Ch. 9: Preservation of Biodiversity

PROPOSED CHANGES IN ESA REGULATIONS

On July 25, 2018, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service proposed significant changes to regulations implementing the Endangered Species Act. The changes would revise regulations for listing species and designating critical habitat, reduce protection of threatened species that currently receive the same protection as endangered species, and relax requirements for interagency consultation. The proposals and the agency's explanation of them can be viewed online at:
https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html

p. 1034: DESIGNATION OF CRITICAL HABITAT: THE DUSKY GOPHER FROG CASE

Congress enacted the Endangered Species Act to conserve 'ecosystems upon which endangered species . . .depend.' 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to 'designate any habitat of such species which is then considered to be critical habitat.' Id. § 1533(a)(3)(A). 'Critical habitat' may include areas 'occupied by the species,' as well as 'areas outside the geographical area occupied by the species' that are determined to be 'essential for the conservation of the species.' Id. § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to 'biological' benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2). A divided Fifth Circuit panel upheld the designation.

The U.S. Supreme Court then granted review to consider two questions: (1) whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation and (2) whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

On November 27, 2018, the Court, without the participation of newly confirmed Justice Kavanaugh, unanimously vacated and remanded the Fifth Circuit's decision. 139 S.Ct. 361 (2018). The Court held that the decision by the Secretary of Interior not to exclude an area from designation as critical habitat is subject to judicial review. The Court instructed the Fifth Circuit to consider whether the Fish and Wildlife Service's assessment of the costs and benefits of designating Weyerhaeuser's land as critical habitat was arbitrary, capricious, or an abuse of discretion. A copy of the decision is available by clicking on "November" and then "Weyerhaeuser Co. v. U.S. Fish & Wildlife Service": HERE

pp. 1059-1077: DOES THE MIGRATORY BIRD TREATY ACT PROHIBIT "INCIDENTAL TAKES" OF MIGRATORY BIRDS?

Although the casebook does not discuss the Migratory Bird Treaty Act (MBTA), recent developments make it an interesting topic to discuss in Chapter 9 when covering incidental takes prohibited by Section 9 of the Endangered Species Act, which uses statutory language very similar to the MBTA. Here is some historical background.

On August 16, 1916, the governments of the United States and Great Britain, representing the Dominion of Canada, signed the Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 (hereinafter "Canada Treaty"), the first of several international treaties for the protection of migratory birds. This convention, which was ratified by both countries in December of 1916, had the express purpose of saving from indiscriminate slaughter, and of insuring the preservation of, migratory birds that are either useful to man or are harmless. The Canada Treaty listed specific migratory birds to be protected by each of the parties and obligated the parties to establish closed seasons during which no hunting could be done and a continuous closed season for a period of ten years for those particularly endangered migratory birds (with a provision for the issuance of permits to take some portion of this group of birds). The treaty also prohibited the taking of nests or eggs of migratory game (except for scientific or propagating purposes) and provided that the parties would propose to their respective law-making bodies the necessary measures for ensuring the execution of the treaty.

The U.S. Congress promptly enacted legislation to implement the treaty in 1916 and Canada adopted the Migratory Birds Convention Act (MBCA) in 1917. The U.S. Congress subsequently adopted the landmark Migratory Bird Treaty Act, which became law on July 3, 1918. The MBTA replaced the more vulnerable 1913 Act and made it illegal to kill, capture, or sell listed migratory birds. Violations were a misdemeanor criminal offense, punishable by an initial fine of "no more than $500 and/or up to six months in jail"; the maximum statutory fine has since been increased to $15,000. 16 U.S.C. § 707(a).

The MBTA spawned the United States Supreme Court's famous Missouri v. Holland decision, 252 U.S. 416 (1920), when the State of Missouri sought to bar a federal game warden, Ray Holland, from enforcing regulations issued to implement the MBTA by the U.S. Secretary of Agriculture in July and August of 1918. Missouri maintained that the MBTA and its implementing regulations infringed on the state's sovereign rights protected by the Tenth Amendment. In an opinion written by Justice Oliver Wendell Homes, the Supreme Court upheld the constitutionality of the MBTA based on the President's treaty power. In his majority opinion, Justice Holmes stated that the "treaty in question does not contravene any prohibitory terms found in the Constitution." Id. at 434. Further, Justice Holmes rejected the claim that "it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." Id. Justice Holmes went on to note that the "whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State, and in a week a thousand miles away." Id. While expressing "[n]o doubt" that "the great

body of private relations usually fall within the control of the State," Justice Holmes nevertheless concluded that "a treaty may override [the State's] power." Id. As Justice Holmes explained: Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see 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. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and the statute must be upheld. Id.

Fast forward to the Obama administration, which recovered $100 million in fines under the MBTA for the Deepwater Horizon oil spill killing more than one million migratory birds. On January 10, 2017, ten days before the change in administration, the outgoing Solicitor of the Interior issued an opinion stating that the MBTA prohibits incidental takes of migratory birds. Incidental Take Prohibited Under the Migratory Bird Treaty Act (Dep't of Interior, Solicitor's Opinion M-37041 Jan. 10, 2017). The opinion found that the "courts have generally agreed with the FWS' interpretation of the MBTA: the Act prohibits incidental take." The Obama Solicitor's Opinion went on to note that "recently a few courts have erroneously construed the prohibition of 'take' in the MBTA as limited to hunting and other forms of intentional taking of migratory birds (emphasis added). The opinion concluded that the United States, in enforcement proceedings against those charged with violating the Act, does not need to make a showing of willful or intentional taking of migratory birds to prove strict liability and demonstrate criminal violations of the Act.

