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MANAGEMENT OF BALD AND GOLDEN EAGLES UNDER FEDERAL LAW

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I. PROTECTION OF BALD EAGLES UNDER THE ENDANGERED SPECIES ACT

A. Listing and De-Listing of Bald Eagles

"Prior to European settlement of North America, bald eagles were distributed widely across the continent and were one of its most common birds."[1] Subsequently, the eagle population significantly declined due to intentional hunting, as well as unintentional anthropogenic impacts.[2] The most harmful impact on bald eagle populations was the introduction of DDT in the 1940's, a toxic chemical used to kill insects.[3] "DDT was absorbed by insect-eating fish, and then by the fish-eating bald eagles."[4] By 1963, the population of bald eagles in the continental United States had dwindled to 487 known breeding pairs.[5]

On March 11, 1967, the Secretary of the Interior listed bald eagles as endangered under the Endangered Species Preservation Act of 1966 (Pub. L. 89-699, 80 Stat. 926), the precursor to the modern ESA, due to the population decline caused by DDT and other factors.[6]

On February 14, 1978, the Secretary listed bald eagles as endangered under the Endangered Species Act of 1973[7] (the ESA) in 43 states, and as threatened in the States of Michigan, Minnesota, Wisconsin, Oregon, and Washington.[8]

On July 12, 1995, the United States Fish and Wildlife Service (FWS) re-classified all bald eagles in the lower 48 States as threatened due to the species' partial recovery.[9]

On July 6, 1999, the FWS published a proposed rule to de-list the bald eagle throughout the lower 48 States due to recovery of the eagle.[10]

On July 9, 2007, the FWS published the final rule removing the bald eagle in the lower 48 States from the List of Endangered and Threatened Wildlife.[11] The eagle de-listing rule states that: "the best available scientific and commercial data indicate that the bald eagle has recovered."[12] As of July 9, 2007, the number of breeding pairs in the lower 48 had increased to 9,789.[13]

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[1] Amie Jamieson, *Will Bald Eagles Remain Compelling Enough to Validate the Bald and Golden Eagle Protection Act After ESA Delisting? The Ninth Circuit's Analysis in* United States v. Antoine, 34 Envtl. Law 929, 933 (2004).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] 72 Fed. Reg. 37436 (July 9, 2007)
[6] *Id.*
[7] 16 U.S.C. § § 1531-1543
[8] 72 Fed. Reg. 37436 (July 9, 2007)
[9] 60 Fed. Reg. 36000 (July 12, 1995)
[10] 64 Fed. Reg. 36454 (July 6, 1999)
[11] 72 Fed. Reg. 37436 (July 9, 2007)
[12] *Id.*
[13] *Id.*

B. The Sonoran Desert Bald Eagle Litigation: Political Meddling in ESA-Listing Determinations.

The Sonoran Desert bald eagle is a discrete population of bald eagles that nest in central Arizona and northwestern New Mexico. They represent the entire bald eagle population known to breed in the Southwestern United States and they demonstrate unique behavioral characteristics. The Sonoran Desert bald eagle is smaller and lighter than other bald eagles and they are primarily cliff nesters. They inhabit a unique desert environment and are reproductively isolated from other eagle populations.[14] As of 2005, there were only 36 breeding pairs of the Sonoran Desert bald eagle. There has been significant litigation regarding the removal of the Sonoran Desert bald eagle from the List of Endangered and Threatened Wildlife under the ESA.

1. The 90-Day Finding

In October 2004, Center for Biological Diversity (CBD) petitioned FWS to classify the Sonoran Desert bald eagle population as a Distinct Population Segment (DPS) of the bald eagle species and to re-classify that DPS as an endangered species.[15] Upon receipt of the petition, FWS was required to review the petition and to make a finding, within 90 days, as to whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted" (a 90-day finding).[16] As of March 27, 2006 (18 months after CBD filed its petition), FWS had failed to make its 90-day finding on the CBD petition. CBD sued FWS as a result of the delay and on August 30, 2006, FWS published its decision, rejecting the petition and issuing a negative 90-day finding.[17]

