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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.

3. Split of Authority Regarding Liability for "Incidental" Takings.

There is a split of authority in the courts as to whether liability can arise under the MBTA (and presumably Eagle Act) for "incidental takings" – that is, a taking that results from otherwise lawful activity that is not designed or intended to take birds.[61] In *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D. ND, Jan. 17, 2012), the federal government charged seven oil and gas companies for violating the MBTA because protected birds were dying in its oil reserve pits. The Court dismissed the prosecution, concluding that, "as a matter of law, that lawful commercial activity which may indirectly cause the death of migratory birds does not constitute a federal crime." *Id.* at 1214. According to the Court, the MBTA does not impose liability for "incidental or accidental taking through lawful commercial activity." *Id.* at 1209.

Other courts have reached a different conclusion, such as the Court in *United States v. Citgo Petroleum Corporation*, 893 F. Supp. 2d 841 (S.D. Texas, Sept. 5, 2012). In the *Citgo* case, the Court held that the defendant's open-air oil tanks proximately caused deaths of migratory birds and that prosecution under the MBTA based on such deaths did not violate due process. The Court agreed with rulings out of the Second, Fifth, and Tenth Circuits that liability under the MBTA is a "strict liability offense." *Id.* at 844. The Court found: "Based on the evidence presented at trial, not only was it reasonably foreseeable that protected migratory birds might become trapped in the layers of oil on top of [the tanks], [the defendant] was aware that this was happening for years and did nothing to stop it. [The defendant's] unlawful, open-air oil tanks proximately caused the deaths of migratory birds in violation of the MBTA." *Id.* at *848.*

In *U.S. v. Moon Lake Electric Ass'n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999), the Court upheld a federal prosecution under the MBTA and Eagle Act stemming from the electrocution of migratory birds on the defendant's power lines. Like the Court in *Citgo*, the *Moon Lake* court found the MBTA to be a strict liability offense, and that liability extended beyond direct takings from traditional hunting and poaching. The relevant question in this Court's mind was whether the defendant's activity caused the death of a protected bird – if it did, the MBTA's strict prohibition on killing birds was violated. While the Court found the Eagle Act to not be a "strict liability" statute, the Court did conclude that prosecution against the electric company could go forward if they "knew" that eagles could be killed through operation of their power lines.

In summary, plaintiffs have thus far been unsuccessful in requiring projects, such as wind farms, to obtain permits under the MBTA or Eagle Act prior to operation. In cases involving prosecutions for actual deaths of protected birds, "a majority of appellate and lower courts have found that incidental taking of protected species is subject to [liability under the MBTA], so long as the conduct of such activity is both the actual and proximate cause of the taking."[62] Based on the Ninth Circuit's analysis in *Seattle Audubon Society*, lower courts in the Ninth Circuit have so far taken a narrower interpretation of the reach of the MBTA and Eagle Act.

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[61] Andrew Ogden's recent law review article provides a comprehensive summary of authority regarding "incidental" takings. 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).

[62] *Id.* at 27.

III. "TAKING" EAGLES PURSUANT TO FEDERAL REGULATIONS

A. Take Regulations Under the Eagle Act.

The Eagle Act authorizes the Secretary of the Interior to provide regulations for the permitted taking of protected bald and golden eagles. 16 U.S.C. § 668a provides, in part:

> Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe.

FWS has promulgated regulations for the take of eagles for scientific and exhibition purposes (50 CFR § 22.21), for Indian religious purposes (50 CFR § 22.22), to take depredating eagles (50 CFR § 22.23), to possess golden eagles for falconry (50 CFR § 22.24), and for take of golden eagle nests that interfere with resource development or recovery operations (50 CFR § 22.25). On May 20, 2008, FWS published a regulation that provides "grandfathered" take authorization under the Eagle Act for persons that previously obtained authorization to take bald eagles under the ESA.[63] On September 11, 2009, FWS published regulations that permit take of bald and golden eagles "for the protection of . . . other interests in any particular locality."[64]

FWS regulations also permit the removal or relocation of an eagle nests in certain circumstances.[65] A permit may be issued to authorize removal or relocation of:

(i) An active or inactive nest where necessary to alleviate a safety emergency;
(ii) An inactive eagle nest when the removal is necessary to ensure public health and safety;
(iii) An inactive nest that is built on a human-engineered structure and creates a functional hazard that renders the structure inoperable for its intended use; or
(iv) An inactive nest, provided the take is necessary to protect an interest in a particular locality and the activity necessitating the take or the mitigation for the take will, with reasonable certainty, provide a clear and substantial benefit to eagles.[66]

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[63] 73 Fed. Reg. 29075 (May 20, 2008); 50 CFR § 22.28.

