

Notes

It's Always Windy in McCain Valley: Vicarious Liability Under the Migratory Bird Treaty Act

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This Note considers whether a federal agency that grants a license, lease, or permit to a wind farm developer can thereafter be held vicariously liable for the developer's violations of the Migratory Bird Treaty Act's ("MBTA") "take provisions." It concludes by positing that a federal agency can justifiably and logically be held vicariously liable in situations where the violation was both foreseeable and inevitable.

Part I provides background to the question, discussing a recent circuit split over the question, the interplay of the MBTA and the Administrative Procedure Act, and an older circuit split over the meaning of the word "take" as applied to the MBTA. Part II frames the various arguments made in the two cases that resulted in the recent circuit split over the potential for federal agency vicarious liability. Part III analyzes the text, history, and purpose of the MBTA; compares the issue of MBTA vicarious liability to a similar and instructive line of cases arising under the Endangered Species Act; and presents an argument for a "middle ground," where federal agencies can be held vicariously liable for not securing a take permit in scenarios where the developer they are licensing will inevitably commit a violation of the MBTA.

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INTRODUCTION

Renewable energy production in the United States reached an all-time high in 2015, representing 13.44% of all domestically produced electricity.¹ The Obama-era saw unprecedented enthusiasm for clean energy; as of July 2016, the grant program established by section 1603 of the American Recovery and Reinvestment Tax Act funded 105,733 projects, with total estimated private, regional, state, and federal funding sitting at \$90.2 billion.² More than twenty states enacted “renewable portfolio standards” requiring utilities to generate a certain percentage of power from renewable energy sources.³ For many, the

1. *Electric Power Monthly*, U.S. ENERGY INFO. ADMIN. tbl. 1.1 (2017).

2. U.S. DEP’T OF THE TREASURY, OVERVIEW AND STATUS UPDATE OF THE § 1603 PROGRAM (2017).

3. Jocelyn Durkay, *State Renewable Portfolio Standards and Goals*, NAT’L CONF. OF ST. LEGISLATURES (Aug. 1, 2017), <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx>.

prospect of our energy system making better use of potentially limitless sources like solar and wind represents America's future, free of the threats of pollution and a changing climate.⁴

However, renewable energy comes with its own set of costs. Solar and wind farms are typically extremely large, as the amount of energy they are capable of producing is necessarily correlated with how much space they take up.⁵ Studies show that a wind farm requires a whopping 46,000 acres of land in to order produce 1000 megawatts of power.⁶ A concentrated solar power plant requires 6000 to 10,000 acres.⁷ By contrast, coal-fired and nuclear power plants require 640 to 1280 acres to produce the same output.⁸ Solar and wind projects often sprawl across a combination of local, state, federal, and private lands, triggering a complex interplay of guiding statutes and various agencies.⁹ The intrusive presence of large renewable energy projects has drawn the ire of conservation groups, Native American tribes, and localities that border or overlap with development sites.¹⁰ Not surprisingly, these controversies frequently result in years of protracted litigation.

All in all, siting these large facilities often results in a variety of bitter disputes. If there is one common thread, however, it is the negative effects that the construction and operation of these facilities can have on wildlife. Solar and wind farms are typically sited in undeveloped areas, with public lands being favored.¹¹ In many cases these lands represent important habitats for endangered species. The

4. Steve Leone, *Billionaire Buffet Bets on Solar Energy*, RENEWABLE ENERGY WORLD (Dec. 7, 2011), <http://www.renewableenergyworld.com/articles/2011/12/billionaire-buffett-bets-on-solar-energy.html>.

5. The Solar Star solar farm occupies a 3200 acre site in the Mojave Desert. Eric Wesoff, *Solar Star, Largest PV Power Plant in the World, Now Operational*, GREEN TECH MEDIA (June 26, 2015), https://www.greentechmedia.com/articles/read/solar-star-largest-pv-power-plant-in-the-world-now-operational#gs._ih=kLw.

6. Alexandra B. Klass, *Energy and Animals: A History of Conflict*, 3 SAN DIEGO J. CLIMATE AND ENERGY L. 159, 184 (2012).

7. *Id.* at 193–94.

8. *Id.*

9. See Rob Nikolewski, *Expansion of Tule Wind Project OK'd by State*, SAN DIEGO UNION-TRIB. (Oct. 31, 2016, 11:40 AM), <http://www.sandiegouniontribune.com/business/energy-green/sd-fi-tule2-approval-20161028-story.html>.

10. See *generally* *Save Panoche Valley v. San Benito Cty.*, 217 Cal. App. 4th 503 (Cal. Ct. App. 2013) (challenging the county's certification of an environmental impact report ("EIR") regarding a proposed solar power development in the area and the county's cancellations of Williamson Act agricultural land preserve contracts.); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921 (S.D. Cal 2013) (noting that the Indian tribe was alleging that Bureau of Land Management's approval of utility-scale wind power project violated National Historic Preservation Act, Federal Land Policy and Management Policy Act, National Environmental Policy Act, Archaeological Resources Protection Act, Native American Graves Protection and Repatriation Act, and Administrative Procedure Act).

11. Janine Blaeloch, *Government Subsidies for Industrial-Scale Solar*, SOLAR DONE RIGHT (Dec. 12, 2011), http://solaroneright.org/index.php/briefings/post/government_subsidies_for_industrial-scale_solar/.

endangered desert tortoise and the destruction of its arid habitat are frequently the subject of litigation in the court of Southern California.¹² The construction of solar and wind farms destroys habitat necessary for their survival and can damage eggs buried underground.¹³ Concentrated solar thermal plants have been observed to practically vaporize birds in midair due to the intense heat created by the fields of heliostat mirrors.¹⁴ The endangered blunt-nosed leopard lizard, San Joaquin kit fox, giant kangaroo rat, and big-horn sheep have all been subjects of concern, as well as various plant species.¹⁵ However, the most visible conflict between renewable energy production and wildlife may be the damage that wind farms do to avian species. The spinning blades of the enormous windmills are estimated to cause the deaths of at least 573,000 birds and 888,000 bats every year.¹⁶

The Tule Wind Project is a paradigmatic example of the types of disputes that arise from the siting and development of a large wind farm. First proposed by a company named Avangrid Renewables in 2004, the Tule Wind Project is slated to produce 201 megawatts of power from a 12,000-acre site in San Diego's East County.¹⁷ The site is located in McCain Valley, a resource conservation area that encompasses 38,692 acres of the In-Ko-Pah Mountains, one of Southern California's coastal mountain ranges.¹⁸ The proposed site is largely located on federal land overseen by the Bureau of Land Management, but extends into state lands managed by the California State Lands Commission as well as private lands and tribal lands that belong to the Ewiiapaayp Band of Kumeyaay Indians.¹⁹ McCain Valley, typical of the mountain ranges of Southern California, largely consists

12. Chris Mooney, *Why Big Solar and Environmentalists Are Clashing over the California Desert*, WASH. POST (Aug. 15, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/08/15/the-greens-and-solar-industry-agree-on-climate-but-they-cant-agree-on-the-california-desert>.

13. *See* W. Watersheds Project v. Salazar, 993 F. Supp. 2d 1126, 1134 (C.D. Cal. 2012); *Defs. Of Wildlife v. Jewell*, No. CV 14-1656-MWF(RZX), 2014 WL 1364452 (C.D. Cal. Apr. 2, 2014).

14. Morgan Walton, *A Lesson from Icarus: How the Mandate for Rapid Solar Development Has Singed a Few Feathers*, 40 VT. L. REV. 131, 132 (2015) ("The workers called these birds 'streamers' for the image they created as the animals spontaneously ignited in midair and hurtled to the ground in a smoking, smoldering ball.").

