁹¹ There are few cases making this tort law comparison, however, and scholars have argued that these cases have no support in MBTA law.¹⁹²

In *Seattle and Newton County Wildlife Association v. United States Forest Service*,¹⁹³ the court recognized the MBTA's strict liability element, but distinguished these as cases where the actions merely threatened birds' habitat.¹⁹⁴ The court held that habitat destruction was not comparable to toxic pesticides or the actions of hunters and poachers, situations where courts had previously found strict liability.¹⁹⁵ Consequently, the MBTA could not be applied as a

186. 16 U.S.C. § 707(b) (1994).

187. *Id.* § 707(a).

188. *See supra* text accompanying note 178.

189. 572 F.2d 902 (2d Cir. 1978).

190. *Id.* at 906-08.

191. *Id.*

192. *See Means, supra* note 133, at 835 (determining that the quasi-tort theory of an extra-hazardous materials extension to the MBTA has no basis in the statute, even under an expansive reading); *see also Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1583 n.9 (S.D. Ind. 1996) (rejecting the extra-hazardous extension as having "no apparent basis in the statute itself or in the prior history of the MBTA's application since its enactment").

193. 113 F.3d 110 (8th Cir. 1997).

194. *See id.* at 115 (determining that strict liability, which may be appropriate in hunting situations, stretches the MBTA "far beyond the bounds of reason" in situations of habitat destruction); *see also Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991) (stating that the MBTA definition describes physical conduct of hunters which does not include habitat destruction).

195. *Seattle Audubon Soc'y*, 952 F.2d at 303 (9th Cir. 1991) (discussing cases analogous to strict tort liability and the MBTA's limited scope as related to actions of hunters to conclude that habitat destruction

strict liability statute with an absolute criminal prohibition in cases alleging habitat destruction.¹⁹⁶

Similarly, a tower that threatens yet does not kill birds is unlikely to constitute an MBTA strict liability violation.¹⁹⁷ If there is evidence of bird deaths at a tower, strict liability then becomes plausible.¹⁹⁸ The MBTA places liability on anyone who kills a bird, accidentally or intentionally.¹⁹⁹

III. PAST ANSWERS TO LIMIT AN EXPANSIVE READING OF THE MBTA

A. Prosecutorial Discretion

In MBTA cases courts face the challenge of reading the statute broadly without offending common sense.²⁰⁰ Until now, they have relied on prosecutorial discretion to limit over-inclusive application of the MBTA.²⁰¹ This reliance may not always achieve its goal, as it may be affected by prosecutorial ambitions for higher office that increase “the allure of a guaranteed conviction under a strict liability

did not require a strict liability determination); *see also* Newton County Wildlife Ass’n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) (noting its agreement with the *Seattle Audubon Society* court).

196. *See* Newton County Wildlife Ass’n, 113 F.3d at 115.

197. *See* Seattle Audubon Soc’y, 952 F.2d at 303 (noting that cases of habitat destruction, which indirectly leads to bird death, does not amount to a taking under the MBTA).

198. *See* United States v. Moon Lake Elec. Ass’n, 45 F. Supp. 2d 1070, 1076 (D. Colo. 1999) (holding defendants liable for the actual deaths of seventeen protected birds, and distinguishing *Seattle Audubon Society* where no actual injury or death occurred).

199. *See id.* at 1081 (citing congressional records noting at least two Congressmen who anticipated the MBTA’s application to children acting inadvertently or accidentally).

200. *See* United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978) (listing situations “such as deaths caused by automobiles, airplanes, plate glass modern office buildings, or picture windows in residential dwellings into which birds fly [that] would offend reason and common sense” under a broad construction of the MBTA).

