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## Brief for Appellant United States of America: Tenth Annual Pace National Environmental Moot Court Competition

Michael Elbaz  
*Brooklyn Law School*

Dahlia Fredericks  
*Brooklyn Law School*

Donna Weiner  
*Brooklyn Law School*

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA

and

BLACKACRE FOREST PRODUCTS, INC.,

Appellants

v.

CITIZENS TO SAVE THE BIRDS, INC.,

Appellee.

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ON APPEAL FROM

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW UNION

BRIEF FOR APPELLANT UNITED STATES OF  
AMERICA

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Michael Elbaz

Dahlia Fredericks

Donna Weiner

Brooklyn Law School

250 Joralemon Street

Brooklyn, NY 11201

QUESTIONS PRESENTED

- I. Does Citizens to Save the Birds, Inc. lack standing to bring suit because no birds were killed by the Forest Service's timber sale nor is there any guarantee that any birds will be killed in the future?
- II. Is the Migratory Bird Treaty Act "law" with which agency actions under the National Forest Management Act must be in accord for purposes of judicial review under the Administrative Procedure Act?

- III. Is the Migratory Bird Treaty Act’s misdemeanor provision a strict liability crime given that there is no language in the statute indicating otherwise?
- IV. Does the United States Forest Service violate the Migratory Bird Treaty Act if it satisfies all statutory requirements in implementing a forest management plan in accordance with the National Forest Management Act?

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... 833

TABLE OF CONTENTS..... 834

TABLE OF AUTHORITIES ..... 836

STATUTES AND REGULATIONS INVOLVED ..... 838

STATEMENT OF THE CASE ..... 839

SUMMARY OF THE ARGUMENT ..... 840

ARGUMENT ..... 842

    I. THE DISTRICT COURT IMPROPERLY DENIED THE UNITED STATES’ MOTION TO DISMISS BECAUSE CSB FAILED TO SATISFY THE NECESSARY ELEMENTS OF STANDING..... 833

        A. CSB Failed To Satisfy The Injury-In-Fact Requirement Because There Was No Concrete And Particularized Injury Nor Was There Any Actual Or Imminent Injury..... 842

        B. Even If This Court Finds That CSB Suffered An Injury-In-Fact, CSB Failed To Show A Causal Connection Between Injury And Conduct..... 845

    II. THE FOREST SERVICE, EMPOWERED BY THE NFMA WITH THE MANAGEMENT OF THE NATION’S RENEWABLE RESOURCES, IS EXEMPT FROM THE MBTA’S PROHIBITIONS, THEREBY PRECLUDING THE FOREST SERVICE’S TIMBER SALE FROM JUDICIAL REVIEW. .... 833

A.	Congress Did Not Intend The APA's General Grant Of Jurisdiction To Duplicate The Special Statutory Procedures Relating To Specific Agencies. ....	847
B.	The Forest Service Was In Full Compliance With All Required Statutes And The Timber Sale Was Not Subject To Review Because The Sale Was In Accordance With The NFMA, Which Supersedes The MBTA. ....	849
C.	As A Government Agency, The Forest Service Is Not Subject To The MBTA's Restrictions. ....	850
D.	Judicial Review Is Improper Because Neither The Judiciary Nor Private Citizens Are Empowered With The Prosecution Of Crimes. ....	852
III.	THE MBTA IS A REGULATORY STATUTE DERIVED FROM AN INTERNATIONAL TREATY, WHICH PROTECTS PUBLIC WELFARE BY IMPOSING MINOR PENALTIES FOR STRICT LIABILITY MISDEMEANORS. ....	834
A.	Although Originally Enacted To Implement An International Treaty, The MBTA Was Expanded Beyond The International Convention's Concerns To Include Additional Protection Of Migratory Birds. ....	854
B.	The Protection Afforded By The MBTA Is Not Only Conferred Upon Migratory Birds, But Serves To Benefit Society As A Whole. .	857
C.	The MBTA Is Not Rooted In Traditional Common Law Where A Mens Rea Element May Have Been Required. ....	858
D.	In View Of The Statutory Scheme, A Scienter Requirement Is Not Required Because The MBTA's Misdemeanor Provisions Levy Relatively Small Penalties. ....	859