15. Klass, *supra* note 6, at 194-95.

16. K. Shawn Smallwood, *Comparing Bird and Bat Fatality-Rate Estimates Among North American Wind-Energy Projects*, 37 WILDLIFE SOC'Y BULLETIN 19, 19 (2013).

17. Rob Nikolewski, *Tule Wind Project Takes Another Step*, SAN DIEGO UNION-TRIB. (July 26, 2016, 3:46 PM), <http://www.sandiegouniontribune.com/sdut-tule-wind-fight-2016jul26-story.html>.

18. *McCain Valley Resource Conservation Area*, DESERTUSA, https://www.desertusa.com/mccain/oct_mccain.html (last visited Jan. 20, 2018).

19. Nikolewski, *supra* note 17; *see also* Bureau of Indian Affairs Approves Tule Wind Farm Lease, EAST COUNTY MAG. (Dec. 31, 2013), <http://www.eastcountymagazine.org/bureau-indian-affairs-approves-tule-wind-farm-lease>.

of untouched chaparral.²⁰ The valley is hot and dry, home to bighorn sheep, great horned owls, antelope, and various other wildlife.²¹ It also represents prime breeding habitat for golden eagles.²² In 2014, roughly fifty breeding pairs of golden eagles were found to be threatened by the prospect of encroaching human development in San Diego County.²³ Needless to say, the prospect of the construction of the Tule wind farm and the potential threat it posed to eagles and other species sparked a fierce backlash.

The goal of this Note is to provide an answer to the central question that arose from the litigation over the Tule Wind Project. That question is whether a federal agency acting in a permitting or licensing capacity can be held vicariously liable for Migratory Bird Treaty Act (“MBTA”) violations committed by a third-party developer. In this Note, I argue that it can, but only in limited situations where the violation is completely foreseeable and inevitable, and where the agency’s permit or license is a proximate and but-for cause of the violation.

Part I discusses the Ninth Circuit case that arose from the dispute over the Tule Wind Project, *Protect Our Communities Foundation v. Jewell*, as well as a very similar case from the D.C. Circuit, *Public Employees for Environmental Responsibility v. Hopper*.²⁴ It describes the statutory bases for the plaintiffs’ claims, as well as an old and well developed circuit split over how to interpret the “take provision” of the MBTA. Although that split is largely beyond the narrow scope of the question that this Note tackles, discussing it is useful for framing the issues here. Part II explores the arguments and counterarguments raised by the parties in *Protect our Communities* and *Public Employees* and then frames the overarching question of this Note through those arguments. Part III analyzes the text, history, and purpose of the MBTA and then describes the application of the federal agency vicarious liability argument in Endangered Species Act (“ESA”) take cases, as well as the differences and similarities between the ESA and MBTA. Finally, Part III articulates the circumstances in which a vicarious liability claim should, and should not, succeed under the MBTA.

20. *McCain Valley Resource Conservation Area*, *supra* note 18.

21. *McCain Valley Resource Conservation Area*, *supra* note 18.

22. *Advocacy*, PROTECT OUR COMMUNITIES FOUND, <http://protectourcommunities.org/advocacy> (last visited Jan. 20, 2018).

23. Morgan Lee, *Windfarm Plan Rebuffed over Eagle Impacts*, SAN DIEGO UNION-TRIB. (Sept. 29, 2014, 10:52 AM), <http://www.sandiegouniontribune.com/sdut-eagle-lawsuit-against-wind-farm-2014sep29-story.html>.

24. *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 578 (9th Cir. 2016); *Pub. Emps. for Env'tl. Responsibility v. Hopper*, 827 F.3d 1077, 1089 (D.C. Cir. 2016).

I. BACKGROUND

In 2014, the San Diego-based conservation nonprofits Protect Our Communities Foundation and Backcountry Against Dumps brought an action in the federal district court for the Southern District of California, challenging the Bureau of Land Management's ("BLM") decision to authorize development of the Tule Wind Project.²⁵ The plaintiffs alleged that the BLM's approval of a right-of-way for the wind project violated the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), the MBTA, and the Bald and Golden Eagles Protection Act ("BGEPA").²⁶

The plaintiffs attacked various perceived failings in the preparation of the Environmental Impact Statement required by NEPA.²⁷ They also argued that either the BLM or the developer were required to obtain a "take permit" under the MBTA, claiming that the project would inevitably cause the deaths of golden eagles through habitat destruction or collision with wind turbines or transmission lines.²⁸ On motion for summary judgment, the district court found that the BLM had satisfied the mandates of NEPA, and that although the court was "deeply troubled by the project's potential to injure golden eagles and other rare and special-status birds," the agency was not required to secure a take permit under the MBTA or BGEPA.²⁹ The plaintiffs filed two separate notices of appeal, with Protect Our Communities Foundation solely addressing the MBTA issues.³⁰

The plaintiff's MBTA arguments eventually became the centerpiece of the appeal. Protect Our Communities Foundation argued that through the APA, the Bureau itself could be liable for violations of the MBTA's take provisions attributable to bird deaths caused by the wind farms to whom they granted a lease.³¹ The Ninth Circuit found this argument untenable, holding that the BLM could not be held liable for bird deaths caused by the wind farm it had licensed, and thus was not required to secure an MBTA take permit.³² The court held that the act of granting a right of way was not sufficient to render the BLM liable for the deaths of birds ostensibly caused by the wind farm itself, and that the statute did not contemplate secondary liability of this nature.³³ Furthermore, the court found that there was no requirement to obtain

25. Complaint at 1–2, *Protect Our Cmty. Found. v. Jewell*, No. 3:13-cv-00575-JLS-JMA, 2014 WL 1364453, at *1 (S.D. Cal. Mar. 25, 2014), *aff'd*, 825 F.3d at 571.

26. *Id.*

27. *Id.* at 3.

28. *Id.* at 3, 22.

29. *Id.* at 21.

30. *Protect Our Cmty. Found.*, 825 F.3d at 578.

31. *Id.* at 585.

32. *Id.*

33. *Id.*

an MBTA take permit prior to construction, because the language of the lease required the developer to comply with all “applicable laws and regulations.” The court reasoned that the BLM could withdraw its right-of-way approval at any time if it determined that the developer failed to comply with those provisions.³⁴

Across the county, and around the time that the Ninth Circuit issued its ruling, the D.C. Circuit acknowledged that the Bureau of Ocean Energy Management (“BOEM”) and the Fish and Wildlife Service (“FWS”) were required to ensure that another wind farm obtain an MBTA take permit.³⁵ That wind farm, the Cape Wind Energy Project, is cut from the same basic cloth as the Tule Wind Project. Various conservation groups challenged a proposal to build and maintain 130 wind turbines in the Horseshoe Shoal region of Nantucket Sound.³⁶ Nantucket Sound is a crucial habitat for threatened or endangered migratory birds, including roseate terns and piping plovers.³⁷ According to the FWS, at the end of the summer and beginning of fall, “there is the potential that every breeding adult roseate tern in the northeast population . . . will be in Nantucket Sound, within twenty miles of the Cape Wind Project area.”³⁸

The plaintiffs in *Public Employees for Environmental Responsibility* asserted that the proposed turbines were guaranteed to kill eighty to one hundred endangered roseate terns and at least ten threatened piping plovers over the life of the project.³⁹ As in *Protect Our Communities*, the lease granted to Cape Wind by the BOEM contained language requiring compliance with all applicable laws.⁴⁰ In the Ninth Circuit, that language was enough to excuse the agency from ensuring that a MBTA take permit was secured prior to construction.⁴¹ However, in the D.C. Circuit, the developer and the agency both conceded at oral argument—under pressure from the panel—that the take permit had to be obtained by one of them in order to comply with the statute.⁴² The D.C. Circuit ruled accordingly, taking them at their

34. *Id.* at 587.