On January 5, 2007, CBD again sued, challenging the 90-day finding. *Center for Biological Diversity v. Kempthorne*, Case No. CV 07-0038-PHX-MHM (D. Ariz.).[18] While the lawsuit was pending, FWS issued its 2007 rule de-listing all bald eagles in the lower 48. FWS argued that the CBD challenge was mooted by the final de-listing rule, which also contained a cursory analysis of the CBD petition and a determination that the Desert Eagle was not

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[14] *Center for Biological Diversity v. Kempthorne*, Case No. CV07-0038-PHX-MHM, 2008 WL 659822 (D. Ariz.) (March 5, 2008 Order (Dkt. #53), p. 2)

[15] Under the ESA, "species" is defined to include any "distinct population segment of any species." 16 U.S.C. § 1532(16). To determine whether a population segment qualifies as a DPS, the FWS considers two elements: (1) discreteness of the population segment in relation to the remainder of the species to which it belongs; (2) the significance of the population segment to the species to which it belongs. 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996).

[16] 16 USC § 1533(b)(3)(A); 50 C.F.R. § 424.14(b).

[17] 71 Fed. Reg. 51,549; 51,551 (Aug. 30, 2006)

[18] The San Carlos Apache Tribe, Yavapai-Apache Nation, Tonto Apache Nation, Fort McDowell Yavapai Nation, and Salt River Pima-Maricopa Indian Community supported CBD's lawsuit as amici curiae.

sufficiently important to the bald eagle population to warrant a DPS designation.[19] District Court judge (now 9th Circuit justice) Mary Murguia disagreed that the 2007 de-listing rule resolved the listing status of the Desert Eagle, because FWS had not followed the formal procedures that the ESA requires for a species status review under 16 U.S.C. § 1533(b)(3)(B).

Turning to the merits of FWS' 90-day finding, Judge Murguia found that the 90-day finding had been subject to political meddling, violating the ESA's requirement that decisions be based solely on the best scientific and commercial data available as well as the Administrative Procedure Act's prohibition against arbitrary and capricious decision-making.[20] Notes from a July 17, 2006 internal FWS conference call showed that, although there was "no information to refute [the CBD petition] at the 90-day stage" a "policy call" had been made by the FWS Washington DC office that the petition should be denied. Judge Murguia found:

> "It appears that FWS participants in the July 18, 2006 conference call received 'marching orders' and were directed to find an analysis that fit with the negative 90-day finding on the DPS status of the Desert bald eagle. These facts cause the Court to have no confidence in the objectivity of the agency's decision making process in its August 30, 2006 90-day finding."[21]

Judge Murguia enjoined application of the bald eagle de-listing rule to the Sonoran Desert eagle and ordered FWS to conduct a formal status review under 16 U.S.C. § 1533(b)(3)(B) to determine whether the Desert eagle qualified as a DPS and whether it should remain protected under the ESA.

2. The 12-Month Status Review.

In February 2010, FWS completed its status review and again determined that the Sonoran Desert bald eagle was not a DPS of the bald eagle species and should not remain listed on the ESA.[22] On September 30, 2010, Judge Murguia ruled that FWS had completed the procedure that she ordered it to do (complete a status review) and thus dissolved the injunction

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[19] 72 Fed. Reg. 37346; 37358 (July 9, 2007) (finding that the Sonoran Desert bald eagle is not significant in relation to the remainder of the taxon because it lacks any biologically or ecologically distinguishing factors).

[20] 16 U.S.C. § 1533(b)(1)(A) (requiring that ESA-listing determinations be made "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species . . . ."); 5 U.S.C. § 706(2)(A) (requiring court to hold unlawful and set aside agency action that is arbitrary, capricious, or an abuse of discretion).

[21] *Center for Biological Diversity v. Kempthorne*, Case No. CV07-0038-PHX-MHM, 2008 WL 659822 (D. Ariz.) (March 5, 2008 Order (Dkt. #53), pp. 17, 19)

[22] 75 Fed. Reg. 8601 (Feb. 25, 2010)

she previously entered, which had the effect of removing the protections of the ESA for the Desert bald eagle.[23] Judge Murguia did not rule on the substance of the 12-month finding.