[64] 74 Fed. Reg. 46836 (September 11, 2009); 50 CFR § 22.26.

[65] 50 CFR § 22.27(a)

[66] *Id.*

B. Permits Authorizing Take For Indian Religious Purposes

Possession of eagles and eagle parts by Native Americans for religious use is regulated by the Eagle Act and regulations at 50 C.F.R. § 22.22. In *United States v. Dion*, 476 U.S. 734 (1986), the Supreme Court held that the Eagle Act abrogated Indians' treaty right to hunt bald and golden eagles, and thus any taking of eagles by Native Americans required a permit issued by the Secretary under the Eagle Act. In *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003), the Ninth Circuit ruled that the permit procedures relating to Native American religious use did not violate the Religious Freedom Restoration Act, 42 U.S.C. § § 2000bb-2000bb-4.

Under 50 C.F.R. § 22.22, members of federally-recognized Indian tribes are eligible for permits to take, possess, or transport bald and golden eagles or parts thereof. An application submitted to FWS must provide the following information: (1) species and number of eagles or feathers proposed to be taken, or acquired by gift or inheritance; (2) State and local area where the taking is proposed to be done, or from whom acquired; (3) name of tribe with which applicant is associated; (4) name of tribal religious ceremony for which required; and (5) certification of enrollment in a federally-recognized Indian tribe, signed by authorized tribal official.[67]

A permit granted under 50 C.F.R. § 22.22 will typically not permit an individual to acquire live eagles or eagle parts from the wild.[68] Instead, a permit will authorize the tribal member to possess eagles or eagle parts from the National Eagle Repository in Colorado.

> "FWS processes Eagle Act permits at its migratory bird permit offices and then forwards the approved permits to the National Eagle Repository in Colorado. Government wildlife agents bring dead eagles they collect to the Repository. The eagles collected at the Repository died from a variety of causes, including collisions with cars, electrocution, unlawful killing, or simply natural causes. Once at the Repository, FWS staff members assign each eagle a number and record its species, age, and condition into a database. Staff members also may add replacement parts to an eagle if its parts or feathers or damaged or missing. The eagles are then used to fill permits in the order in which the permits were received. FWS may make an exception to the first-come, first-served system for an immediate need, such as a burial ceremony."[69]

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[67] 50 C.F.R. § 22.22(a).

[68] The first authorization to take live eagles from the wild under the Eagle Act permit provisions for religious use was issued in March 2012 to the Northern Arapaho Tribe. The Tribe applied for the permit in 2009 and it was issued only after the Tribe filed suit against the FWS. *Northern Arapaho Tribe v. Ashe*, Case No. 11cv347-ABJ (D. Wyoming).
See http://www.redorbit.com/news/science/1112496160/native-american-tribe-granted-permission-to-hunt-bald-eagles/

[69] 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, 938 (2004)

A permit applicant can expect to wait three and a half years if they are applying for an entire eagle.[70] Applicants seeking loose feathers may wait six to nine months.[71] The National Eagle Repository receives about 1000 eagles every year and there are approximately 5000 people on the waiting list to receive eagles.[72]

C. Permits Authorizing Take For "Protection of Other Interests In A Locality"

In 2009, FWS developed a permit program for eagle take, where take is necessary "for the protection . . . of other interests in any particular locality." 50 C.F.R. § 22.26. Permits issued under 50 C.F.R. § 22.26 authorize take of bald and/or golden eagles where the take is:

(a) compatible with the preservation of the bald eagle and the golden eagle;[73]
(b) necessary to protect an interest in a particular locality;
(c) associated with but not the purpose of the activity; and
(1) for individual instances of take: the take cannot practicably[74] be avoided; or
(2) for programmatic take[75]: the take is unavoidable even though advanced conservation practices[76] are being implemented.