Less than a year later, the Trump administration reversed this policy. On December 22, 2017, the Trump administration's Solicitor of the Interior withdrew the Obama Solicitor's Opinion and issued a new opinion concluding that the MBTA does not prohibit incidental takes. The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (Dep't of Interior, Solicitor's Opinion M-37050 Dec. 22, 2017) (hereinafter "Trump Solicitor's Opinion"). The new Trump Solicitor's Opinion bases this conclusion on the "text, history, and purpose of the MBTA, as well as relevant case law." Id. at 1. The Trump Solicitor's Opinion finds that "interpreting the MBTA to apply to incidental or accidental actions" by the oil, gas, and timber industries "hangs the sword of Damocles over a host of otherwise lawful and productive actions" and will deter investment and operation of the energy and timber industries. Id. Thus, the current legal opinion of the federal government is that the MBTA's prohibition on taking migratory birds applies only to those affirmative actions that have as their stated purpose the killing of protected migratory bird species.

Seventeen former officials of the U.S. Department of Interior representing every administration from President Nixon to President Obama wrote a memo protesting the new Trump Solicitor's

Opinion. Letter from 17 former Interior officials to Secretary Ryan Zinke on new Migratory Bird Treaty Act Policy, Wash. Post, Jan. 10, 2017, https://apps.washingtonpost.com/g/documents/national/letter-from-17-former-interior-officials-to-secretary-ryan-zinke-on-new-migratory-bird-treaty-act-policy/2708/. The former officials observe that the Trump Solicitor's Opinion turns "the MBTA's straightforward language—'it shall be unlawful to hunt, take, capture, kill ... by any means whatever ... at any time or in any manner, any migratory bird' (emphasis added)—into a conclusion that the killing of migratory birds violates the Act only when 'the actor [is] engaged in an activity the object of which was to render an animal subject to human control' (emphasis added)." Id. at 1. The former officials denounce this conclusion as "a new, contrived legal standard that creates a huge loophole in the MBTA, allowing companies to engage in activities that routinely kill migratory birds so long as they were not intending that their operations would 'render an animal subject to human control.'" Id. The former officials maintain that the prohibition of incidental takes has created a strong and effective incentive for companies to work with government officials to avoid foreseeable harm to bird populations. For example, it is estimated that the installation of nets over oil pits that birds often mistake for sources of water has prevented more than one million bird deaths each year (the equivalent number of birds taken as a result of the BP oil spill).

The arguments in the Trump Solicitor's Opinion are strikingly similar to those rejected by the U.S. Supreme Court in Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 695 (1995) (hereinafter "Sweet Home"). In Sweet Home, the Court explicitly rejected an effort to read incidental take out of the Endangered Species Act (ESA) when considering the endangered Spotted Owl's habitat in old growth forests. Petitioners in Sweet Home brought a facial challenge to the Department of the Interior's definition of the word "take." The Court found that the Department of the Interior's interpretation of take includes incidental takes, matches the ordinary understanding of the word, and is consistent with the broad purpose of the ESA, namely, to protect endangered species by prohibiting activities that cause the death of protected species. Unlike the ESA's "take" prohibition, the MBTA's "take" prohibition has not previously been interpreted by the government or the courts to cover habitat modification. But in Sweet Home, the Supreme Court's rejection of the argument on which the Trump Solicitor's Opinion is founded—i.e., the claim that "take" requires intentional application of physical force—supports the notion that the MBTA bars incidental take.

During a Senate hearing on May 10, 2018, Interior Secretary Ryan Zinke defended the new interpretation by arguing that it would prevent prosecution of an oil company employee who "hits a bird in the windshield" while driving. See Michael Doyle, Here's Why Words Matter in Migratory Bird Debate, E&E News (May 11, 2018), www.eenews.net/stories/1060081521. But Senator Chris Van Hollen quickly pointed out that such accidents have never been prosecuted as violations of the MBTA. Indeed, the same argument failed to persuade the Supreme Court in the Sweet Home case, when it was claimed that "hitting a listed insect on your windshield" could violate the ESA if it prohibited incidental takes. Transcript of Oral Argument at 44, Sweet Home, available at www.supremecourt.gov/pdfs/transcripts/1994/94-859_04-17-1995.pdf.

On May 24, 2018 the National Audubon Society, the American Bird Conservancy, Defenders of Wildlife and the Center for Biological Diversity filed a lawsuit in federal district court in New York to challenge the legality of the Trump Solicitor's Opinion. National Audubon Society v. U.S. Department of Interior, Case 1:18-cv-04601 (S.D.N.Y. May 24, 2018). The lawsuit argues that the Opinion is reviewable, final agency action that is arbitrary and capricious and contrary to the MBTA. It also alleges violations of the Administrative Procedure Act and the National Environmental Policy Act.