201. *See id.* at 905 (stating that discretion can be left to prosecutors and the courts when penalties would offend reason). *See also* Means, *supra* note 133, at 836. Relying on discretion avoids explaining the real meaning of the statute. *Id.*

statute.”²⁰² Conversely, some instances may exist where prosecutors may improperly use their discretion in declining to bring suit. To counter this possible abuse, Congress has responded to environmentalists’ concerns that “government is far too vulnerable to special interests to be a reliable protector of endangered species” by allowing citizen suits under the ESA.²⁰³

B. Environmental Groups’ Discretion In Choosing Suits

If construed as a strict liability statute, environmental groups could use a guaranteed conviction under the MBTA to advance a multiplicity of causes, beyond the apparent protection of a certain species.²⁰⁴ Though not a strict liability statute, the ESA has long been used to accomplish this objective.²⁰⁵ Critics of environmentalists argue that saving very marginal species to cure other environmental problems negatively taints government decisions to list additional endangered species for fear of triggering unintended consequences.²⁰⁶

For example, the snail darter was thrust into the spotlight by environmentalists bringing suit under the ESA.²⁰⁷ In *Tennessee*

202. Matthew J. Hainfield et al., *Tenth Annual Pace National Environmental Moot Court Competition: Brief for Appellant Blackacre*, 15 PACE ENVTL. L. REV. 867, 895 (1998).

203. MICHAEL S. GREVE, REMARKS AT THE ANNUAL MEETING OF THE NORTHEAST POLITICAL SCIENCE ASS’N (Nov. 12, 1992) (discussing Congress’ creation of exceptions in the ESA and other environmental statutes based on the “overriding considerations” of the “might of the affected constituencies and the anticipated rewards for legislatures”).

204. See SUSAN J. BUCK, UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW 130-31 (1996) (explaining environmentalists’ interest in saving the forests, which they indirectly achieve by prosecuting endangered bird deaths under the ESA); see also Greve, *supra* note 203 (noting that protecting the spotted owl under the ESA was “merely the best-suited instrument for curbing logging in old-growth forests”). “The Act is a lever to attain unrelated objectives. [Environmentalists] defend this strategic use of endangered species on various grounds—most frequently, on the grounds that endangered species serve as a kind of proxy for the broader environmental values at stake.” *Id.*

205. See *supra* text accompanying note 204.

206. Greve, *supra* note 203.

207. Buck, *supra* note 204, at 130-31 (recognizing that the spotted owl has been “center stage” for the last ten years, noting that “the

Valley Authority v. Hill,²⁰⁸ a \$53 million dollar dam construction project was nearing completion when an endangered fish was discovered.²⁰⁹ Local citizens and national conservation groups opposed the project and sought injunctions claiming NEPA violations to protect historic sites and the river's abundant trout.²¹⁰ Shortly after a district court dissolved this injunction the snail darter was listed as endangered.²¹¹ Environmentalist groups now had a "new . . . basis to halt construction of the dam."²¹²

Courts are not blind to environmentalists' ancillary interests.²¹³ Consequently, not all courts interpret the MBTA as a strict liability statute in every situation.²¹⁴ Further disadvantaging environmentalists is the expense of litigation, which requires environmentalists to choose their cases based on the probability of creating favorable precedent.²¹⁵

C. FCC Discretion: Self-Regulating

Courts have relied on an agency's discretion in determining environmental impact when approving or denying licenses and are only permitted to find statutory violations in cases of abuse of

Northern Spotted Owl has become to the 1990s what the snail darter was to the 1970s"). "Environmentalists who had long opposed cutting in the old growth forests because of watershed protection, soil erosion, and a general aversion to extensive cutting of virgin timber took on the cause of the owl with fervor." *Id.*

208. 437 U.S. 153 (1978).

209. *Id.* at 157, 166.

210. *Id.* at 156, 158.

211. *Id.* at 158-59, 161.

212. *Id.* at 159.

213. See *Friends of Endangered Species v. Jantzen*, 596 F. Supp. 518, 520, 527 (N.D. Cal. 1984). See also *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (finding that "the Wildlife Association's *real dispute* [was] with the FWS for that agency's failure to enforce MBTA against Forest Service timber sales in the manner the Wildlife Association desires") (emphasis added).

214. *Newton*, 113 F.3d at 115 (holding that the MBTA would not be interpreted as strict liability statute in the context of habitat destruction).