IV. THE FOREST SERVICE SATISFIED ALL STATUTORY REQUIREMENTS IN IMPLEMENTING A FOREST MANAGEMENT PLAN THEREBY EXEMPTING ITSELF FROM LIABILITY UNDER THE MBTA. ....	834
A. Substantial Deference Should Be Given To The Forest Service's Decision To Exempt Itself From The MBTA. ....	862
B. The Forest Service Exempted Itself From Liability Under The MBTA By Complying With The Requisite Components Of The Forest Management Plan. ....	863
CONCLUSION .....	865

## TABLE OF AUTHORITIES

### SUPREME COURT DECISIONS

1. *Abbott Lab. v. Gardner*, 387 U.S. (1967)
2. *Bowen v. Massachusetts*, 487 U.S. 879 (1988)
3. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)
4. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)
5. *Missouri v. Holland*, 252 U.S. 416 (1920)
6. *Morissette v. United States*, 342 U.S. 246 (1952)
7. *Morton v. Ruiz*, 415 U.S. 199 (1974)
8. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989)
9. *Reiter v. Cooper*, 507 U.S. 258 (1993)
10. *Sierra Club v. Morton*, 405 U.S. 727 (1972)
11. *Staples v. United States*, 511 U.S. 600 (1994)
12. *United States v. Balint*, 258 U.S. 250 (1922)
13. *United States v. Batchelder*, 442 U.S. 114 (1979)
14. *United States v. Calandra*, 414 U.S. 338 (1974)
15. *United States v. Cooper Corp.*, 312 U.S. 600 (1941)
16. *Wayte v. United States*, 470 U.S. 598 (1985)

## UNITED STATES COURT OF APPEALS DECISIONS

1. *Cerritos Gun Club v. Hall*, 96 F.2d 620 (9th Cir. 1938)
2. *Defenders of Wildlife v. Administrator, Env'tl. Protection Agency*, 882 F.2d 1294 (8th Cir. 1989)
3. *Headwater v. BLM*, 914 F.2d 1174 (9th Cir. 1990)
4. *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110 (8th Cir. 1997)
5. *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966)
6. *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997)
7. *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994)
8. *United States v. Boynton*, 63 F.3d 337 (4th Cir. 1995)
9. *United States v. Catlett*, 747 F.2d 1102 (6th Cir. 1984)
10. *United States v. Chandler*, 753 F.2d 360 (4th Cir. 1985)
11. *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997)
12. *United States v. Delahoussaye*, 573 F.2d 910 (5th Cir. 1978)
13. *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986)
14. *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978)
15. *United States v. North Dakota*, 650 F.2d 911 (8th Cir. 1981)
16. *United States v. Smith*, 29 F.3d 270 (7th Cir. 1994)
17. *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971)
18. *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996)

## UNITED STATES DISTRICT COURT DECISIONS

1. *Idaho Sporting Congress, Inc. v. United States Forest Serv.*, 843 F. Supp. 1373 (D. Idaho 1994)
1. *United States v. Schultze*, 28 F. Supp. 234 (W.D.Ky. 1939)

FEDERAL STATUTES, REGULATIONS AND  
LEGISLATIVE MATERIALS

1. Administrative Procedure Act, 5 U.S.C. § 706
2. Code of Federal Regulations, 36 C.F.R. §§ 219 et seq.

3. Forest Service Decision Making and Appeals Reform Act, Pub.L. 102-381, § 322.
4. Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq.
5. Endangered Species Act, 16 U.S.C. § 1532(13)
6. Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528 et seq.
7. National Environmental Protection Act, 42 U.S.C. § 4321 et seq.
8. National Forest Management Act, 16 U.S.C. §§ 1600 et seq.
9. S. Rep. No. 86-1779, at 1 (1960)
10. S. Rep. No. 93-851, at 3-4 (1974)
11. S. Rep. No. 99-445 at 35 (1986)

### STATUTES AND REGULATIONS INVOLVED

The statutes relevant to the determination of this case are the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq.; the National Forest Management Act, 16 U.S.C. §§ 1600 et seq.; the Administrative Procedure Act, 5 U.S.C. § 706; the National Environmental Protection Act, 42 U.S.C. § 4321 et seq.; the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528 et seq.; and Forest Service Decision Making and Appeals Reform Act, Pub. L. 102-381, § 322, all of which are reproduced in Appendix B. The regulations relevant to this case are found in 36 C.F.R. § 219.10 and 36 C.F.R. § 219.19, which also are reproduced in Appendix B.

