California Department of Fish and Wildlife and California Attorney General Xavier Becerra Advisory

Affirming California's Protections for Migratory Birds

November 29, 2018

The California Department of Fish and Wildlife (CDFW) and California Attorney General Xavier Becerra jointly provide this advisory to affirm that California law continues to provide robust protections for birds, including a prohibition on incidental take of migratory birds, notwithstanding the recent reinterpretation of the Migratory Bird Treaty Act (MBTA) by the U.S. Department of the Interior (DOI).

The Federal Government's Reinterpretation of MBTA

Section 2 of the MBTA makes it "unlawful *at any time*, *by any means or in any manner*, to pursue, hunt, take, capture, [or] kill …" a wide variety of migratory birds, except as permitted by regulations. (16 U.S.C. § 703, emphasis added.) A bipartisan coalition of seventeen former leaders of DOI and the U.S. Fish and Wildlife Service recently confirmed that, since at least the 1970s, both agencies have consistently interpreted Section 2 of the MBTA to prohibit incidental

take of migratory birds.[1] "Incidental take" is take that is incidental to but not the intended purpose of an otherwise lawful activity. (See 16 U.S.C. § 1539(a)(1)(B).) In January 2017, the DOI issued a memorandum affirming this longstanding interpretation.

In December 2017, the acting Solicitor of the DOI issued a new memorandum now disclaiming the DOI's longstanding interpretation of the MBTA as prohibiting incidental take of migratory birds. While three separate lawsuits, including one joined by the Attorney General, challenge the legality of the new memorandum and its consistency with the requirements of the MBTA, California's protections for migratory birds, including a prohibition against incidental take, remain clear and unchanged.

California Law's Protection for Birds

The protection of birds is of critical importance to both CDFW, which holds fish and wildlife resources in California in trust for the people of the State and has jurisdiction over the conservation, protection, and management of those resources (Fish and Game Code §§ 711.7(a) and 1802), and to the Attorney General, who enforces state law, including statutes protecting birds. (Cal. Gov. Code §§ 12607 and 12511.) California courts have affirmed the "legitimate and, indeed, vital nature of a state's interest in protecting its natural resources, including wildlife within the State," stressing the State's "obligation and duty to exercise supervision over such resources for the benefit of the public generally." (*People v. Maikhio*, 51 Cal.4th 1074, 1093-95 (2011).)

As identified below, California law contains a number of provisions prohibiting "take" of migratory birds. The California Fish and Game Code defines "take" for purposes of all of these statutes as "to hunt, pursue, catch, capture, kill, or attempt to hunt, pursue, catch, capture, or kill." (Fish and Game Code § 86.) California courts have held that take includes incidental take and is not limited to hunting and fishing and other activities that are specifically intended to kill protected fish and wildlife. (*See Dept. of Fish and Game v. Anderson Cottonwood Irrigation Dist.*, 8 Cal.App.4th 1554, 1563-64 (1992) ("take" includes the killing of endangered species in the course of lawful activity; in that case, via unscreened diversions of water), citing *Churchill v. Parnell*, 170 Cal.App.3d 1094, 1098 (1985) ("take" includes the application of pesticides in water that kills fish).) More recently, in *Center for Biological Diversity v. Department of Fish and Wildlife*, 62 Cal.4th 204, 235-36 (2015), the California Supreme Court specifically stated that:

> The broad definition of "take" in Fish and Game Code section 86 ensures that DFW can maintain legal control over actions interfering with threatened, endangered and fully protected animals even where those actions may not have been intended to kill or hurt the animal.

[1] *See*: 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/.

Unless the Fish and Game Code or its implementing regulations provide otherwise, under California law it is unlawful to:

- Take a bird, mammal, fish, reptile, or amphibian (Fish and Game Code § 2000);
- Take, possess, or needlessly destroy the nest or eggs of any bird (Fish and Game Code § 3503);
- Take, possess, or destroy any bird of prey in the orders *Strigiformes* (owls) and *Falconiformes* (such as falcons, hawks and eagles) or the nests or eggs of such bird (Fish and Game Code § 3503.5);
- Take or possess any of the thirteen fully protected bird species listed in Fish and Game Code section 3511;
- Take any non-game bird (i.e., bird that is naturally occurring in California that is not a gamebird, migratory game bird, or fully protected bird) (Fish and Game Code § 3800);
- Take or possess any migratory non-game bird as designated in the MBTA[2] or any part of such bird, except as provided by rules or regulations adopted by the Secretary of the Interior under the MBTA (Fish and Game Code § 3513);
- Take, import, export, possess, purchase, or sell any bird (or products of a bird), listed as an endangered or threatened species under the California Endangered Species Act unless the person or entity possesses an Incidental Take Permit or equivalent authorization from CDFW (Fish and Game Code § 2050 et seq.).

California hosts an incredible diversity of bird species, and over 600 species of migratory birds live in or migrate through California. CDFW and the Attorney General will continue to implement and enforce California law to protect these birds.

For more information regarding permit requirements for activities that may affect bird species, please visit https://www.wildlife.ca.gov/Conservation/Environmental-Review or contact CDFW staff for your region. To report the illegal take of birds and other wildlife, please call the CalTIP hotline at 1-888-334-2258 or visit https://www.wildlife.ca.gov/enforcement/caltip.

[2] "Migratory bird" is defined in federal regulations implementing the MBTA at 50 C.F.R. § 10.12. The list of species protected under the MBTA is set forth at 50 C.F.R. § 10.13.