35. *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016) (declining to reach the question outright, as Cape Wind and the Bureau of Ocean Energy Management both conceded that a permit was required to comply with the MBTA, stating “we take the defendants at their word that the lease requires a migratory bird permit and that Cape Wind will apply for one.” The court arguably drew this concession out at oral argument, as addressed below).

36. *Id.* at 1080-81.

37. *Id.* at 1088.

38. Brief for Appellant at 9, *Pub. Emps. for Envtl. Responsibility v. Hopper*, No. 14-5301, 2015 WL 3465970 (D.D.C. May 26, 2015) (internal quotations omitted).

39. *Pub. Emps. for Envtl. Responsibility*, 827 F.3d at 1088.

40. *Id.*

41. *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 585 (9th Cir. 2016).

42. Telephone Interview with Eric Glitzenstein, Partner, Meyer Glitzenstein & Eubanks LLP (Feb. 21, 2017) (on file with author); see also *Pub. Emps. for Envtl. Responsibility*, 827 F.3d at 1088 n.11.

word.⁴³ In light of the D.C. Circuit's opinion, the plaintiffs in *Protect Our Communities Foundation* requested an en banc hearing, but were denied.⁴⁴

Thus a form of circuit split was born, albeit in a roundabout way. Although the D.C. Circuit declined to directly address the issue after the agency conceded the point, these subtly contradictory holdings pose an important question. Does incidental take of a protected species that results from the construction and operation of wind farms implicate the liability of the federal agency governing their development? Or would that liability amount to what the Ninth Circuit deemed "attenuated secondary liability" beyond the scope of the statute?⁴⁵

A. THE MIGRATORY BIRD TREATY ACT

The "International Convention for the Protection of Migratory Birds" between the United States and Great Britain (acting for Canada) eventually led to the codification of the Migratory Bird Treaty Act of 1918.⁴⁶ The act was an effort to protect migratory bird species in reaction to population decline that was the result of overhunting and the trade in birds and their feathers.⁴⁷ Since 1918, similar conventions between the United States and four other nations have been made and incorporated into the MBTA: Mexico (1936), Japan (1972), the Soviet Union (1976), and again with Russia after the dissolution of the Soviet Union.⁴⁸ The act is one of the earliest examples of federal environmental laws, and currently lists 800 species as protected.⁴⁹ Justice Oliver Wendell Holmes wrote that the motivations behind the enactment of the statute represented "a national interest of . . . the first magnitude."⁵⁰ The Treaty "recited that many species of birds . . . were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection."⁵¹

43. *Protect Our Cmty's Found.*, 825 F.3d at 588.

44. Nikolewski, *supra* note 17.

45. *Protect Our Cmty's Found.*, 825 F.3d at 585.

46. Martha Harbison, *The Migratory Bird Treaty Act, Explained*, AUDOBON SOC'Y (May 22, 2015), <http://www.audubon.org/news/the-migratory-bird-treaty-act-explained>.

47. *Id.*

48. *Migratory Bird Treaty Act: Birds Protected*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php> (last updated Dec. 3, 2017).

49. *Id.*

50. *Mo. v. Holland*, 252 U.S. 416, 435 (1920).

51. *Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 883 (D.C. Cir. 2000) (internal quotations omitted).

The MBTA states that:

[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 [without a permit or express waiver]⁵²

Unlike other more recent examples of environmental legislation, such as the ESA or Clean Water Act, the MBTA provides only for criminal enforcement by the United States.⁵³ It does not contain a citizen suit provision to allow for civil suits seeking to ensure federal agency compliance.⁵⁴ However, the D.C. courts, and now arguably the Ninth Circuit, follow the view that claims brought under the APA can enforce MBTA limitations against federal agencies.⁵⁵

B. THE ADMINISTRATIVE PROCEDURE ACT

Enacted in 1946, the APA governs the way in which federal administrative agencies propose and establish regulations.⁵⁶ Former Chair of the Senate Judiciary Committee Senator Pat McCarran called the APA “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated” by federal agencies.⁵⁷ The basic purposes of the APA are to require agencies to keep the public informed of their organization, procedures, and rules; provide for public participation in the rulemaking process; establish uniform standards for the conduct of formal rulemaking and adjudication; and to define the scope of judicial review.⁵⁸

52. Migratory Bird Treaty Act, 16 U.S.C. § 703 (2012).

53. JOHN C. MARTIN ET AL., CROWELL MORING, THE MIGRATORY BIRD TREATY ACT: AN OVERVIEW (2016), <https://www.crowell.com/files/The-Migratory-Bird-Treaty-Act-An-Overview-Crowell-Moring.pdf>.

54. *Id.*

55. *Id.*; see also *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 585 (9th Cir. 2016) (“Through the APA’s prohibition against unlawful agency action, a plaintiff may bring a civil suit to compel agency compliance with the MBTA.”); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004).

56. See generally *Administrative Procedure Act*, 5 U.S.C. § 500 (2012).

57. DONALD D. BARRY & HOWARD R. WHITCOMB, *THE LEGAL FOUNDATIONS OF PUBLIC ADMINISTRATION* 32 (3d ed. 2005).

58. Ralph F. Fuchs, *Attorney General’s Manual on the Administrative Procedure Act*, Prepared by the United States Department of Justice; *The Federal Administrative Procedure Act and the*

Under the APA, agency decisions must be upheld unless the court finds that the decision or action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁵⁹ Agency action taken “without observance of procedure required by law” may also be set aside.⁶⁰ In short, the APA serves the dual purposes of providing guidelines for agencies and acting as an enforcement mechanism for the public.

C. THE INCIDENTAL TAKE SPLIT

The issue of vicarious federal agency liability that arose in *Protect Our Communities* and *Public Employees* must be framed in the context of a more developed split over the general purpose of the “take” provision in the MBTA. The word “take” is one of the most heavily litigated terms in wildlife law. While this is especially true in the context of the ESA, the MBTA has also seen its fair share of controversy.⁶¹ The FWS defines “take” for MBTA purposes to mean “pursue, hunt, shoot, wound, kill, trap, capture, or collect.”⁶² This definition clearly encompasses intentional harm like hunting, trapping, or poisoning. There is a great deal of confusion, however, as to whether it should be extended to activities that inadvertently or unintentionally cause the deaths of birds. Examples of these activities include logging, petroleum industry operations, the construction of telecommunications towers, and of course the operation of wind turbines.⁶³ In 2001, President Clinton explained that for the purposes of the MBTA, “[t]ake’ means take as defined in 50 C.F.R. § 10.12, and includes both ‘intentional’ and ‘unintentional’ take.”⁶⁴ President Clinton did not clarify whether this definition refers solely to hunting or poaching activities or instead could be any activity that incidentally harms birds.⁶⁵

Some courts interpret the “take” provision of the MBTA narrowly, requiring activities affirmatively intended to harm birds. For example, in *United States v. CITGO Petroleum Corp.*, the Fifth Circuit Court of Appeals found that a defendant petroleum corporation was not liable under the MBTA for the deaths of migratory birds that had become

Administrative Agencies, Vol. VII of the New York University School of Law Institute Proceedings, 23 IND. L.J. 362 (1948).

59. 5 U.S.C. § 706(2)(A) (2012).

60. *Id.* at § 706(2)(D).

61. See generally *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

62. 50 C.F.R. § 10.12 (2017).

63. Cf. *Babbitt*, 515 U.S. at 697 (explaining that the ESA’s take provision includes “harm.” Additionally, agency regulations and the Supreme Court have defined “harm” to include habitat modification and other unintentional damage).