### STATEMENT OF THE CASE

This case is before the court on appeal from a denial of a Motion to Dismiss filed by the defendants, the United States Forest Service ("Forest Service") and Blackacre Forest Products, Inc. ("Blackacre") against Citizens to Save the Birds, Inc. ("CSB").

In May, 1997, the Forest Service, an agency within the Department of Agriculture, authorized a timber sale to Blackacre in accordance with the National Forest Manage-

ment Act, 16 U.S.C. §§ 1600, et seq. ("NFMA").<sup>1</sup> Record 1. The timber sale permitted Blackacre to clearcut 500 acres, known as the "Big Tree Tract," in the New Union National Forest. Record 1. The Big Tree Tract is part of an area of old growth forest, which is one of few in the New Union National Forest. Record 1. The New Union National Forest is therefore a very valuable timber resource, in addition to being used for outdoor recreation and study. Record 1. To balance these diverse interests, the Forest Service developed a land and natural resource management plan ("the Plan"), for the New Union National Forest, pursuant to § 1604 of the NFMA. Record 1. The Plan designated some parts of the old growth forest, including the Big Tree Tract, for logging and other parts for preservation. Record 1. The Forest Service, in compliance with all applicable statutes and regulations, followed its normal procedures both for the development of the Plan and for the timber sale, which included preparation of an Environmental Impact Statement ("EIS") as required under the National Environmental Policy Act, 42 U.S.C. §§ 4321, et seq. ("NEPA").<sup>2</sup> Record 2.

CSB is a non-profit corporation whose purpose is to protect the avian population resident in and migrating through the State of New Union. Record 2. CSB claims that its members observe birds and enjoy the outdoors in the New Union National Forest. Record 2. CSB alleges that its members' use of the Big Tree Tract would be adversely affected if Blackacre were allowed to clearcut the Big Tree Tract. Record 2.

CSB opposed the timber sale at all stages of the Forest Service's development of the Plan and during the sale to Blackacre. Particularly, CSB opposed the Plan and sale on grounds that clearcutting would result in the direct and indirect deaths of migratory birds that roost and nest in the trees designated for cutting. Record 2. The Forest Service's EIS acknowledged the possibility that if cutting occurs during the spring or summer months, it will result in the loss of nests with their eggs or chicks. Record 2. Based on a survey, there

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1. See Appendix B.

2. See Appendix B.



would be a little over one hundred migratory bird nests affected if all the timber is cut only during nesting season. Record 2. In addition, the EIS recognizes that the clearcutting may result in some habitat destruction. Neither the Plan nor the timber sale restricts the season of the year during which clearcutting is allowed. Record 2.

CSB seeks judicial review of the Forest Service's timber sale under the NFMA, using the standard for judicial review set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA").<sup>3</sup> CSB claims that the United States is foreclosed from any timber sale that authorizes logging which will kill migratory birds in violation of the Migratory Bird Treaty Act, 16 U.S.C. § 703 ("MBTA").<sup>4</sup> Record 2.

The United States moved to dismiss the action, arguing that CSB lacked standing to raise this dispute, the issue was not ripe for decision, the MBTA is not law that governs the timber sale, and regardless, the Forest Service is exempt from the MBTA's strict liability offense. The Honorable R. N. Remus, of the United States District Court for the District of New Union, denied the United States' motion. Record 4.

### SUMMARY OF THE ARGUMENT

CSB lacked standing to bring this suit against the United States Forest Service. CSB failed to establish that it has suffered an injury-in-fact because no birds were killed by the timber sale nor is there any guarantee that any birds will be killed in the future. Furthermore, even if CSB sustained an injury, there is no causal connection between the injury complained of by CSB and the Forest Service's conduct.