215. See French, *supra* note 58, at 979-80 (noting that environmental litigation budgets are modest); DONALD SNOW, *INSIDE THE ENVIRONMENTAL MOVEMENT* 52 (1992).

discretion.²¹⁶ NEPA's EA and EIS requirements provide the FCC with a self-regulating tool to address preliminary environmental concerns with significant impacts.²¹⁷ Some courts have questioned whether a federal agency should have absolute discretion over whether it can "take" a protected species.²¹⁸ Indeed, the FCC's expertise is communications, not the environment.²¹⁹ Acknowledging this weakness, the FCC is required to consult the FWS when towers might affect endangered species and the FAA when proposed towers exceed two hundred feet.²²⁰ When the FCC chooses to waive agency advice, the judicial deference normally accorded the agency in a court appeal should reflect such rejections.²²¹

Realistically, agency's discretion of whether to require an EA favors its own agenda.²²² In the case of tower construction in pursuance of the Telecommunication Act's goal of rapid development of digital systems, environmental review will slow the process of granting licenses.²²³ The FCC's charter, the

216. 5 U.S.C. § 706(2)(A) (1994) (permitting the court to find an agency violative of a particular statute if the agency's actions were "arbitrary, capricious, or an abuse of discretion").

217. 47 C.F.R. §§ 1.1307-1.1319 (1999).

218. *See* Defenders of Wildlife v. EPA, 688 F. Supp. 1334, 1350 (D. Minn. 1988). "The alleged prohibited taking of protected species through federal agency action is not the type of enforcement action for which the agency should retain absolute discretion." *Id.* *See also* Humane Soc'y v. Glickman, No. 98-1510, 1999 U.S. Dist. LEXIS 19759, at *37-38 (holding that the Department of Agriculture violated the MBTA when creating a program to kill migratory geese for population control).

219. *See* French, *supra* note 58, at 932, 987 (noting that courts can not presume agency expertise in predicting environmental impacts).

220. 14 C.F.R. § 77 (1999) (requiring FAA involvement when objects are constructed in navigable airspace over 200 feet tall). *See also* 47 C.F.R. § 1.1308 (1999) (noting that when actions involve § 1.1307(a)(3) and (a)(4) the FCC shall solicit and consider FWS comments).

221. *See* French, *supra* note 58, at 987.

222. *See* Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 251, 255 (1976) (explaining that Environmental Impact Statements were created to respond to the hostility towards the environmental council, thereby concluding that the original drafters contemplated a judicial role in NEPA because of the temptation for an agency to underestimate the environmental risks of favored proposals).

223. *See* FCC Proposed Rule, *supra* note 5 (stating that there "is an array of obstacles arising from state and local regulation of tower siting

Communications Act, requires the FCC to weight every decision with the “public interest, convenience, and necessity.”²²⁴ Consequently, the FCC has the discretion to weigh the public’s interest in tower construction with environmental protection by requiring or forgoing an EA, even though NEPA and the MBTA do not explicitly require the FCC to balance public interests.²²⁵

IV. AN OLD METHOD, BUT A NEW ANSWER TO ADDRESS AVIAN DEATHS: COMPENSATION IN EXCHANGE FOR MBTA IMMUNITY

Realistically, towers take birds, whether or not liability can be found under the MBTA.²²⁶ Refusing tower construction licenses and thereby crippling the development of the communications industry is unlikely, and not the answer.²²⁷

A. Mitigation

Mitigation could be an alternative method of restricting the breadth of the MBTA and of avoiding reliance on the discretion of easily influenced parties.²²⁸ To eliminate the uncertainty and expense

and construction including environmental assessments . . . [M]ultiple levels of review can last for several months, and that when appeals are involved, the process can take several years.”).

224. Communications Act of 1934, 47 U.S.C. § 310 (1994).

225. See Means, *supra* note 133, at 841 (questioning whether the public interest in migratory birds should supersede the interest in productive land use). Agencies must educate themselves about environmental consequences of their actions. See *id.* at 946-47. See also Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986) (recognizing that NEPA does not incorporate a balancing standard).

226. See BIRD ISSUE BRIEF, *supra* note 10 (citing five long-term studies conducted at towers over eight hundred feet high where a range of 375 to 3,285 bird carcasses were documented per tower yearly, based on a 20 year average).

227. See Braile, *supra* note 26 (noting the trend of deregulation of the telecommunications industry that allows towers to be built “at a stunning rate”); see also Towerkill.com, *supra* note 7 (identifying deregulation of the communications industry as one reason for recent rapid proliferation of towers).