On October 5, 2010, CBD sued to challenge the substance of the 12-month finding. *Center for Biological Diversity v. Salazar*, Case No. CV10-2130-PHX-DGC (D. Ariz.) The San Carlos Apache Tribe and Salt River Pima-Maricopa Indian Community intervened as Plaintiffs. On November 30, 2011, the Court[24] again overturned FWS' determination to not classify the Desert eagle as a DPS, finding that policy/politics again got in the way of science.[25] Although FWS' regional staff biologists had initially prepared a positive DPS finding, the Assistant Director for Endangered Species in the Washington DC instructed the regional office to change the conclusion. Rather than relying on the "virtually unanimous comments [during the status review] from biologists that desert eagle should be accorded DPS status," the Assistant Director relied on the prior cursory analysis from the 2007 de-listing rule. The Court found this to be improper, because the analysis in the 2007 de-listing rule was not based on notice, comment, and consultation required in a status review. In addition, the Court found:

> "it appears that the 2007 delisting decision was made in the same environment as the negative 90-day finding, an environment in which Washington's 'policy call' resulted in 'marching orders' for FWS scientists in Arizona. Needless to say, a result-driven decision should not become the presumptive baseline for a subsequent and properly-noticed status review, to be departed from only for compelling reasons."[26]

The Court set aside the 12-month finding and required FWS to complete a new 12-month finding on whether the Desert bald eagle should be classified as a DPS and protected under the ESA.

3. Lawsuit #4 and Formal Allegations of Scientific and Scholarly Misconduct.

On May 1, 2012, FWS released its new 12-month finding, which (surprise!) determined that the Desert bald eagle did not qualify as a DPS.[27] FWS also reported that even if the Desert bald eagle is a DPS, it is not threatened and should not be listed under the ESA. For the fourth time, CBD filed suit challenging FWS refusal to protect the Desert bald eagle under the ESA.[28]

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[23] *Center for Biological Diversity v. Salazar*, Case No. CV07-0038-PHX-MHM (D. Ariz.) (Sept. 30, 2010 Order (Dkt. #130)).

[24] With Judge Murguia moving on to the 9th Circuit Court of Appeals, the District Court case was assigned to Judge David Campbell.

[25] *Center for Biological Diversity v. Salazar*, Case No. CV10-2130-PHX-DGC (D. Ariz.) (November 30, 2011 Order (Dkt. #88)).

[26] *Center for Biological Diversity v. Salazar*, Case No. CV10-2130-PHX-DGC (D. Ariz.) (November 30, 2011 Order (Dkt. #88), at p. 15).

[27] 77 Fed. Reg. 25792 (May 1, 2012)

[28] *Center for Biological Diversity v. Jewell*, Case No. CV12-2296-PHX-DGC (D. Ariz.)

While this fourth lawsuit was pending, Interior's Office of the Executive Secretariat and Regulatory Affairs ("OES") received a written complaint that FWS had engaged in "scientific and scholarly misconduct" while conducting its status review on the Desert bald eagle in violation of Interior policies on scientific integrity. This complaint triggered an internal review process, as required by Interior Department Manual 305 DM 3.4(I) to "examine, track, and resolve all reasonable allegations of scientific and scholarly misconduct." If there is merit to the allegations, the matter is referred to a Scientific and Scholarly Integrity Review Panel, which must conduct a formal review and produce a fact-finding report.[29] As a result of this internal investigatory process, FWS requested that the Court stay the pending District Court litigation relating to the Desert eagle listing, which the Court granted until May 18, 2014.

Thus, at this date, the Desert eagle, like all other bald eagles is not listed or protected by the ESA. Yet, the litigation to re-instate ESA protection for the Desert eagle remains pending.

