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## Feds Drop 2nd Circ. Challenge Of Migratory Bird Protections

By [Michael Phillis](#)

Law360 (February 26, 2021, 5:43 PM EST) -- The Biden administration told the Second Circuit it is withdrawing its appeal and will no longer fight to overturn a lower court's decision that threw out a Trump administration move to loosen restrictions on the incidental killing of migratory birds.

The Biden administration in a filing Thursday moved to leave in place an August decision by U.S. District Judge Valerie Caproni. That [decision vacated U.S. Department of the Interior Solicitor](#) Daniel Jorjani's 2017 [opinion](#) that said the Migratory Bird Treaty Act, or [MBTA](#), allows for the criminal prosecution only of individuals and companies that intentionally kill migratory birds, and that the agency was wrong to have claimed, as it did since the 1970s, the right to go after those that incidentally kill the creatures in the course of some project.

"The Biden administration is doing the right thing by refusing to defend the prior administration's illegal and ecologically disastrous interpretation of the Migratory Bird Treaty Act, one of the nation's bedrock conservation laws," Eric Glitzenstein, an attorney with the [Center for Biological Diversity](#), said in a statement. The center was part of a coalition of environmental groups fighting the Trump administration's action at the Second Circuit.

The decision to stop the appeal is just one of the actions the Biden administration has taken to reverse the Trump administration's approach. The Trump administration in January [finalized](#) a policy that eliminated criminal penalties for incidental migratory bird deaths, a move officials at the time said provided more certainty for industry, but environmentalists countered would undermine the century-old law.

The Biden administration pushed back the effective date of the finalized rule from February to March 8 and invited public comments on what action should be taken on the policy, including whether it should be rescinded.

"In effect, the Biden administration has made clear the rule itself is a dead letter," Glitzenstein said, adding that the Jorjani opinion was the foundation of the Trump administration's rule, and defense of that opinion has now been abandoned.

The Trump administration's final rule said that the MBTA bars only the intentional killing of birds. If an activity is not meant to "take" birds, it isn't prohibited under the 1918 law, according to the policy issued by the U.S. [Fish and Wildlife Service](#). "Take" was defined generally as causing harm through activities such as hunting.

For decades, the Interior Department held that the 1918 law — drafted as a partnership among the U.S., Canada, Mexico, Japan and Russia to protect migratory birds — prohibits incidental taking or killing that occurs during otherwise permitted activities, such as the operation of electric transmission lines. An industry group in 2017 asked the agency to halt the prosecution of incidental bird deaths, and the department agreed, issuing a legal opinion that the MBTA does not prohibit the incidental taking or killing of birds.

The agency's argument that the Jorjani opinion tied up a "patchwork of legal standards" written over decades was misplaced, Judge Caproni said last year.

"First, the opinion is riddled with ambiguities made only more apparent by the incoherent guidance FWS subsequently issued. Second, Interior's argument vastly overstates circuit disagreement and blurs the actual boundaries that have been drawn," the judge wrote last year.

The Interior Department said last year that five words at issue in their interpretation of the act, "pursue, hunt, take, capture and kill" should be read so they have a "related meaning." The department said that three of the words indicate actions that are deliberate. Although "kill" and "take" by themselves could incorporate incidental conduct, when they are considered in context with the other three words, they are meant to implicate "affirmative acts," according to the government.

The interpretation doesn't pass close scrutiny, the judge said last year.

"Interior's statute would have been easy to draft, but that is not the statute Congress drafted. There is nothing in the text of the MBTA that suggests that in order to fall within its prohibition, activity must be directed specifically at birds," the judge said in August. "Nor does the statute prohibit only intentionally killing migratory birds."

A representative with the Interior Department declined to comment.

The National Audubon Society, American Bird Conservancy, Center for Biological Diversity and [Defenders of Wildlife](#) are represented by Eric R. Glitzenstein of the Center for Biological Diversity and Ethan I. Strell of the National Audubon Society.

The [Natural Resources Defense Council](#) and [National Wildlife Federation](#) are represented by Ian Fein and Gonzalo E. Rodriguez Gonzalez of the NRDC.

The Department of the Interior is represented by Tomoko Onozawa and Benjamin H. Torrance of the [U.S. Attorney's Office for the Southern District of New York](#).

The case is Natural Resources Defense Council Inc. et al. v. U.S. Department of the Interior et al, case number [20-3491](#), in the [U.S. Court of Appeals for the Second Circuit](#).

--Additional reporting by Juan Carlos Rodriguez and Keith Goldberg. Editing by Jay Jackson Jr.