64. Exec. Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 10, 2001).

65. *Id.*

trapped in open-air oil production facilities.⁶⁶ The *CITGO* court principally relied on Justice Scalia's dissenting argument in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*.⁶⁷ The Fifth Circuit held that "take" means "to reduce those animals, by killing or capturing, to human control," and that "[o]ne does not reduce an animal to human control accidentally or by omission; he does so affirmatively."⁶⁸

Other courts have held that the MBTA imposes strict liability, and does not distinguish intentional acts from acts that accidentally or indirectly kill birds. In *United States v. FMC Corp.*, the Second Circuit held that a corporation engaged in the manufacture of a highly toxic pesticide was subject to MBTA liability for failing to prevent the chemicals from reaching a pond where it harmed protected birds.⁶⁹ The court found that:

The principle here is the same as in the tort situation even though in this case the [chemical] remained on the property of [the corporation], and the birds found their way to the attracting . . . pond. When one enters into a business or activity for his own benefit, and that benefit results in harm to others, the party should bear the responsibility for that harm.⁷⁰

Similarly, in *United States v. Apollo Energies, Inc.* the Tenth Circuit found that the MBTA rendered the taking or killing of migratory birds a strict liability crime, and that it was not necessary to prove that defendants violated MBTA with specific intent or guilty knowledge.⁷¹ The *Apollo Energies* court found that "[a]s a matter of statutory construction, the 'take' provision of the [MBTA] does not contain a scienter requirement."⁷²

Perhaps surprisingly, the Ninth Circuit has generally followed the narrower interpretation of the MBTA's take provision.⁷³ This view may be shifting, however. While not addressed outright, a sense of acceptance of the applicability of the take provision to incidental take

66. See generally *U.S. v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

67. *Id.* at 489.

68. *Id.*; see also *Babbitt*, 515 U.S. at 717 (Scalia, J., dissenting).

69. *U.S. v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978).

70. *Id.* at 907.

71. *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679, 684 (10th Cir. 2010).

72. *Id.* at 686.

73. See *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991):

These cases do not suggest that habitat destruction, leading indirectly to bird deaths, amounts to the 'taking' of migratory birds within the meaning of the Migratory Bird Treaty Act. We are not free to give words a different meaning than that which Congress and the Agencies charged with implementing congressional directives have historically given them under the Migratory Bird Treaty Act and the Endangered Species Act. Habitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA.

scenarios is implicit in *Protect Our Communities*, at least where the take is inevitable or foreseeable.⁷⁴ The court did not address the split over the definition of take as described above, focusing instead on the issue of third party federal agency liability.⁷⁵ The court held that the “argument that the Project will inevitably result in migratory-bird fatalities, *even if true*, is unavailing because the MBTA does not contemplate attenuated secondary liability on agencies . . . that act in a purely regulatory capacity[.]”⁷⁶ This implicit acceptance may be due to the fact that the BLM themselves have conceded that the MBTA encompasses incidental take resulting from wind turbine operations.⁷⁷ This concession mirrors FWS’s own view that the MBTA encompasses incidental take.⁷⁸

All in all, the split over the definition of MBTA take is ripe for a Supreme Court decision or a legislative alteration. The issue of federal agency liability presented by *Protect Our Communities* and *Public Employees* is, in a sense, merely one facet of that overarching argument. The questions posed by both issues are closely related, however. What kinds of acts or omissions can result in MBTA liability, and how broad is the statute’s reach?

II. RECENT MIGRATORY BIRD TREATY ACT LITIGATION OVER THE VICARIOUS LIABILITY OF FEDERAL AGENCIES

A. THE ARGUMENTS FOR APPLICATION OF THE MBTA TO AGENCY ACTIONS

The goal of the plaintiffs in both *Protect our Communities* and *Public Employees* was, of course, to try and prevent future harm to protected migratory bird species. The plaintiffs tried to achieve this goal in part by forcing compliance with the permitting requirements of the MBTA and BGEPA.⁷⁹ Importantly, the plaintiffs were initially not trying to force the lead agencies in both projects to obtain the MBTA take permit. Rather, the objective was to ensure that a responsible party obtained the permit in general.

74. Telephone Interview with Eric Glitzenstein, *supra* note 42.

75. *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 585 (9th Cir. 2016).

76. *Id.* (emphasis added).

77. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995) (noting that agency regulations and the Supreme Court have defined “harm” in ESA’s take provision to include habitat modification and other unintentional damage).

78. Notice of Intent, 80 Fed. Reg. 30,032 (May 26, 2015).

79. Forcing the developer or agency to obtain the permits would not have stopped the project from being built, of course, and would not have prevented the harm to protected species. The goal here was likely to ensure accountability, open the door to criminal liability, and possibly stall the development process.

B. PROTECT OUR COMMUNITIES FOUNDATION

In *Protect Our Communities*, the plaintiffs' argument on appeal was based on a straightforward syllogism: (1) the Tule Wind Project, like other large industrial wind projects, will inevitably and foreseeably kill migratory birds . . . (2) under the MBTA, the *only* way in which the killing of migratory birds may be authorized is through a *permit* issued by the FWS . . . [and] BLM's authorization for Tule Wind to construct and operate a project on federal land that BLM *knows* will violate the MBTA cannot be deemed federal agency action that is "in accordance with law" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)[.]⁸⁰

Tule Wind had taken the position as an intervenor-defendant that it was not required to obtain a take permit at all, citing the Fifth Circuit's *CITGO* decision where the court found that the take provision only extended to affirmative actions intended to harm migratory birds.⁸¹ Thus, it was clear that Tule did not intend to obtain a permit, and the plaintiffs felt that the responsibility must fall on the lead agency.⁸² The BLM, on the other hand, conceded that "MBTA liability plainly extends to non-hunting activities that incidentally but directly take migratory birds such as wind-turbine operations," and that the Tule Wind Project would itself kill birds protected by the MBTA.⁸³ The BLM contended that they had nonetheless not acted "contrary to law" within the meaning of the APA.⁸⁴ The BLM relied on the fact that Tule had adopted a "Project-Specific Avian and Bat Protection Plan for the Tule Wind Project" which required "compliance with all applicable laws."⁸⁵ However, while the plan contained multiple references to other environmental protection statutes like the ESA and the Clean Water Act, it did not incorporate the MBTA.⁸⁶ Furthermore, the BLM maintained that it could not be sued under the APA, arguing that the strictures of the MBTA did not extend to third parties who merely authorized the activities of an entity that may have the effect of resulting in the incidental take.

Relying in large part on the D.C. Circuit case *Humane Society of the United States v. Glickman*, the plaintiffs argued that "the notion that the availability of an MBTA-based APA claim should turn on

80. Reply Brief of Appellant at 2, *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (No. 14-55842, 14-55666), 2015 WL 416884.