228. See County of Leelanau, Michigan 9 FCC Rec. 24 (Nov. 4, 1994) (conditioning a tower license on special lighting features and monitoring when allegations of MBTA violations were presented, even though the administrative judge questioned whether the FCC was actually bound by the MBTA). See also Braile, *supra* note 26 (noting that the

of litigation, MBTA cases could require preliminary mitigation in order to compensate for threats to birds.²²⁹ Applying a "bird tax" to tower construction could also mitigate any threat of a migratory bird taking and protect tower companies and the FCC from potential liability under the MBTA.²³⁰

To offset possible harm to a species, mitigation requirements are already elements of the ESA and NEPA.²³¹ An ESA exception allows mitigation to constitute a permitted take if approved by the FWS.²³² For example, in *Friends of Endangered Species v. Jantzen*²³³ developers who set aside a portion of their land for endangered butterflies sufficiently mitigated their harm to the species to allow development of other portions of the mountain.²³⁴ The FCC can consider tower companies' mitigation efforts through EA's under NEPA.²³⁵

B. Bird Tax

A bird tax may be an effective means of funding scientific research to develop workable mitigation methods.²³⁶ This tax would

MBTA does not require tower constructors to mitigate threats they pose to birds, but the ESA would require mitigation).

229. See *supra* text accompanying note 228.

230. Cf. *Friends of Endangered Species v. Jantzen* 596 F. Supp. 518, 524-25 (N.D. Cal. 1984) (agreeing with an agency that mitigating efforts, which allowed an incidental take of a species, absolved a developer from liability under the ESA).

231. 16 U.S.C. § 1539(2)(A)(ii), (B)(ii) (1994). See also *Jantzen*, 596 F. Supp. at 524 (commenting on the similar nature of the ESA and NEPA claims to recognize that NEPA focuses on the impact a permit to take an endangered species will have on the environment).

232. See 16 U.S.C. § 1539(B)(2) (1994).

233. 596 F. Supp. 518 (N.D. Cal. 1984).

234. *Id.* at 521, 524-25.

235. 47 C.F.R. § 1.1309 (1999) (allowing applicants to reduce or minimize the potential environmental problems outlined in an EA before the FCC considers preparation of an EIS).

236. See MITIGATING AVIAN MORTALITY AT COMMUNICATIONS TOWERS, RES. OF THE AMERICAN BIRD CONSERVANCY POLICY COUNCIL (Sept. 1, 1998) (urging the FWS to consider a bird tax on tower construction to fund mortality mitigation research), available at <http://nrmnhwww.si.edu/BIRDNET/NOAC98Res.html#radio> (earlier resolution, since altered, on file with author) (last visited Apr. 5, 2001) [hereinafter *Mitigating Resolution*].

achieve the same goal as the developer reserving land for endangered species in *Jantzen*.²³⁷ Although a tower company cannot offer land, the telecommunications industry can fund research to make towers safer, thereby reducing bird deaths.²³⁸ Realistically, towers cannot be disassembled for seasonal migrations, but construction companies can equip towers with visual or acoustic devices to minimize the towers' harm to migrating birds.²³⁹ A bird tax would provide the funding to research these methods.²⁴⁰

C. Studies Possible With Proper Funding

The Personal Communications Industry Association ("PCIA") requests conclusive evidence before applying specific mitigating methods.²⁴¹ There is, however, little scientific data on effective mitigation methods and few long-term studies addressing those species of birds that are most vulnerable.²⁴²

Other industries have cooperated with environmentalists in the past to form committees to address avian mortality.²⁴³ For example,

237. 596 F. Supp. at 521, 524-25 (upholding the Forest Services' grant of a license with mitigating conditions including that the licensee refrain from developing a portion of the site, in exchange for a permit to take an endangered species).

238. MANVILLE SPEECH, *supra* note 7 (determining that a Communication Tower Working Group will structure a means to research bird death at towers and find solutions to avoid or minimize the collisions).

239. HAWK MT. PETITION, *supra* note 9, at 10 (advocating that the FCC should require the industry to "develop alternate siting, lighting, acoustical, painting, and construction designs, as well as other avoidance measures to minimize losses").

240. See MITIGATING RESOLUTION, *supra* note 236 (determining that a bird tax on tower construction could be applied to experiment with bird-friendly tower lighting methods).

241. See MOSS SPEECH, *supra* note 6 (requiring conclusive evidence of a long-term detrimental impact on migratory bird populations by communications towers before adopting policy to limit the fatal encounters, but encouraging research of bird-friendly lighting possibilities).