Additionally, the district court lacked jurisdiction to entertain CSB's claim under the APA. The lower court's review of the timber sale improperly, and unnecessarily, duplicated the NFMA's procedure for reviewing agency action. The MBTA does not apply to government entities. Therefore, the MBTA is not "law" with which agency actions under the NFMA must be in accord for purposes of judicial review.

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3. See Appendix B.

4. See Appendix B.

Concluding otherwise would frustrate the Forest Service's ability to execute its congressionally delegated duties pursuant to the NFMA. Moreover, judicial review of a potential penal violation under the MBTA improperly circumvents the Department of Justice's prosecutorial discretion.

Furthermore, as most circuit courts hold, the MBTA's misdemeanor offense is a strict liability crime. The statute lacks a scienter requirement. Congress specifically reiterated its intention to enact a strict liability offense in its continuous revisions of the MBTA. The MBTA's scienter-free nature ensures efficient enforcement of a significant public welfare statute.

Finally, regardless of whether the MBTA prohibits the killing of migratory birds by clearcutting, the timber sale did not violate the MBTA. The sale was part of a forest management plan conducted in accordance with the NFMA. By considering numerous alternatives, and taking into account economic, environmental, and societal concerns, the Forest Service concluded that the benefit resulting from the timber sale considerably outweighed any potential harm to birds caused by clearcutting. The Forest Service's decision to implement the Plan was reasonable and should be given substantial deference by the court in light of the Forest Service's expertise.

## ARGUMENT

### I. THE DISTRICT COURT IMPROPERLY DENIED THE UNITED STATES' MOTION TO DISMISS BECAUSE CSB FAILED TO SATISFY THE NECESSARY ELEMENTS OF STANDING.

Citizens to Save the Birds, Inc. ("CSB") is not injured by the action complained of and is therefore not the proper party to bring suit. CSB bears the burden of establishing the elements of standing as the party invoking federal jurisdiction, but has failed to do so. First, CSB has not demonstrated that it has suffered an injury-in-fact. Second, CSB has not shown that there is a causal connection between the conduct complained of and the alleged injury. Finally, CSB has not

shown that a favorable decision would be likely to redress its injury. The second and third elements are contingent upon the first, thus without proof of an injury-in-fact, they need not be addressed. CSB failed to establish that it has suffered an injury-in-fact because no birds were killed by the sale of timber. Therefore, the decision of the district court should be reversed, and the United States' motion to dismiss should be granted.

A. CSB Failed To Satisfy The Injury-In-Fact Requirement Because There Was No Concrete And Particularized Injury Nor Was There Any Actual Or Imminent Injury.

CSB fails to establish an injury-in-fact. Injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (hereinafter "*Defenders I*"). While aesthetic and environmental well-being are cognizable interests, the Supreme Court has held that "the 'injury in fact' test requires more than an injury to a cognizable interest." *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972). The interest also must be particular to the party invoking the action. Here, CSB failed to make such a showing. Therefore, the action must be dismissed.

CSB's contention that its special interest would be adversely affected if Blackacre clearcuts the Big Tree Tract does not establish an injury-in-fact. See *Morton*, 405 U.S. at 739 (discussing that a "special interest" by itself is insufficient to demonstrate an injury-in-fact). In *Morton*, the Supreme Court rejected the Sierra Club's claim of a special interest in conservation of natural game refuges and forests, holding that the group lacked standing to maintain the action. *Id.* at 727. Likewise, CSB also lacks standing. Its claim of a special interest in saving the avian population is not sufficient to maintain an action. Otherwise, as the Court in *Morton* noted, "there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization . . . [a]nd if any group with a bona fide 'spe-

cial interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so." *Id.* at 739.