In addition to analyzing the factors above, FWS will also consider whether issuing the permit would preclude FWS from "authorizing another take necessary to protect an interest of higher priority."[77] This recognizes the possibility that demand for permits might exceed the

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[70] *Id.*; see also http://www.fws.gov/mountain-prairie/law/eagle/

[71] *Id.*

[72] *Id.*

[73] Although not defined in the codified regulation, the 2009 Federal Register notice explains that "compatible with the preservation of the bald eagle and golden eagle" means "consistent with the goal of stable or increasing breeding populations." 74 Fed. Reg. 46836; 46838 (2009).

[74] "Practicable" is defined as: "capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles, the following three things: the cost of remedy compared to proponent resources; existing technology; and logistics in light of overall project purposes." 50 CFR § 22.3.

[75] "Programmatic take" is defined as: "take that is recurring, is not caused solely by indirect effects, and that occurs over the long term or in a location or locations that cannot be specifically identified." 50 CFR § 22.3.

[76] "Advanced conservation practices" means "scientifically supportable measures that are approved by the Service and represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable." 50 CFR § 22.3.

[77] 50 CFR § 22.26(e)(4).

"scientifically based take thresholds" developed by FWS. For such a circumstance, FWS developed the following prioritization order for take permit issuance:

(i) Safety emergencies;
(ii) Native American religious use for rites and ceremonies that require eagles be taken from the wild;
(iii) Renewal of programmatic take permits;
(iv) Non-emergency activities necessary to ensure public health and safety; and
(v) Other interests.[78]

To implement this priority system, the FWS' regional offices were directed to develop a "structured allocation process consistent with the rule's prioritization criteria to be implemented in each Service region if there is evidence that demand for take will exceed take thresholds for either species of eagle."[79]

In 2009, the FWS determined that it would initially cap the permitted take of bald eagles at 5% of estimated annual productivity.[80] For golden eagles west of 100 degrees West longitude, FWS said "we will initially implement this rule only insofar as issuing take permits based on levels of historically authorized take, safety emergencies, and take permits designed to reduce ongoing mortalities and/or disturbance. Future projects seeking programmatic permits would need to minimize their own take of golden eagles to the point that it is unavoidable and also reduce take from another source to completely offset any new take from the new activity."[81] For areas east of 100 degrees West longitude, FWS said "we will not issue any take permits unless necessary to alleviate an immediate safety emergency" due to the lack of sufficient data on rates of golden eagle mortality in the eastern United States.[82]

In its 2009 notice, FWS explained that "a programmatic permit is not available where the only long-term take is due to indirect effects from an initial action. Programmatic take is the direct result of ongoing operations."[83] According to FWS, the following are examples of programmatic take:

1. A railroad that routinely strikes eagles feeding on carcasses on the tracks.
2. Utilities that kill eagles through collisions and electrocutions from contact with power lines.
3. Ongoing disturbance at a port due to vessel traffic and/or other port operations.

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[78] *Id.*

[79] 74 Fed. Reg. 46836; 46840 (Sept. 11, 2009)

[80] *Id.*at 46839.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 46842.

4. Construction and maintenance of highways throughout a State or other jurisdiction that routinely disturbs eagles.
5. Airports that periodically (but immediately upon discovery) need to remove eagle nests to protect human health and safety.[84]

The following are examples of what is not programmatic take:

1. Construction of a boat ramp, with or without long-term indirect effects that take eagles (boat traffic)
2. Construction of a port when eagles are disturbed by pile driving and other construction activities.
3. Construction of a single highway, or multiple highways, where eagle take can be projected to occur at particular locations and during specific project phases.[85]

Take that is not recurring, or that is caused solely by indirect effects, or that is limited to a specific defined location must be covered under a standard take permit – not a programmatic permit.