242. HAWK MT. PETITION, *supra* note 9, at 8 (concluding that figures of avian death at towers are understated because the majority of communications towers in the United States are not monitored for avian deaths and only a few have been monitored on a long-term basis).

243. See MANVILLE SPEECH, *supra* note 7 (commenting on the FWS's alliances with the wind generation industry and the electric utility

the electric utility industry formed the Avian Power Line Interaction Committee and the wind generation industry formed the Avian Subcommittee of the National Wind Coordinating Committee.²⁴⁴ Environmental groups hope to establish a similar alliance with the communications industry.²⁴⁵ An instance of voluntary collaboration exists in New York where an ornithologist has asked 170 television stations to allow researchers to survey towers for bird carcasses.²⁴⁶ Out of fifty replies from television broadcasters, only one station refused.²⁴⁷

D. Alternatives to a Bird Tax

Without funding to minimize losses, bird deaths will only increase significantly given the rate of new tower construction.²⁴⁸ The resulting bird losses will have potentially tangential effects on the ecosystem.²⁴⁹ Aside from their aesthetic role, migrating birds are important for seed dispersal and destroying insects injurious to forests and agricultural crops.²⁵⁰

industry that have resulted in established practices for reducing bird collisions, and voluntary compliance).

244. *Id.*

245. *Id.* (recognizing the possibility of a partnership with the communications industry).

246. Karen Anderson, *Running a-Fowl of Towers*, BROADCASTING & CABLE, Aug. 30, 1999, at 48 (stating that ornithologist Bill Evans is heading the New York State Towerkill Survey to study bird deaths at tall towers on upstate NY television stations).

247. *Id.*

248. See MANVILLE SPEECH, *supra* note 7. "The current increase in the siting of new towers—estimated at some 6-8% per year—only increases the potential for bird strikes." *Id.* See also BIRD ISSUE BRIEF, *supra* note 10. "Some tower constructors have funded monitoring studies at individual towers, but there is no funding source for the comprehensive research program needed to find solutions to this problem." *Id.* at 4.

249. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 177, 178 (1978) (stating "[a]s we homogenize the habitats . . . we threaten their—and our own-genetic heritage. The value of this genetic heritage is, quite literally, incalculable . . . [animals] are potential resources . . . and may provide answers to question which we have not yet learned to ask.") *Id.*

250. See *Humane Soc'y v. Glickman*, No. 98-1510, 1999 U.S. Dist. LEXIS 19759, at *16 (D.D.C. 1999) (noting that Congress passed the MBTA to "preserve for the nation the aesthetic good that migratory birds delivered as they passed overhead during their annual sojourns").

Alternatives to a bird tax include co-location of antennas and careful tower siting outside of main bird flyways.²⁵¹ Others require the FCC to grant licenses on the condition that tower owners permit open access for research of mitigating possibilities and that towers are monitored regularly to establish scientifically valid statistics of avian death.²⁵² *In the Matter of County of Leelanau, Michigan*,²⁵³ the FCC placed conditions on the granting of a license for a radio tower for emergency services.²⁵⁴ It required red strobe lighting and continual monitoring of the towers to mitigate the threat to birds.²⁵⁵

Another option, albeit an unlikely one, is for the FCC to block tower growth by denying licenses.²⁵⁶ Bird deaths will not increase.²⁵⁷ The communications industry would demand Congressional action and raise Fifth Amendment takings challenges in court.²⁵⁸ In the case of a bird tax, however, a Constitutional takings challenge is

251. See HAWK MT. PETITION, *supra* note 9, at 3 (contesting a tower to be built four miles from Hawk Mountain, a major migratory pathway). The petition asks the FCC to require co-location, locate the tower elsewhere, be built below the tree line, be built at less than 200 feet to eliminate the need for lighting, and/or be built without guy wires. *See id.* at 10.

252. *See id.* at 8 (proposing that the FCC should require that tower owners regularly monitor and record deaths to develop annual figures of avian mortality at towers); *see also* BIRD ISSUE BRIEF, *supra* note 10, at 3 (suggesting that the FCC could condition grants of tower licenses on communications companies permitting researchers access to study their towers).

253. 9 FCC Rec. 24 (Nov. 4, 1994).

254. *Id.* (concerning a 480-foot tower to update a public safety system).