81. Reply Brief of Appellant, *supra* note 80, at 2; Telephone Interview with Eric Glitzenstein, *supra* note 42.

82. Reply Brief of Appellant, *supra* note 80, at 2.

83. Reply Brief of Appellant, *supra* note 80, at 3 (internal quotations omitted).

84. Reply Brief of Appellant, *supra* note 80, at 4-5.

85. Reply Brief of Appellant, *supra* note 80, at 4-5.

86. Reply Brief of Appellant, *supra* note 80, at 5.

whether a federal agency is undertaking an action itself or, rather, *authorizing someone else to undertake the very same action* makes no legal or logical sense.”⁸⁷ In *Glickman*, plaintiffs challenged the Department of Agriculture’s “Integrated Goose Management Program,” which was an attempt to control an exploding Canada Goose population that was harming crop yields and contaminating water supplies.⁸⁸ The plan called for various measures including harassment, habitat alteration, capture, and killing.⁸⁹ The court held that federal agencies could be considered “persons” who may be held criminally liable for violating the Act or the Treaty.⁹⁰

The BLM argued that *Glickman* was distinguishable, as in that case the Department of Agriculture had been directly causing the deaths of protected birds, whereas the BLM was merely a third party granting a lease to a developer.⁹¹ The Ninth Circuit eventually agreed, finding the language in the right-of-way requiring compliance with all applicable laws and regulations was sufficient to ensure that Tule complied with any MBTA requirements if the need arose.⁹²

C. PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

The MBTA issues and arguments presented in *Public Employees* were largely the same as those in *Protect Our Communities*. In *Public Employees*, the plaintiffs argued that the BOEM authorization of the Cape Wind project violated the MBTA.⁹³ They likewise argued that the authorization was not “in accordance with law” within the meaning of the APA; and that *Glickman* applies where an agency authorizes another party to engage in certain conduct if that party could only proceed after receiving that authorization.⁹⁴ The BOEM raised the same attenuated liability counterargument as the BLM, contending that it had already imposed significant measures to protect migratory birds by requiring adoption of the Avian and Bat Mitigation and Monitoring Plan as a condition of Cape Wind’s lease.⁹⁵

The major distinction between the two cases lies with the concessions made by Cape Wind and the BOEM. In *Protect Our*

87. Reply Brief of Appellant, *supra* note 80, at 6; *see also* Humane Soc’y of the U.S. v. Glickman, 217 F.3d 882, 884 (D.C. Cir. 2000).

88. Glickman, 217 F.3d at 884.

89. *Id.*

90. *Id.*

91. Transcript of Oral Argument at 10, *Protect Our Cmty. Found.*, 825 F.3d at 571 (No. 14-55666), 2016 WL 2902816.

92. *Id.* at 9–10.

93. Brief of Petitioner-Appellant at 40, *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016) (No. 14-5303), 2015 WL 3465970.

94. *Id.*

95. *Id.* at 15.

Communities, the Ninth Circuit found that the language of the BLM's lease meant that the BLM was not required to ensure Tule preemptively obtained an MBTA permit.⁹⁶ In response to the pressured questioning of the panel at oral argument, in *Public Employees* the BOEM and Cape Wind conceded that the language of their lease required the agency to ensure that MBTA permits were secured prior to construction.⁹⁷

The BOEM and Cape Wind's concessions meant that the D.C. Circuit could decline to directly address the issue of vicarious agency liability.⁹⁸ Thus, the opinion of the *Public Employees* court did not explicitly contradict the Ninth Circuit's finding in *Protect Our Communities* that MBTA liability did not extend to agencies acting in a licensing capacity. However, that possibility may have been the underlying threat that led to BOEM and Cape Wind conceding that the permit was required. The question remains: do the strictures of the MBTA extend to agencies licensing or authorizing the activities of entities whose activities will cause the taking of bird species protected by the MBTA?

III. FEDERAL AGENCIES CAN BE HELD VICARIOUSLY LIABLE FOR VIOLATIONS OF THE MIGRATORY BIRD TREATY ACT COMMITTED BY DEVELOPERS THAT THEY LICENSE

The text and legislative history of the MBTA provide a framework for a court to logically justify extending liability to third party federal agencies. Furthermore, comparable wildlife protection statutes are instructive and provide examples of when holding agencies liable in their permitting and licensing capacities is justified. Finally, there is a way to limit the applicability of the vicarious liability theory that will curb the risk of unlimited secondary liability.

A. THE HISTORY, TEXT, AND INTENT OF THE MBTA

The MBTA was largely enacted in response to the decimation of migratory bird populations by direct take like hunting. Rampant overhunting of migratory birds for their feathers (known as "millinery murder" because the feathers were primarily used for women's hats) was the major impetus that led to Congress passing the MBTA.⁹⁹ As one

96. *Protect Our Cmty's. Found.*, 825 F.3d at 578.

97. Telephone Interview with Eric Glitzenstein, *supra* note 42; *Pub. Emps. for Envtl. Responsibility*, 827 F.3d at 1088 n.11.

98. Telephone Interview with Eric Glitzenstein, *supra* note 42.

99. Kristina Rozan, *Detailed Discussion of the Migratory Bird Treaty Act*, ANIMAL LEGAL & HISTORICAL CTR. (2014) (noting that the MBTA was preceded by the nation's first wildlife conservation law, the Weeks-McLean Act, which was passed in response to the same issues that the MBTA addressed. The Weeks-McLean act was quickly challenged on the basis of the historical right of the states to regulate wildlife and was declared unconstitutional).

senator stated, the MBTA was intended to “keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it.”¹⁰⁰ These direct take origins, and the common law roots of the term “take” itself, form the basis of the *CITGO* decision declining to extend the MBTA to instances of incidental take.¹⁰¹ This logic can be extended from the incidental take issue to the vicarious liability issue presented in *Protect Our Communities*. If the statute only contemplated hunting at the time of enactment, what basis is there for extending its restrictions to a federal agency granting a lease to a third party? While the history and text of the statute do not provide an overt basis for extending liability to an overseeing agency, they do seem to indicate that the statute can and should encompass incidental take scenarios. It follows that the statute’s restrictions could logically be extended to an agency if that agency’s action is both a proximate and but-for cause of harm.

B. MOTIVATIONS BEYOND HUNTING

The MBTA came about in reaction to overhunting, but the benefits offered by migratory bird species were also used as a justification for acting to protect them. The primary justification cited was the fact that they provided a reliable means of protecting crops by consuming damaging insects.¹⁰² Congress took notice of the annual food losses sustained by insects and used the numbers as a basis for the passing the MBTA.¹⁰³ In the first major Supreme Court challenge to the constitutionality of the statute, the Court held that it saw “nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.”¹⁰⁴ Congress also recognized the inherent aesthetic value of migratory birds.¹⁰⁵ The MBTA guaranteed that migratory birds would continue to be part of America’s aesthetic recreation by “[providing a] place where [migratory birds] can come and remain safely and be a pleasure and companions.”¹⁰⁶ Furthermore, the list of protected species included “a number of songbirds and other birds not commonly

100. Hye-Jong Linda Lee, Note, *The Pragmatic Migratory Bird Treaty Act: Protecting “Property,”* 31 B.C. ENVTL. AFF. L. REV. 649, 652 (2004) (internal quotations omitted).

101. *U.S. v. CITGO Petroleum Corp.*, 801 F.3d 477, 490–91 (5th Cir. 2015).

102. Lee, *supra* note 100, at 662.

103. Lee, *supra* note 100, at 653.

104. *Mo v. Holland*, 252 U.S. 416, 434–35 (1920).

105. 56 CONG. REC. 7458 (1918).

106. *Id.*

hunted.”¹⁰⁷ Congress imposed criminal penalties on those who killed these birds as well as on persons who hunted game birds.¹⁰⁸

There were thus numerous motivations behind enacting the statute besides combatting overhunting. This implies that the purpose of the statute was not strictly to keep hunters and trappers from indiscriminately killing birds, but rather to protect the bird populations from harm regardless of how that harm occurred.

If one of the goals of the statute is to ensure that migratory bird species continue to feed on crop-damaging insect species, then it should make no difference whether those birds are purposefully harmed by hunters or incidentally by wind turbines. By that same token, if the statute is intended to prevent harm to endangered birds, it should not matter whether the entity being held liable is an individual or an agency. This was the foundation of the *Glickman* decision, which held that for the purposes of the MBTA, there is no material difference between requiring the same level of compliance from a federal agency as is required from individual hunters.¹⁰⁹ It follows that if a developer is unable to undertake the action that will foreseeably harm protected birds without the approval of a federal agency, then the agency is a proximate cause of the harm and should be held equally liable.