D. The Recent Change In Maximum Permit Term for Programmatic Take Permits

In the 2009 regulations, FWS set the maximum term of a programmatic permit at five years. On December 9, 2013, FWS revised the maximum term of a programmatic permit to 30 years.[86] This change became effective on January 8, 2014.[87] The purpose of this change was to "facilitate the responsible development of renewable energy and other projects designed to operate for decades, while continuing to protect eagles consistent with [FWS'] statutory mandate."[88] Based on comments, primarily from wind energy proponents, "it became evident that the 5-year term limit imposed by the 2009 regulations should be extended to better correspond to the operational timeframe of renewable energy projects."[89]

Extending the maximum permit term for programmatic permits to thirty years has been controversial.[90] A significant concern is the lack of any known effective mitigation measures to reduce harm to eagles at wind projects. The FWS' April 13, 2012 federal register notice proposing the 30-year permit term states that "we have relatively little information on the

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[84] *Id.*

[85] *Id.*

[86] 78 Fed. Reg. 73704 (Dec. 9, 2013)

[87] *Id.*

[88] *Id.*

[89] *Id.* at 73705.

[90] *Id.* at 73708 – 73730 (response to comments).

impacts of wind energy on eagles."[91] Likewise, in the September 11, 2009 federal register notice, FWS stated that: "we are currently unaware of any measures that would eliminate eagle mortalities when [wind power] turbines are sited in golden eagle habitat (including migration corridors)."[92] The lack of information, and lack of any feasible mitigation measures for wind projects, has caused concern regarding the decision to increase the permit term to thirty years.

Another concern expressed with regard to the lengthy permit terms was the potential for decline in eagle populations over a thirty year period. Eagles were only recently de-listed and FWS may discover that additional protections are warranted to prevent further population decline. Yet, a project developer with a permit to operate will vigorously resist any new conditions or permit requirements that FWS attempts to impose beyond those in the original permit. When FWS published the eagle take rule in September 2009, FWS explained its rationale for the five year permit term, stating: "the rule limits permit tenure to five years or less because factors may change over a long period of time such that a take authorized much earlier would be incompatible with the preservation of the bald eagle or golden eagle."[93] While FWS retains authority to revoke or modify permits based on changing conditions, that would likely happen only in the most extreme circumstances, and not without opposition from the permittee.

Thirty-year permit terms also raise concern because of the nature of the programmatic permit. As explained in the September 11, 2009 federal register notice, programmatic permits need not be specific about how many eagles may be taken. Programmatic permits "authorize take for large-scale and long-term activities where take is anticipated but the exact amount, location, and timeframes are impossible to identify."[94] The effectiveness of programmatic permit regime (in terms of eagle protection) will depend largely on the project proponent to exercise good faith in implementing permit conditions, monitoring, and reporting. It may be extremely difficult to determine how many eagles are actually being taken by wind energy facilities absent stringent enforcement of monitoring and reporting requirements.

E. More Proposed Changes in the Permit Program.

On April 13, 2012, FWS published an Advance Notice of Proposed Rulemaking (APNR) regarding the take permit program that it created in 2009.[95] As FWS put it, "during the 2 years that the regulations have been in effect, some stakeholders have expressed concern with some provisions of the rule." FWS solicited "public input on any . . . aspects of the permit program

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[91] 77 Fed. Reg. 22267; 22268 (April 13, 2012)

[92] 74 Fed. Reg. 46836; 46842 (Sept. 11, 2009)

[93] 74 Fed. Reg. 46836; 46856 (Sept. 11, 2009)

[94] *Id.*

[95] 72 Fed. Reg. 22278 (April 13, 2012)

governed by 50 CFR 22.26 that may be improved by revision of the regulations."[96] But specifically, FWS was "particularly interested" in three issues:

(1) Should the criteria for authorizing a programmatic permit (which currently requires the permitted take to be "unavoidable") be changed to mirror the criteria for issuance of a standard take permit (which authorizes "take that cannot practicably be avoided")?

(2) Under what circumstances should permittees be required to provide compensatory mitigation and to what degree should any required mitigation offset the detrimental impacts to eagles?

(3) The Eagle Act requires FWS to determine that any take of eagles is "compatible with the preservation of bald eagles or golden eagles." FWS has defined that standard to mean: "consistent with the goal of stable or increasing breeding populations."[97] FWS seeks input as to whether this standard is appropriate or whether it should be changed.