255. *Id.*

256. *See* Supplemental Report in Support of the Petition by the City of Savage for an EA of Minnesota Public Radio's License, at 3 (Aug. 9, 1994) (on file with author) (acknowledging FCC discretion to grant or deny a license extension request). FCC movement to block tower growth would be unlikely due to the deregulatory trend within the communications industry. *See* Braile, *supra* note 26.

257. *Cf.* BIRD ISSUE BRIEF, *supra* note 10, at 1 (noting that the pattern of building more towers will result in more dead birds).

258. *See* U.S. CONST. amend. V. Three factors to be considered when measuring a regulatory taking are (1) the economic impact of the regulation on the claimant, (2) the investment-backed expectations, and (3) the character of the governmental action. *See also* MELTZ, *supra* note 33, at 130 (citing *Penn Central Transp. Co. v. New York City* 438 U.S. 104 (1978)).

unlikely.²⁵⁹ When a tower company can still profit from using its land, a government taking cannot occur.²⁶⁰ Towers would flourish, without an MBTA basis for environmentalists to challenge.²⁶¹ Any incidental take of a species would be pre-paid for and off-set by corresponding benefits.²⁶²

E. Strike a Balance: the Communications Industry and Environmental Protection's Coexistence

The issue of avian mortality requires harmonization of competing, compelling national objectives: protecting species, fostering development, and safeguarding private property from bearing a public burden.²⁶³ The communications industry's interests should be weighed with the goals of environmentalists.²⁶⁴ Both fundamentally serve the public interest.²⁶⁵

Though a balancing test is not outlined in NEPA, ESA, or MBTA,²⁶⁶ the FCC is required to weigh the "public interest, convenience, and necessity" when granting a construction permit or

259. See generally MELTZ, *supra* note 33, at 132 (noting that generally, courts have held that to constitute a taking, a regulation must eliminate all beneficial uses of property, though there have been narrow exceptions).

260. *Id.*

261. See *supra* text accompanying note 230.

262. See *supra* text accompanying note 230.

263. See generally MELTZ, *supra* note 33, at 402, 404. See also Miceli, *supra* note 2, at 193 (determining that an efficient regulation balances the "social benefit of preservation" with the "private cost to individuals harmed by the regulation").

264. See FCC Fifth Report, *supra* note 27, at 2.

265. See *id.* "Congress clearly provided that broadcaster's public interest obligations extend to the digital environment . . . It placed broadcasters on notice that existing public interest requirements continue to apply to all licensees, that the [FCC] may adopt new public interest rules, and that nothing is foreclosed from [FCC] consideration." *Id.* See also *supra* text accompanying note 264.

266. See Means, *supra* note 133, at 840, 840 n.120 (explaining that the MBTA does not provide a means to balance competing uses and the ESA prohibits balancing in order to strictly protect species in danger of extinction); *cf.* Friends of Endangered Species v. Jantzen 596 F. Supp. 518, 524 (N.D. Cal. 1984) (commenting on the similarities in the ESA and NEPA claims, whereby NEPA focuses on the impact a permit to take an endangered species under the ESA will have on the environment).

station license.²⁶⁷ In considering these, the FCC could weigh environmental protection with technological advances.²⁶⁸ Both have public interest benefits, but towers built for cellular phones also have public safety capabilities.²⁶⁹ Towers that provide for public safety are likely to supersede environmental concerns, however there is also a strong public interest benefit in larger communications towers for information and entertainment.²⁷⁰ Regardless, both cellular and digital television towers pose significant threats to birds.²⁷¹

This environmental and economic balance has costs and benefits.²⁷² For example, in *Robertson*, "harvesting the forests, say environmentalists, would kill the owls. Restrictions on harvesting, respond local timber industries, would devastate the region's economy."²⁷³ The FCC must decide that the benefits of towers outweigh the costs of bird loss to grant tower construction licenses.²⁷⁴ Some argue that the benefits of preservation do not

267. Communications Act of 1934, 47 U.S.C. § 310 (1998).

268. See Miceli, *supra* note 2, at 193 (proposing that efficient regulations balance the benefits of preservation with the costs to those harmed by the regulation).

269. See MOSS SPEECH, *supra* note 6 (noting that the Personal Communications Industry Association anticipates that "federal law will soon require a wireless network with capacity to identify the specific location of emergency 9-1-1 calls placed from a wireless phone").