II. PROTECTING EAGLES UNDER THE BALD AND GOLDEN EAGLE PROTECTION ACT AND MIGRATORY BIRD TREATY ACT

A. Overview of the Bald and Golden Eagle Protection Act (Eagle Act)

Congress passed the Bald Eagle Protection Act in 1940 and amended that Act in 1962 to add protections to golden eagles. The Bald and Golden Eagle Protection Act (Eagle Act)[30] subjects individuals to civil and criminal liability if they, without a permit to do so, "knowingly . . . take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import [any bald or golden eagle]."[31] The definition of "take" in the Eagle Act is to "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb" individual eagles.[32]

On June 5, 2007, FWS published a final rule defining the statutory term "disturb."[33] The FWS defined disturb by regulation to mean: "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior."[34]

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[29] Interior Department Manual 305 DM 3.8(E)(1)(c); 305 DM 3.8(F)(2) and (3).

[30] 16 U.S.C. § § 668-668d.

[31] 16 U.S.C. § 668.

[32] 16 U.S.C. § 668c.

[33] 72 Fed. Reg. 31132 (June 5, 2007); 50 C.F.R. § 22.3.

[34] *Id.*

The Eagle Act provides for criminal and civil penalties. Conviction under the Eagle Act can result in a $5,000 fine and one year of imprisonment for a first conviction, and a $10,000 fine and up to two years of imprisonment for a second conviction.[35] Civil penalties of up to $5,000 per offense can be imposed.[36]

B. Overview of the Migratory Bird Treaty Act

Passed in 1918, the Migratory Bird Treaty Act (MBTA) prohibits actions, such as capturing or taking migratory birds, which threaten the survival of individual migratory birds and their nests or eggs.[37] "The MBTA was enacted to implement a 1916 treaty with Great Britain, acting on behalf of its then-province Canada, for the protection of birds that migrate between the two countries."[38] The MBTA makes it unlawful, "except as permitted by regulations" to "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, . . . any migratory bird, any part, nest, or egg of any such bird . . . ."[39] The MBTA authorizes the Secretary of the Interior to "determine when, to what extent, if at all, and by what means . . . to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird . . . and to adopt suitable regulations permitting and governing the same. . . ."[40] Regulations authorizing taking of migratory birds for specific purposes under the MBTA are at 50 C.F.R. Part 21. Individuals who knowingly take a migratory bird with the intent to sell it, or who actually sell it, are subject to a felony, a $2,000 fine and up to two years of imprisonment. [41]

C. Differences Between the Protections Formerly Provided to Bald Eagles by the ESA and Those Currently Provided by the Eagle Act and MBTA.

The Endangered Species Act, 16 U.S.C. § § 1531-1543, offered significant additional protection to bald eagles above and beyond the Eagle Act and MBTA. The ESA required federal agencies to engage in consultation prior to taking actions that could affect the bald eagle or its habitat. In addition, the ESA provides greater protection to habitat than either the Eagle Act or MBTA. Finally, the ESA provides additional avenues of enforcement through citizens' suits and greater levels of deterrence. These differences are explained in more detail below.

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[35] 16 U.S.C. § 668(a).

[36] 16 U.S.C. § 668(b).

[37] 16 U.S.C. § § 703-712.

[38] Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 Wm. & Mary Evntl. L. & Pol'y Rev. 1 (2013), at p. 4.

[39] 16 U.S.C. § 703.

[40] 16 U.S.C. § 704.

[41] 16 U.S.C. § 707.

1. Consultation

A significant protection provided by the ESA that is not found in the Eagle Act or MBTA is the consultation obligation under Section 7(a)(2) of the ESA. Pursuant to Section 7(a)(2), each Federal agency "shall, in consultation with . . . the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter . . . referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical habitat]."[42]

The consultation obligation is prospective in approach. In other words, before any federal agency can take an action that may affect listed species, the action agency must consult with the expert fish and wildlife agencies from the Secretaries of Interior or Commerce, as appropriate, to determine possible effects on the species and its designated critical habitat.[43] The consultation obligation is not merely procedural. If the proposed action would result in jeopardy, or adverse modification to critical habitat, it may not go forward absent the development of a non-jeopardy producing, reasonable and prudent alternative.[44] The consultation obligation is especially significant in the western United States given the abundance of federally managed lands and resources, and the number of listed species located on federal lands or affected by federally approved actions. The consultation obligation is also triggered by private actions, located on private lands, which require a federal permit or authorization, or private lands designated as critical species habitat.[45]