In addition to the changes proposed in the APNR, in late 2013, FWS sent letters to federally-recognized Indian tribes "to consult with the Service on a government-to-government basis regarding several issues related to our management of bald and golden eagles." The letter stated:

> The Service is considering revising several regulations pertaining to: incidental take permits for bald and golden eagles; permits to remove eagle nests; and disposition of eagles held under rehabilitation permits. The Service is also seeking Tribal input regarding the proposed propagation of eagles under raptor propagation permits, and possible changes to procedures for handling eagle carcasses that are sent to the National Eagle Repository.

The letter contained an attachment providing more detail, which invited recommendations from tribal governments with regard to the following issues:

- What population management objectives should be established for each eagle species;
- How might the Service better use tribal traditional ecological knowledge about eagles;
- How to define and determine which tribes are "affected tribes" under the regulations;
- How the Service can ensure tribal input is sought and weighed before issuing permits;
- What data standards should be required to adequately assess risk to eagles from particular activities;
- How the Service can integrate the tribal consultation process with the NEPA process for this rulemaking and for individual permit applications to take eagle;
- How the Service's NEPA analysis should consider effects to tribes from this rulemaking; and
- How to better include tribal governments in the long-term management of eagles;

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[96] *Id.* at 22279.

[97] 74 Fed. Reg. 46836 (Sept. 11, 2009)

In addition, the letter stated that FWS plans to modify its protocols on eagle carcass disposition by "draft[ing] a new chapter for the Service Manual to replace Director's Order 69 (DO 69) – the Service's Eagle Distribution Policy. DO 69 directs Service employees to salvage, transport, and ship eagle carcasses that are not being used as evidence in legal cases to the National Eagle Repository for distribution to Native Americans for religious use." The proposed change would be to transfer some eagle carcasses to the National Wildlife Health Center (NWHC) for avian disease analysis and cause of death determination prior to being transferred to the Repository for Native American religious use. The Service asked for input on

- Sending eagle carcasses to the NWHC for necropsy to obtain more information about eagle mortalities; and
- How the Service could incorporate carcass-handling practices that are respectful of the sacred nature of eagles to Indian tribes.

The letter indicates that FWS hopes to complete consultation with tribal governments and revision of its eagle regulations by the end of 2014; however, to date, there has not been any formal proposal for change published in the Federal Register.

F. An Assessment of the Programmatic Take Permit Program in the Context of Renewable Energy Development.

On March 11, 2009, the Secretary of the Interior issued Secretarial Order 3285, Renewable Energy Development by the Department of the Interior, which "establishes the development of renewable energy as a priority for the Department." Pursuant to that order, Interior has received and processed dozens of applications for large-scale solar and wind energy facilities on federally owned lands, especially in the western United States. Dozens of other solar and wind energy facilities are concurrently being built on non-federal lands in the western United States. This explosive growth in energy development has had, and will have, a significant adverse impact on eagles. The FWS programmatic permit regime, which is specifically intended to apply to commercial-scale energy developments, is currently failing to protect eagles from impacts arising out of these developments.

In 2008, even before Secretary Salazar adopted renewable energy development on federal lands as an official Department priority, an FWS wildlife biologist reported that 155,000 wind turbines were projected to be operating in the United States by 2020 (compared with 22,000 installed and operating as of February 2008).[98] Since 2009, Interior has approved at least ten commercial-scale wind energy facilities for development on federal lands.[99] Once constructed, these facilities alone would add nearly 2000 individual turbines to the environment. This tally does not include wind turbine developments located solely on non-federal lands. Although many

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[98] Manville, A.M., II. 2009. Towers, turbines, power lines, and buildings – steps being taken by the U.S. Fish and Wildlife Service to avoid or minimize take of migratory birds at these structures. In C.J. Ralph and T.D. Rich (editors). Proceedings 4th International Partners in Flight Conference, February 2008, McAllen, TX.

[99] http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/active_renewable_projects.html

of these projects are anticipated to take eagles, none of these facilities has obtained a programmatic permit to take eagles.