Moreover, CSB's contention that its activities would be adversely affected is also insufficient to establish standing. In *Morton*, the Court revealed that the Sierra Club did in fact assert that "[i]ts interests would be vitally affected . . . and would be aggrieved . . . ." *Morton*, 405 U.S. at 735 n.8. Despite the alleged injury in the pleadings, the Court held that this allegation was insufficient to establish standing. *Id.* at 741. CSB asserts no more than the Sierra Club. CSB merely alleges that its members' use of the forest would be adversely affected if Blackacre clearcuts the Big Tree Tract. Record 2. Consistent with the holding in *Morton*, CSB's contention is insufficient to establish standing.

CSB also fails to establish imminent injury. CSB speculates that some injury may occur in the future. Record 2. A claim of future injury lacks the imminence required to establish an injury-in-fact. "[S]ome day' intentions—without any description of concrete plans, or indeed even any specifications of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Defenders I*, 504 U.S. at 564 (emphasis in original). In *Defenders I*, imminence was lacking despite the plaintiff's demonstration that the disputed agency action would adversely affect its plans to observe endangered species in the future. *Id.* The party invoking jurisdiction "must make an adequate showing that the injury is actual or certain to ensue. Assertions of potential future injury do not satisfy the injury-in-fact test." *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). CSB has done nothing but assert potential future injury. Record 2. Neither the United States Forest Service ("Forest Service") nor Blackacre has killed any migratory birds. Record 3. Furthermore, the Forest Service will not kill any birds in the future and there is no indication that Blackacre will do so. Record 3. Bird deaths may occur as a result of logging only if Blackacre actually logs the Big Tree Tract and logs it during nesting season. Record 3.

Moreover, the Forest Service's Environmental Impact Statement ("EIS") states that bird deaths will occur only if cutting occurs during spring or summer months. Record 2.

The key word is "if." No present injury has occurred, and there is a possibility that no injury will ever occur. This speculation as to future injury falls far below the standard required to show actual or imminent injury. Additionally, there is no proof that Blackacre is about to log the Tract and no proof that if it ever logs the Tract it will do so during the nesting season. Record 3. CSB has not alleged any facts demonstrating that it has or will suffer any injury. Without a showing of actual and imminent injury, there is no basis to maintain an action.

Finally, CSB's defective pleading cannot be cured by the testimony given at the hearing on the motion to dismiss. "The existence of federal jurisdiction ordinarily depends upon the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). In the present case, only at the hearing on the motion to dismiss did the Forest Service and Blackacre acknowledge that neither of them contemplated notice to or further action by the Forest Service before Blackacre begins to harvest timber. Record 2. Blackacre also made a comment at the hearing that "it will harvest timber during the bird nesting season . . . ." Record 2. There is no indication that these facts were alleged in the filed complaint. These actions by the Forest Service and Blackacre were untimely, and therefore, CSB cannot maintain an action. "[F]or the controversy to be ripe, the complained-of injury must be immediate or imminently threatened." *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996). CSB failed to make this showing in its complaint and may not assert standing based on actions made subsequent to the filing of its complaint. Otherwise, this court would grant judicial approval of CSB's fishing expedition. A party may not file a complaint without facts sufficient to maintain the action, with the hope that discovery will lead to facts sufficient to maintain a cause of action. "The ripeness doctrine prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract

disagreements over administrative policies' as well as ,protects the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Alcock*, 83 F.3d at 390 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-149 (1967)). Since CSB’s speculative claim does not fulfill the injury-in-fact requirement, the lower court’s decision should be reversed and the motion to dismiss granted.

**B. Even If This Court Finds That CSB Suffered An Injury-In-Fact, CSB Failed To Show A Causal Connection Between Injury And Conduct.**

CSB fails to show a causal connection between injury and conduct. In asserting standing, once a party establishes an injury-in-fact, the party must demonstrate a “causal connection between the injury and conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant . . . .” *Defenders I*, 504 U.S. at 560. CSB argues that it is injured by the government’s abdication of its responsibility to protect migratory birds. Record 4. CSB’s alleged “injury” involves a proposed violation of the Migratory Bird Treaty Act (“MBTA”). The injury complained of by CSB has no relation to the Forest Service’s actions under the National Forest Management Act (“NFMA”), thereby eliminating any causal connection between the injury and conduct. The Forest Service has not abdicated its responsibility. Rather, it has fulfilled all the statutory requirements. Record 3; *see also* Part IV.B., *infra*. CSB’s allegations are so far removed from any action taken by the government, such that it is virtually impossible to trace the actions of the Forest Service to the alleged injury suffered by CSB. Therefore, even if this court finds that CSB suffered an injury-in-fact, CSB did not establish a causal connection between injury and conduct. Causal connection is a requirement for standing with which CSB failed to comply. CSB has no standing to bring this suit and the lower court’s decision should be reversed.