The consultation obligation of the ESA allows for a prospective, comprehensive review, prior to commencing an action that could adversely affect listed species. The Eagle Act and MBTA do not provide for any kind of prospective review prior to federal agency action that could affect a protected eagle. The Eagle Act and MBTA are designed to act as deterrents by punishing individuals who unlawfully "take" protected birds after-the-fact. The ESA's consultation obligation provided a legal mechanism to protect bald eagles prior to taking adverse action that could cause harm.

2. Habitat Protection.

Habitat loss is a significant, if not the primary, existing threat to bald eagles.[46] The ESA

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[42] *Id.*

[43] *See, e.g., National Wildlife Federation v. National Marine Fisheries Service*, 481 F.3d 1224 (9th Cir. 2007); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

[44] *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); 16 U.S.C. § 1536(b)(3)(A).

[45] *See, e.g., Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (consultation triggered regarding issuance of Clean Water Act permit for private development of subdivision on private land).

[46] *See* Jamieson, *Will Bald Eagles Remain Compelling Enough to Validate the Bald and Golden Eagle Protection Act After ESA Delisting? The Ninth Circuit's Analysis in* United States v. Antoine, 34 Envtl. Law 929, 949-956 (2004).

provides broad habitat protections that the Eagle Act and MBTA lack. The FWS has recognized the ESA as a "key factor in protecting eagle habitat."[47] The ESA and its governing regulations provide for habitat protection through two mechanisms: the designation and protection of critical habitat and the prohibition on "harming" species through "significant habitat modification or degradation."[48]

Once a species is listed, the ESA mandates the Secretary to designate critical habitat.[49] The ESA broadly defines critical habitat in 16 U.S.C. § 1532(5)(A) as "the specific areas within the geographical area occupied by the species. . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." Once designated as critical habitat, all federal actions are subject to the consultation obligations of Section 7(a)(2) to insure that the action will not adversely modify such critical habitat.[50] Again, these protections are unique to the ESA and not contained in the Eagle Act or MBTA.

In addition to the critical habitat designations, habitat is also protected through the ESA's prohibition on "take" of listed species. Section 9 of the ESA makes it unlawful for any person to "take" any listed species.[51] The statutory term "take" is used in both the ESA and Eagle Act, but the definitions and regulatory interpretations of "take" are somewhat different in each statute. In the ESA, Congress defined "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[52] The FWS regulatory definition of "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[53]

The FWS definition of "disturb" in the Eagle Act regulations is similar in certain respects to the regulatory interpretation of "harm" in the ESA in that it targets actions that could indirectly harm an eagle (defining "disturb" to include actions "likely to cause (1) injury to an

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[47] 64 Fed. Reg. 36454, 36457 (1999).

[48] 16 U.S.C. § 1532(5)(A) (defining "critical habitat"); 16 U.S.C. § 1533 (a)(3) (requiring designation of critical habitat); 50 C.F.R. .17.3 (defining "harm"); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

[49] 16 U.S.C. § 1533(b)(2).

[50] 16 U.S.C. § 1536(a)(2).

[51] 16 U.S.C. § 1538(a)(1)(B).

[52] 16 U.S.C. § 1532(19).