Commercial-scale wind energy facilities kill eagles in substantial numbers. In September 2013, FWS biologists published an article in the Journal of Raptor Research entitled *Bald Eagle and Golden Eagle Mortalities at Wind Energy Facilities in the Contiguous United States.* J. Raptor Res. 47(3): 311-315 (2013). This article reports that operation of the Altamont Pass Wind Resource Area in California resulted in annual mortality of up to 75 golden eagles per year in 2005-2007. *Id.* at p. 311. In addition to the mortalities at Altamont, the article reported an additional 67 confirmed mortalities of bald or golden eagles at other commercial-scale wind energy facilities operating in the United States from 2008 through June 2012. *Id.* at p. 312. Comparatively, from 1997 through 2007, there were 18 confirmed mortalities of bald or golden eagles at commercial-scale wind energy facilities. *Id.* at p. 314. The significant increase in eagle mortalities, beginning in 2008, correlates with the growth of wind energy development across the United States, especially in the West. The article also advises that "these data underrepresent the total number of mortalities of eagles at wind energy facilities in the United States during this period; e.g., most were discovered incidentally during routine activities at facilities." *Id.* at p. 312. The article noted a "general lack of rigorous monitoring and reporting of eagle mortalities" at commercial wind facilities. *Id.*, at p. 313. "Thus, our findings of the reported mortalities likely underestimate, perhaps substantially, the number of eagles killed at wind facilities in the United States." *Id.*[100]

While impacts to birds, including eagles, are more obvious and prevalent at commercial-scale wind energy facilities, recent evidence shows that birds, and potentially eagles, are also subject to take at commercial-scale solar energy facilities. For example, multiple bird injuries and mortalities have been reported at the Ivanpah Solar Electric Generating Station in southeastern California, which is impacting avian species even though it is only partially completed and operational. Compliance reports filed with the California Energy Commission by the project owner reported 26 bird mortalities at the Ivanpah facility between June and mid-September 2013.[101] Some of these deaths reportedly resulted from birds being burned by "heat flux" when flying over the facilities. Others resulted from birds crashing down into the solar heliostats or other structures. Some reports suggest that these large solar projects, which often consist of tens of thousands of concentrated mirrors reflecting into the sky, look like large water bodies from the air, attracting birds searching for water in the desert environment.[102] A

[100] For example, this report documented the deaths of 29 golden eagles at wind-energy facilities in Wyoming since 2009. However, a May 14, 2013 Associated Press article states: "One of the deadliest places in the country for golden eagles is Wyoming, where federal officials said wind farms have killed more than 50 golden eagles since 2009, predominantly in the southeastern part of the state. The officials spoke on condition of anonymity because they were not authorized to disclose the figures." Dina Cappiello, *Wind farms get pass on eagle deaths*, Associated Press, May 14, 2013. This article further reports that the Chokecherry/Sierra Madre Wind Project, an 1,000 turbine project approved by BLM for development in south-central Wyoming, could kill as many as 64 eagles per year.

[101] http://www.kcet.org/news/rewire/solar/concentrating-solar/bird-deaths-mount-at-ivanpah-solar.html

[102] http://www.kcet.org/news/rewire/solar/water-birds-turning-up-dead-at-solar-projects-in-desert.html

peregrine falcon was also found injured at the facility in the first week of September 2013. Similar avian deaths are reportedly occurring at the Genesis Solar facility, located near Blythe, California.[103]

Despite the growth in development of commercial-scale renewable energy projects, and the documented injuries and deaths to protected eagles resulting from commercial wind facilities, very few developers have sought approval for programmatic take permits and, to date, FWS has not issued any programmatic take permits under its 2009 regulations. *See* 77 Fed. Reg. 22278, 22279 (April 13, 2012); *see also* M. Weiser, *Eagle conservation effort at Solano wind energy project is first of its kind*, Sacramento Bee, Sep. 27, 2013 (reporting that no programmatic take permits have been issued to date).[104] Thus, to date, every eagle death directly attributable to commercial-scale wind energy facilities, including those located on federal lands, has been an unpermitted, and likely unlawful, take of eagles in contravention of the Eagle Act and MBTA.