C. LATER TREATIES REACHED WITH OTHER COUNTRIES

The MBTA came about as a result of the United States entering a treaty with Great Britain: the “Convention with Great Britain [on behalf of Canada] for the Protection of Migratory Birds.”¹¹⁰ As described above, the United States went on to enter into similar agreements with several other countries.¹¹¹ These treaties were then incorporated into the provisions of the MBTA, although each treaty differed in its scope and goals.¹¹²

As described previously, the Canadian Convention cited the importance of migratory birds as a food source and predators of crop damaging insects as the main reasons for entering into the treaty.¹¹³ The Mexican Convention, however, focused more broadly on preserving migratory birds “for purposes of sport, food, commerce, and industry.”¹¹⁴ The Japanese and Russian conventions went even further,

107. *U.S. v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

108. *Corbin Farm Serv.*, 444 F. Supp. at 532.

109. *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 883 (D.C. Cir. 2000).

110. Convention Between United States and Great Britain (on behalf of Canada) for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702.

111. Lee, *supra* note 100, at 665.

112. Lee, *supra* note 100, at 665.

113. Lee, *supra* note 100, at 665.

114. Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb.

announcing the general goal of enhancing the environment of migratory birds, finding them a natural resource of great recreational, aesthetic, scientific, cultural, ecological, and economic value.¹¹⁵

Each successive treaty also broadened the scope of the species of protected birds. The Canadian Convention defined protected birds as migratory game birds, migratory insectivorous birds, and migratory non-game birds.¹¹⁶ By contrast, the Mexican Convention listed protected families of migratory birds without specifying the species included in such families.¹¹⁷ The Japanese Convention broadened the list of protected birds to non-migratory birds common to both Japan and the United States.¹¹⁸ The Russian Convention included species and subspecies that migrated between the two countries and those with separate populations sharing common breeding, wintering, feeding, or molting areas.¹¹⁹

These international attempts to protect migratory birds, each increasing in scope and drawing from a broadening array of motivations, provide an indication of the extent to which the United States government has historically been concerned with protecting migratory bird species. If a sovereign nation enters into a treaty with another in order to achieve a certain purpose, the administrative agencies of that country should be held to the same standard of care and responsibility as the country itself. On this basis, it is reasonable to require that government agencies ensure that private parties acting under their supervision comply with applicable statutes like the MBTA or face the same liability for noncompliance as the private party.

D. TEXTUAL ANALYSIS

The broad, comprehensive prohibitory language of section 703 also provides a foundation for an argument for imposing liability on agencies acting in a regulatory or permitting capacity. The long list of forbidden actions, some of them vague, is an indication that the act was intended to guard against a wide range of possibilities and provide protection in general rather than counter specific intentional activities.¹²⁰ “While hunting and poaching were made illegal by the

7, 1936, 50 Stat. 1311, 1312.

115. Convention for Protection of Migratory Birds and Birds in Danger of Extinction in their Environment, U.S.-Japan, Mar. 4, 1972, 979 U.N.T.S. 149; Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647, 4649.

116. Convention Between United States and Great Britain, *supra* note 110, at 1702.

117. Lee, *supra* note 100, at 654.

118. Lee, *supra* note 100, at 654.

119. Lee, *supra* note 100, at 654.

120. Rozan, *supra* note 99, at 2.

MBTA, so were accidentally steering a wagon over a bird's nest or picking up an egg shell."¹²¹

No definitions or descriptions are offered for the activities forbidden by the statute.¹²² The act forbids not only pursuing, hunting and taking protected species, but also causing them to be bought, sold, or transported.¹²³ The same protections apply to parts of birds and their eggs or nests.¹²⁴ The MBTA gives the Secretary of the Interior the authority to

carry out the purposes of the conventions . . . having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof . . .¹²⁵

The misdemeanor charge of the MBTA amounts to a strict liability crime, as did the felony provision prior to amendments made in 1986.¹²⁶ By the plain terms of the statute, it is possible for an entity to be found guilty of violating the MBTA without having intended to commit the prohibited act.¹²⁷ The strict liability nature of the MBTA's misdemeanor penalty provisions formed the basis of the *United States v. FMC Corp.* and *United States v. Apollo Energies, Inc.*, decisions.¹²⁸ One of the goals of the statute was to provide a strong incentive against causing harm to migratory bird species generally, as it required no element of intent or knowledge. At least one court has held that the MBTA applied to taking and killing "by any means or in any manner."¹²⁹ That court found that the Act did not "suggest in any way that only direct applications of force constitute 'killing' or 'taking,'" and that the plain language of the Act made it clear that intent was "irrelevant."¹³⁰

On its face, the statute does not contemplate who causes the harm or how. It simply seeks to prevent harm to the listed species in general, and punish those responsible for causing that harm. "As legislation goes, [section] 703 contains broad and unqualified language—at any

121. Rozan, *supra* note 99, at 2.

122. Rozan, *supra* note 99, at Section I.

123. Migratory Bird Treaty Act, 16 U.S.C. § 703 (2012).

124. *Id.*

125. *Id.* at § 704(a).

126. *Id.* at § 707(a); Rozan, *supra* note 99, at Section III.E.

127. Rozan, *supra* note 99, at Section III.E.

128. *U.S. v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978); *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679, 684 (10th Cir. 2010).

129. *U.S. v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1075 (D. Colo. 1999) (quoting 16 U.S.C. § 703(a)).

130. *Id.* at 1078.

time,' 'by any means,' 'in any manner,' 'any migratory bird.'"¹³¹ Broad, vague language and penalty provisions are an indication of legislation that can justifiably be construed broadly, which would explain the wide variation in interpretations that courts have applied.¹³² The statute bars a wide range of activities that can potentially harm migratory birds and their nests, and grants the Secretary of the Interior purview to enforce both the provisions of the statute and the treaties.¹³³ It follows that the statute protects migratory bird species generally, rather than prohibiting harmful activities specifically. Moreover, under the *Glickman* court's logic, there is no reason the statute should not also apply to federal agencies.¹³⁴ So if harm to protected bird species is completely foreseeable, and will not occur *but for* an action taken by an agency, the statute's terms do not prevent MBTA liability from being extended to an agency acting in a third-party regulatory capacity.

E. THE ESA AND VICARIOUS LIABILITY

The general concept of holding agencies vicariously liable for actions that harm protected wildlife is not a new one. In fact, attempting to hold agencies vicariously liable under the ESA has been a popular strategy in recent years.¹³⁵ As one commentator put it, "the leverage vicarious liability gives to environmental preservation advocates is simply irresistible."¹³⁶ That said, academia has not embraced the theory, and its success in the courts has fluctuated.¹³⁷ Critics justifiably warn that "almost no private action takes place in the complete absence of some connection to government regulation," and that a well-developed vicarious liability doctrine for "permitting and licensing liability" could lead to near limitless application of liability to agencies and governmental bodies.¹³⁸ Nonetheless, the ESA cases lay a strong foundation by analogy for applying the theory in MBTA permitting situations.

F. NOTABLE CASES

"In *Defenders of Wildlife v. EPA*, [] the Eighth Circuit held that EPA's 'decision to register pesticides' made the agency liable for illegal

131. *Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000).

132. Rozan, *supra* note 99, at Section I.

133. Rozan, *supra* note 99, at Section I.

134. Brief of Petitioner-Appellant at 14, *Protect Our Cmty's. Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (No. 14-55842), 2015 WL 416884.