[53] 50 C.F.R. § 17.3.

eagle, (2) a decrease in its productivity, . . . or (3) nest abandonment. . . .").[54] However, the focus in the Eagle Act is primarily on protection of individual eagles and their nests, rather than broader protection of species habitat.[55] The ESA's protections of critical habitat and prohibitions on harm via habitat degradation offered legally broader protection of habitat utilized by the species for critical functions (i.e., breeding, feeding, and sheltering), even if that habitat is located outside specific nesting sites.[56]

3. Citizen Suits

Another significant mechanism found in the ESA, but lacking in the Eagle Act and MBTA is the citizen suit. Under the ESA, "any person" can file an action in federal district court to "enjoin any person, including the United States . . . who is alleged to be in violation of any provision [of the ESA] or regulation issued under the authority thereof."[57] Citizen suits are a critical component in enforcement of the ESA and the protection of species. Citizen suits allow the public to act as the enforcer of the ESA's legal mandates in situations where the government lacks the funds, manpower, or political will to prosecute violations of the ESA. The ESA's citizen suit provisions also authorize suit against the United States, thereby ensuring that the government fulfills its mandatory obligations to protect listed species from jeopardy and to prevent adverse modification of critical habitat. The lack of a citizen suit provision in the Eagle Act and MBTA make them significantly less protective than the ESA.

4. Deterrence

As noted above, the Eagle Act and MBTA rely on a deterrence approach to species protection, while the ESA combines deterrence (through penalties and fines) with a prospective, pre-impact, consultation approach. Under the Eagle Act and MBTA, violators are subject to civil and criminal penalties only after the harm to the species has already occurred. However, even under the Eagle Act and MBTA, the maximum available fines and penalties are significantly less than those available to punish individuals that unlawfully take a listed species in violation of the ESA. Under Section 11(b) of the ESA, persons convicted of knowingly and unlawfully taking listed species are subject to a maximum $50,000 fine, or one year of imprisonment, or both.[58] This compares to the maximum $10,000 and $15,000 criminal penalties

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[54] 50 C.F.R. § 22.3.

[55] *See* 72 Fed. Reg. 31132, 31134 (June 5, 2007) (stating, the Eagle Act is "not a habitat management law"); *id.* at 31135 (noting that the Eagle Act "contains no provisions that directly protect habitat except for nests").

[56] *But see Contoski v. Scarlett*, Civ. No. 05-2528 (JRT/RLE), slip op. at 5-6 (D. Minn. Aug. 10, 2006) (stating: "Both the ESA and the [Eagle Act] prohibit the take of bald eagles, and the respective definitions of 'take' do not suggest that the ESA provides more protection for bald eagles than the [Eagle Act]. . . . The plain meaning of the term 'disturb' is at least as broad as the term ' harm' and both terms are broad enough to include adverse habitat modification.")

[57] 16 U.S.C. § 1540(g).

[58] 16 U.S.C. § 1540(b).

available under the Eagle Act and MBTA respectively.[59] The ESA's significantly higher punitive measures provide a larger deterrent effect than the Eagle Act or MBTA.

D. Case Law Interpreting the Eagle Act and MBTA

1. Ninth Circuit Opinions

The Ninth Circuit Court of Appeals, and District Courts within the Ninth Circuit, have interpreted the prohibitions of the Eagle Act and MBTA narrowly. In *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991), plaintiffs moved to enjoin logging in northern spotted owl habitat on grounds that such logging would remove habitat for migratory birds and thus constitute a prohibited "taking" of such birds under the MBTA. The Court ruled that the MBTA and the regulatory definition of "take" in 50 CFR § 10.12 "describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918. The statute and regulations promulgated under it make no mention of habitat modification or destruction." *Id.* at 302. The Court refused to hold that "habitat destruction, leading indirectly to bird deaths, amounts to the 'taking' of migratory birds within the meaning of the "MBTA." *Id.* at 303.[60] The Court did agree that the MBTA could reach as far as direct, yet unintended, taking of migratory birds. *Id.*

In *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004), the Court again refused to find a violation of the MBTA through "habitat destruction," even that which "led indirectly to bird deaths." Because plaintiff alleged only that migratory birds and their nests would be disturbed through habitat modification – and not that any would be directly taken by the action opposed – the MBTA was not violated.

2. Recent District Court Opinions Regarding MBTA/Eagle Act Liability In the Context of Renewable Energy Development.

There have been four court opinions over the past six months that have addressed the application of the Eagle Act and MBTA in the context of renewable energy development.