270. See County of Leelanau, Michigan, 9 FCC Rec. 24 (Nov. 4, 1994) (acknowledging the problem of bird deaths, yet granting a license for a public safety communication tower to enable a "necessary, reliable and effective public communications system necessary to protect and safeguard the County's citizens"). See also FCC Fifth Report, *supra* note 27 (describing DTV as "brilliant high definition pictures, multiple digital-quality program streams, as well as CD quality audio programming and advanced data services, such as data transfer or subscription video").

271. MANVILLE SPEECH, *supra* note 7 (identifying all communications towers for "radio, television, and now microwave and cellular" as sources of bird strikes).

272. See Miceli, *supra* note 2, at 198 (deciding that the compensation owed private property owners for the impact of a regulation should be based on the relative magnitude of their loss, "which reflects a balancing of costs and benefits").

273. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 431 (1992).

274. See Means, *supra* note 133, at 841 (identifying the issue to be whether the public interest in migratory birds should outweigh the interest in productive land use). See also County of Leelanau, Michigan, 9

exceed the costs.²⁷⁵ Environmental assets are difficult to weigh because they have no market value equivalent.²⁷⁶ Rather than imposing the incalculable costs of species protection on hapless landowners, the imposition of a bird tax can provide a finite figure that industry can pass on to consumers.²⁷⁷ This would reduce conflict between environment preservation and tower constructors with private property rights.²⁷⁸

The FCC must decide whether its issuance of tower construction licenses outweighs the public's interest in bird preservation.²⁷⁹ In calculating bird loss with presently estimated statistics, less than .2% of the migratory bird population will be lost due to tower collision.²⁸⁰ It is unlikely that this figure will outweigh a multi-billion dollar telecommunications industry's interest in tower construction.²⁸¹ Increased bird deaths, however, jeopardize the ecosystem—an incalculable risk.²⁸² Bird protection could be accomplished through a

FCC Rec. 24 (Nov. 4 1994) (acknowledging that towers cause bird loss, but deciding that the loss was not “significant” and concluding that “public interest, convenience, and necessity” were served by granting a license for a reliable emergency services communications system that would safeguard the county's citizens).

275. See Miceli, *supra* note 2, at 198 (citing argument that the “current list of endangered species includes many for which the benefits of preservation do not exceed the costs”).

276. *Id.* at 193 (determining the value of protecting environmental assets by eliciting the value people attach to non-market goods).

277. See *id.*

278. See *id.* at 193 (describing an efficient regulation as able to “balance the social benefit of preservation against the private cost to individuals harmed by the regulation”).

279. See FCC Fifth Report, *supra* note 27 (recognizing that the Telecommunications Act “clearly provided that broadcasters’ public interest obligations extend to the digital environment” but Congress also “placed broadcasters on notice that existing public interest requirements continue to apply to all licenses, that the [FCC] may adopt new public interest rules, and that nothing is foreclosed from the [FCC’s] consideration”).

280. See *supra* text accompanying note 24.

281. See County of Leelanau, Michigan, 9 FCC Rec. 24 (Nov. 4, 1994) (recognizing that in granting or denying a license when considering an EA, the issue is whether the tower will “significantly affect the migratory bird population”).

282. See *supra* text accompanying note 249.

bird tax, which would lead to scientifically sound figures of bird death and accurate calculation of the extent of the problem.²⁸³

CONCLUSION

The FCC regulates towers that kill birds. The deaths, however, might not violate any statute. Based on previous procedural stumbles with the MBTA, environmental groups must prove the FCC's plans to implement the objectives of the Telecommunications Act are *able* to be contested, based on the group's standing, an APA jurisdictional basis, and the MBTA's applicability to the federal government. Furthermore, courts disagree over whether the MBTA applies strictly to all takings, or whether the statute only applies to actions associated with hunting.

This conflict is best settled out of court. The Telecommunications Act mandates that the FCC regulate tower construction, creating an accelerated and expansive threat to birds. Communication towers and migratory bird preservation are equally important public interests. Tower construction should continue but birds must be protected. Mitigation provides a method to allow construction, and curb its threats. Solving the problem begins with research, which a bird tax will allow.

283. *See supra* text accompanying notes 241, 242.