135. J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, NAT. RESOURCES & ENV'T 70, 70 (2001).

136. *Id.*

137. *Id.* at 71.

138. *Id.* at 70, 75.

taking of protected species resulting from use of the pesticides.”¹³⁹ Farmers and ranchers had been using bait laced with strychnine to eradicate pesky rodents, but the black-footed ferret—a protected species—was also consuming the bait.¹⁴⁰ “[T]he court found [the] EPA liable because the strychnine could only have been distributed with [the] EPA’s registration approval.”¹⁴¹ The court stated that “strychnine can be distributed only if it is registered” and that “the EPA’s decision to register pesticides containing strychnine or to continue these registrations was critical to the resulting poisonings of endangered species.”¹⁴² The court found that “the relationship between the registration decision and the deaths of endangered species [was] clear.”¹⁴³ The court based its theory of vicarious liability on *National Wildlife Federation v. Hodel*, in which “[t]he FWS had authorized the use of lead shot, ammunition which resulted in secondary poisoning of bald eagles.”¹⁴⁴ The *Hodel* court also “held the FWS’s authorization constituted a taking under the ESA.”¹⁴⁵

“Similarly, in *Sierra Club v. Yeutter*, [] the Fifth Circuit ruled that the Forest Service’s approval of a timber management plan for a national forest made the agency liable when the private timber harvesting” damaged a crucial habitat of the protected red cockaded woodpecker.¹⁴⁶ The court found that the Forest Service did not “completely implement the provisions” of its wildlife management handbook when it had permitted clearcutting within two hundred feet of the woodpecker’s preferred trees.¹⁴⁷ The court found that this course of conduct impaired the woodpecker’s “essential behavioral patterns.”¹⁴⁸ The court held that this failure to adequately implement the requirements of the handbook constituted a taking under the ESA.¹⁴⁹

The ESA vicarious liability argument has been applied to state and local governments as well as federal agencies.¹⁵⁰ In *Strahan v. Coxe*, the leading vicarious liability wildlife case, the First Circuit found the state of Massachusetts liable for harm to whales caused by commercial

139. *Id.* at 71 (quoting *Defs. of Wildlife v. Adm’r, Env’tl. Prot. Agency*, 882 F.2d 1294, 1301 (8th Cir. 1989)).

140. *Id.*

141. *Id.*

142. *Defs of Wildlife*, 882 F.2d at 1301.

143. *Id.*

144. *Id.* (citing *Nat’l Wildlife Fed’n v. Hodel*, 23 Env’t Rep. Cas. (BNA) 1089, 1092–93 (E.D. Cal. 1985)).

145. *Id.*

146. Ruhl, *supra* note 135, at 71 (citing *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991)).

147. *Yeutter*, 926 F.2d at 438.

148. *Id.*

149. *Id.* at 439.

150. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997).

fishing operations.¹⁵¹ The court held that “it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking.”¹⁵² The defendants argued that the statute was not intended to prohibit state licensure activity because such activity could always be found to be a “proximate cause” of the taking.¹⁵³ The defendants pointed to common law tort principles and argued that “the district court improperly found that its regulatory scheme ‘indirectly causes’ these takings.”¹⁵⁴ The First Circuit disagreed, finding that “[t]he causation here, while indirect, is not so removed that it extends outside the realm of causation as it is understood in the common law.”¹⁵⁵

The Eleventh Circuit has seen the argument extended to its utmost. In *Loggerhead Turtle v. Volusia County*, female loggerhead turtles approaching a beach to nest were turned away by bright lights, and hatchlings turned away from the water confusing the bright lights for a full moon.¹⁵⁶ “[T]he Eleventh Circuit held that the plaintiff turtles had standing to sue the county to allege ‘harmfully inadequate regulation’ of lighting in violation of the ESA” “because the county had the authority to regulate municipal and private beach lighting.”¹⁵⁷ The county—which had been granted an incidental take permit—argued that the FWS had impliedly contemplated that the county be excepted from liability for any incidental take that artificial beachfront lighting caused.¹⁵⁸ The county based its argument on the fact that FWS had required it to survey every light source, study their impacts and implement methods to correct light sources that disorient sea turtles.¹⁵⁹ The court disagreed, finding that the incidental take permit exception to the take prohibition did not apply to activity performed as a purely mitigating measure upon which a permit is conditioned.¹⁶⁰

Just as the use of strychnine bait by farmers in *Defenders of Wildlife* required the permission of the EPA, and just as the fishing operations in *Strahan* required permits granted by the state of Massachusetts, the Tule Wind Project could not have been built without the BLM’s approval.¹⁶¹ The causal chain is not so fine as to be impermissibly attenuated; it is in fact rather short and stout. There

151. *Id.* at 164.

152. *Id.*

153. *Id.* at 163.

154. *Id.*

155. *Id.* at 164.

156. *Loggerhead Turtle v. Volusia Cty., Fla.*, 148 F.3d 1231, 1235 (11th Cir. 1998).

157. Ruhl, *supra* note 135, at 72 (quoting *Loggerhead Turtle*, 148 F.3d at 1250).

158. *Loggerhead Turtle* 148 F.3d at 1236–37.

159. *Id.* at 1236.

160. *Id.* at 1242.

161. Brief of Petitioner-Appellant, *supra* note 134, at 1.

must be limits, however, lest an endlessly spiraling and completely unworkable theory of liability ensues. Those limits were what concerned the court in *Protect our Communities*, and are addressed below.¹⁶² Furthermore, the MBTA is not the ESA. While ESA “take” cases provide analogous guidance, the statutes differ in several ways.

G. DIFFERENCES BETWEEN THE ESA AND MBTA, CITIZEN SUIT PROVISIONS, AND THE ROLE OF THE APA

The MBTA and the ESA are fundamentally different statutes. Some commentators have opined that the “cause to be” language in the MBTA “refers not to those *enabling* the act of shipping or carrying, but seems to refer instead to those *coordinating* that act.”¹⁶³ This contrasts with the language of the ESA, which explicitly includes government entities responsible for providing permits, even though those entities are not coordinating the permitted activity.¹⁶⁴ However, as discussed above, an agency acting in a permitting or leasing capacity in a situation like the development of the Tule Wind Project is still both a but-for and proximate cause of impermissible take, and would thus arguably fall within the “cause to be” language.

Furthermore, the MBTA—unlike the ESA—does not contain a citizen suit provision.¹⁶⁵ Only Department of the Interior officials are empowered to enforce the MBTA.¹⁶⁶ At least in the context of ensuring that take permitting requirements are met, the APA potentially solves this problem. The D.C. Circuit has explicitly held that an individual citizen or citizens’ group can enforce limitations against federal agencies using civil injunctions brought under the APA, and the Ninth Circuit seems to have accepted this basic premise in *Protect Our Communities*.¹⁶⁷ As was the situation in *Protect Our Communities* and *Public Employees*, the combination of the APA and the MBTA results in a form of makeshift citizen suit provision. While not capable of implicating federal agencies in actual regulatory violations, the APA at least provides a method by which an interested non-governmental party can attempt to ensure that requisite permits are obtained.

162. See *infra* Part III.I.

163. William M. McLaren, Comment, *An Endangered Theory: Vicarious Liability Under the Endangered Species Act*, 44 ENVTL. L. 1203, 1216 (2014).

164. *Id.* Section 7(a)(2) of the ESA requires federal agencies to consult with FWS or NMFS to ensure protected species will not be jeopardized as a result of “any action authorized, funded, or carried out by such agency.” Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2012).