In *Protect Our Communities Foundation v. Salazar*, 2013 WL 5947137, Case No. 12cv2211 GPC PCL (S.D. Cal., Nov. 6, 2013), plaintiffs argued that BLM and the developer of a wind energy project on federal lands failed to obtain permits under the MBTA for the killing of migratory birds. Defendants argued that there is no permit available, or required, under the MBTA or its regulations for the "incidental" (e.g., unintentional) killing or taking of migratory birds. The Court agreed with defendants and rejected plaintiffs' claims by focusing on the fact that the "Project's purpose and goal is not to intentionally kill or take birds but is to provide an alternative source of energy." 2013 WL 5947137, at *18. The Court concluded: "Plaintiffs

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[59] *See* 16 U.S.C. § 668(a); 16 U.S.C. § 707(a).

[60] The *Seattle Audubon* case did not involve the Eagle Act, which includes a prohibition on "disturb[ing]" protected bald and golden eagles. The MBTA does not contain the word "disturb" like in the Eagle Act, nor the words "harm" or "harass" like in the ESA.

have failed to demonstrate that a permit is required under the MBTA for an unintentional killing of migratory birds." *Id.* at *19. This case is on appeal in the Ninth Circuit.

In *Public Employees for Environmental Responsibility v. Beadreau*, Case No. 10-1067 (RBW) (DAR) (D. D.C., March 14, 2014 (Order, Dkt. #371), the Court rejected plaintiffs argument that the BOEM violated the MBTA by approving an off-shore wind energy project without first obtaining a permit from FWS for taking of migratory birds. While the Court found that the MBTA applies to federal agencies, "on its face, the [MBTA] does not appear to extend to agency action that only potentially and indirectly could result in the taking of migratory birds. Rather, the text of the Act simply makes 'unlawful' the taking of migratory birds." (Opinion, Dkt. #371, at p. 65). The Court added: "BOEM did not violate the [MBTA] by merely approving a project that, if ultimately constructed, might result in the taking of migratory birds." *Id.* at p. 66. In other words, since there had not yet been any unpermitted taking – there could be no violation of the MBTA. Merely issuing a permit to a project that could potentially take birds in the future was not a violation of the MBTA by the federal permitting agency.

In *Protect Our Communities Foundation v. Jewell*, Case No. 13cv00575 (JLS) (JMA) (S.D. Cal., March 25, 2014 (Order, Dkt. 51)), the Court ruled that BLM was not required to obtain a permit under the MBTA or Eagle Act prior to granting a right-of-way for development of a wind energy project on federal lands. "Federal agencies are not required to obtain a permit before acting in a regulatory capacity to authorize activity, such as development of a wind-energy facility." Order, at p. 34. Citing *Seattle Audubon*, the Court added: "the governing interpretation of the MBTA in the Ninth Circuit is quite narrow and holds that the statute does not even prohibit incidental take of protected birds from otherwise lawful activity." *Id.* The Court similarly found that BLM did not need to obtain a permit under the Eagle Act. "BLM's decision to grant Tule's right-of-way application, prior to obtaining MBTA or Eagle Act permits, was not arbitrary, capricious, or without observance of procedure required by law." *Id.*

In *Protect Our Communities Foundation v. Chu*, Case No. 12cv3062 L (BGS) (S.D. Cal., March 27, 2014), the Court summarily denied plaintiffs claim that "a permit is required under the MBTA for an unintentional, third party killing of migratory birds incident to construction of a project which was sanctioned by Presidential permit." Order, at p. 13. The Court dismissed Eagle Act claims on the same grounds. This case related to the federal government's issuance of a Presidential permit for a cross-boundary electric transmission line.

The four cases above all address situations where the federal government has permitted an activity that could, in the future, result in the taking of birds. The courts all held that the federal agency has no obligation to obtain a permit under the MBTA or Eagle Act where it is simply approving activities by a third party on federal lands, which could in the future take protected birds. If the third party ultimately takes protected birds without a permit, it could be subject to liability, but prosecution would be left to the discretion of the federal government. Due to the absence of citizen suit provisions, or any other private cause of action, there is no ability for citizens to enforce the MBTA or Eagle Act against private entities that take eagles.