Despite the evidence gathered by FWS' biologists and scientists of eagle deaths caused by commercial-scale wind energy facilities, there appears to be a current administration practice and/or policy to not enforce laws protecting eagles against renewable energy projects.[105]

For example, a May 14, 2013 Associated Press article reports:

> Wind farms in this corner of Wyoming have killed more than four dozen golden eagles since 2009, one of the deadliest places in the country of its kind. But so far, the companies operating industrial-sized turbines here and elsewhere that are killing eagles and other protected birds have yet to be fined or prosecuted – even though every death is a criminal violation. The Obama administration has charged

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[103] http://www.kcet.org/news/rewire/wildlife/august-was-a-bad-month-for-birds-at-genesis-solar.html

[104] The few applications for programmatic take permits that have been filed evidence the significant impact to eagles caused by commercial wind-energy production. For example, one proposed 94-turbine wind farm in Oklahoma is seeking a permit to kill up to 120 eagles over the life of the project. Another application in California, for a proposed 50-turbine wind farm, has sought a permit to kill five golden eagles over five years. These are only two of the numerous projects being proposed around the country. The cumulative effect of commercial wind energy development on eagles could be very significant. Determining how many eagles are actually killed by these projects will depend on the good faith monitoring and reporting of the project developers.

[105] To date, there has been only one criminal prosecution by the United States DOJ for the taking of eagles at a wind energy project. In *United States v. Duke Energy Renewables, Inc.*, the defendant was charged with misdemeanor violations of Section 703 of the MBTA due to deaths of 14 golden eagles and 149 other birds at two wind energy projects in Wyoming between 2009 and 2013. S*ee* 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. 34. The prosecution was resolved by a plea bargain, in which Duke Energy Renewables paid $1 million in fines (as compared to the project construction costs of $358 million), but Duke Energy Renewables also received a non-prosecution agreement from DOJ for any takings at all four of its Wyoming wind energy projects for nearly ten years so long as Duke complies with the terms of its plea agreement and diligently pursues a take permit. *Id.* at 34-36.

> oil companies for drowning birds in their waste pits, and power companies for electrocuting birds on power lines. But the administration has never fined or prosecuted a wind-energy company, even those that flout the law repeatedly.

Dina Cappiello, *Wind farms get pass on eagle deaths*, Associated Press, May 14, 2013. This selective enforcement policy, in which wind energy projects are not held accountable for violations of existing federal laws like the Eagle Act and MBTA, is also documented in recent articles by Andrew Ogden[106] and Scott W. Brunner.[107]

The Interior Department's renewable energy development policies, combined with its practice of not enforcing federal laws prohibiting eagle take, have created a regulatory environment that provides little incentive for wind-energy developers to apply for and obtain take permits, which could require costly mitigation measures. Interior, acting through the BLM, currently allows wind projects to proceed on federal lands even if the proponent does not apply for or obtain an eagle take permit. None of the wind projects approved by BLM since 2009 have obtained an eagle take permit under the FWS regulations. A wind energy developer can reasonably assume that, even if it violates federal law by taking eagles without a permit, the United States will not impose any penalties against it. *See* Cappiello, *supra* ("By not enforcing the law, the administration provides little incentive for companies to build wind farms where there are fewer birds. And while companies already operating turbines are supposed to avoid killing birds, in reality there's little they can do once the windmills are spinning").

The current programmatic permit regime is not working to protect bald and golden eagles in the context of large-scale renewable energy development. Given that many large-scale wind projects are being developed on federal lands, two changes in policy would significantly enhance protection of eagles. First, the Secretary of the Interior should require proponents of renewable energy projects on federal lands, which are anticipated to take eagles, to apply for and obtain an eagle take permit prior to project approval. Permits should be made a mandatory prerequisite for projects on federal lands, not merely voluntary. Second, the federal government, through FWS, BLM, and DOJ must exercise their respective enforcement authorities against projects that unlawfully take eagles without a permit. If the federal government continues with its current practice of not enforcing take prohibitions, energy developers will continue to simply ignore the permit program and take eagles with relative impunity.

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

[107] *The Prosecutor's Vulture: Inconsistent MBTA Prosecution, Its Clash with Wind Farms, and How to Fix It*, Seattle University Journal Of Environmental Law (2013), available at: http://www.sjel.org/vol3/the-prosecutors-vulture