165. Martin, *supra* note 53, at 1.

166. Migratory Bird Treaty Act, 16 U.S.C. § 707(a) (2012).

167. Humane Soc’y of the U.S. v. Glickman, 217 F.3d 882, 886 (D.C. Cir. 2000); *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 585 (9th Cir. 2016).

H. THE MIDDLE GROUND—FORESEEABILITY AND INEVITABILITY

In *Protect Our Communities*, the Ninth Circuit found that stretching the MBTA and APA to encompass administrative agency permitting actions would be a step too far.¹⁶⁸ The court found that the BLM “only authorized Tule to construct and operate a wind energy facility on public lands, and therefore did not act to ‘take’ migratory birds without a permit within the meaning of the MBTA.”¹⁶⁹ As to the question of whether the agency’s actions were in accordance with the requirements of the APA, the court found that “the APA does not target regulatory action by the BLM that permits a third party grantee like Tule to engage in otherwise lawful behavior, and only incidentally leads to subsequent unlawful action by that third party.”¹⁷⁰ The court stated that “[t]he causal mechanism in question is too speculative and indirect to impose liability on the BLM for engaging in routine regulatory action.”¹⁷¹ The court further found that the plaintiff’s claim “verge[d] on argument for unbounded agency vicarious liability” and that BLM’s right-of-way “did not sanction or authorize the taking of migratory birds without a permit; it authorized the development of a wind-energy facility.”¹⁷²

These concerns reflect the criticisms of the vicarious liability theory as applied to the ESA, as well as the concerns raised by opponents of the incidental take theory. Where should liability end? Critics of the incidental take theory are fond of raising the slippery slope argument, and justifiably so.¹⁷³ Unfortunately, lots of things kill migratory birds. Domestic cats kill approximately 2.4 billion birds each year, far more than wind turbines (although one may assume that they do not often attack bald eagles).¹⁷⁴ Could the owner of a cat be liable under the MBTA? Birds also frequently die from flying into glass windows. Could a homeowner be liable for MBTA take?

The concerns over the limits of the application of the MBTA to incidental take situations are substantially the same as those for the vicarious agency liability argument. Commentators have noted that “[a]ny major land development or resource extraction project these days requires a multitude of permits, often from federal, state, and local governments.”¹⁷⁵ There is always a risk that a major development action

168. *Protect Our Cmty. Found.*, 825 F.3d at 586–87.

169. *Id.* at 585.

170. *Id.* at 586.

171. *Id.* at 586–87.

172. *Id.*

173. *U.S. v. CITGO Petroleum Corp.*, 801 F.3d 447, 494 (5th Cir. 2015).

174. *Cats and Birds: A Bad Combination*, AM. BIRD CONSERVANCY, <https://abcbirds.org/program/cats-indoors/cats-and-birds> (last visited Jan. 20, 2018).

175. Ruhl, *supra* note 135, at 74.

or activity requiring some form of federal agency approval can result in the taking of a listed bird. The defense in *Strahan* argued that:

the Commonwealth's licensure of a generally permitted activity does not cause the taking any more than its licensure of automobiles and drivers solicits or causes federal crimes, even though automobiles it licenses are surely used to violate federal drug laws, rob federally insured banks, or cross state lines for the purpose of violating state and federal laws.¹⁷⁶

The vicarious liability argument is volatile, and if given free rein can indeed result in the "unbounded agency vicarious liability" the Ninth Circuit was so afraid of.

There is a middle road, however, which can tether the theory and make it more viable. It lies with the foreseeability and inevitability of the take, and whether the take could not occur but for the agency granting the permit or license. This essentially formed the basis of the court's holding in *Strahan*:

[W]hereas it is possible for a person licensed by Massachusetts to use a car in a manner that does not risk the violations of federal law suggested by the defendants, *it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking*. Thus, the state's licensure of gillnet and lobster pot fishing does not involve the intervening independent actor that is a necessary component of the other licensure schemes which it argues are comparable.¹⁷⁷

In *Protect Our Communities*, the Tule Wind Project was being built on BLM lands, and could thus only have been built if the BLM granted Tule a lease.¹⁷⁸ The plaintiffs argued that the environmental impact statement incontrovertibly showed that the Tule Wind Project would have "unavoidable adverse impacts' to migratory birds," in that a number of bird species in the area "regularly fly at heights that will place them directly in the turbines' vast 'rotor swept area.'"¹⁷⁹ There was no question as to whether the turbines would cause the deaths of birds listed under the MBTA.¹⁸⁰ Similarly, in *Public Employees*, the plaintiffs pointed out that "FWS prepared a draft biological opinion that found that the turbines would directly kill at least 80 to 100 roseate terns and ten piping plovers over the minimum twenty year life of the project."¹⁸¹ If the projects were to go ahead, the deaths were *inevitable*, and completely foreseeable. The defendants in *Public Employees* conceded

176. *Strahan v. Coxe*, 127 F.3d 155, 163–64 (1st Cir. 1997).

177. *Id.* at 164 (emphasis added).

178. *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 577 (9th Cir. 2016).

179. Brief of Petitioner-Appellant, *supra* note 134, at 6–7.

180. Brief of Petitioner-Appellant, *supra* note 134, at 7.

181. Brief for Appellant, *supra* note 38, at 10.

that this was reason enough to secure the take permit prior to construction, as they were guaranteed to violate the MBTA otherwise.¹⁸²

This is a very different situation from granting a driver's license without knowing whether the grantee will then use that license to drive a car to commit a crime. It is also different from installing a window or adopting a cat without being certain that it will not kill an endangered bird. Even operating an oil processing facility that birds may or may not fly into is dissimilar. In this situation, a federal agency grants a lease to enable the building of a project while fully aware that the project is guaranteed to kill protected birds. In the language of tort law, this amounts to proximate cause. The harm is not only entirely foreseeable, but can be traced directly back to the granting of the lease.

That reasoning leads to my proposed solution to the dilemma of federal agency obligations under the MBTA, and the circuit split. Specifically, in the limited situation where an action requiring a federal agency's permit or license will inevitably cause a take, an agency must require MBTA permitting as a condition of issuing an authorization. If it fails to do so, its authorization may be set aside as arbitrary and capricious.

The danger of unlimited liability lies with extending vicarious liability into situations where the harm is not foreseeable or inevitable and cannot be directly traced to the federal agency's action. A federal agency is tasked, sometimes specifically and sometimes broadly, with easing and ensuring the administration of federal law. As such, it is not absurd to ask that a federal agency ensure that third-party developers comply with federal law. The BLM could have stipulated that Tule obtain an MBTA permit prior to construction, as it did with provisions of other comparable environmental statutes, but it did not.¹⁸³ This would not have changed the fact that the third-party developer was still held ultimately responsible. The potential for holding an agency liable in this context simply provides a strong incentive for ensuring that agencies granting leases or permits comply with the letter of the law themselves.

CONCLUSION

Renewable energy might be the way of the future, but transitioning to an energy infrastructure rooted in wind and solar will not come without costs. Wind turbines kill eagles, and the legislature and society in general have deemed these avian creatures and other migratory birds worth protecting. In order to incentivize achieving this goal, federal

¹⁸². Brief for Appellant, *supra* note 38, at 23; Telephone Interview with Eric Glitzenstein, *supra* note 42.

¹⁸³. Brief of Petitioner-Appellant, *supra* note 134, at 12–13.

agencies can and should be held to the same standards of care and liability as private entities, as the D.C. Circuit held in *Glickman*. Holding an agency like the BLM vicariously liable for its licensing and permitting activities to ensure that they mandate grantee and lease-holder compliance with MBTA take permitting requirements furthers this goal. Limiting its applicability to situations like that of *Protect Our Communities* and *Public Employees*, where the take is certain to occur, keeps the liability theory from spinning out of control.