II. THE FOREST SERVICE, EMPOWERED BY THE NFMA WITH THE MANAGEMENT OF THE NATION'S RENEWABLE RESOURCES, IS EXEMPT FROM THE MBTA'S PROHIBITIONS, THEREBY PRECLUDING THE FOREST SERVICE'S TIMBER SALE FROM JUDICIAL REVIEW.

The Forest Service, authorized by the NFMA to manage the nation's forests, is not subject to the restrictions of the MBTA. The Forest Service performed its duties in accordance with the NFMA, which sets out the only mechanism by which Forest Service actions may be reviewed. Congress enacted the Administrative Procedure Act ("APA") to permit judicial review of agency actions only where authorized by statute or where no other procedure for review exists. *Bowen v. Massachusetts*, 487 U.S. 879, 903-904 (1988). The district court lacked jurisdiction to review the Forest Service's timber sale under the APA because the NFMA provides distinct procedures to review all Forest Service actions.

In addition, the district court had no jurisdiction to review the Forest Service's actions because judicial review can only occur, pursuant to the APA, 5 U.S.C. § 706(2)(A), if the agency violated a substantive statute and failed to act "in accordance with law." CSB's claim that the Forest Service's sale of timber violated the MBTA is without merit because the MBTA, by its own language, does not apply to government agencies. Applying the MBTA to government agencies would frustrate congressional intent, encroach upon prosecutorial discretion, and seriously diminish the Forest Service's ability to efficiently perform its duty under the NFMA of "managing the nation's renewable resources." 16 U.S.C. §§ 1600(1), 1600(6). In view of these factors, the MBTA is not "law" with which agency actions under the NFMA must comply for purposes of judicial review pursuant to the APA.

A. Congress Did Not Intend The APA's General Grant Of Jurisdiction To Duplicate The Special Statutory Procedures Relating To Specific Agencies.

The APA, 5 U.S.C. § 706 2(A), states the scope of review required by district courts when considering agency actions which are "otherwise not in accordance with law." "The APA generally provides a framework for judicial review of final agency action when an adequate remedy is otherwise lacking, . . . it does not provide an independent source of jurisdiction or create a cause of action where none previously existed." *Defenders of Wildlife v. Administrator, Env'tl. Protection Agency*, 882 F.2d 1294, 1303 (8th Cir. 1989) (hereinafter "*Defenders II*"). Because the NFMA provides specific remedies to guarantee that the Forest Service acted "in accordance with law," and further provides a framework for obtaining judicial review, the district court lacked jurisdiction to entertain CSB's claims.

Federal district courts lack jurisdiction under the APA to review Forest Service decisions made pursuant to NFMA provisions. "Jurisdiction to review the sales is conferred by the NFMA, not the APA." *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 114 (8th Cir. 1997). The NFMA provides for a specific and thorough review of the Forest Service's decisions and actions. Section 1612 of the NFMA, as amended by the Forest Service Decision Making and Appeals Reform Act, Pub. L. 102-381, § 322, sets forth the proper procedure for agency action review, and encourages public participation in the Forest Service's decisions. "[A] person who was involved in the public comment process" has the right to appeal the Service's decision to a Secretary appointed by the Chief of the Forest Service. Pub. L. 102-381, § 322(c). "If the Secretary fails to decide the appeal within the 45-day period, the decision on which the appeal is based shall be deemed a final agency action for the purpose of chapter 7 of title 5, United States Code." Pub. L. 102-381, § 322(d)(4); see also *Idaho Sporting Congress, Inc., v. United States Forest Serv.*, 843 F. Supp. 1373, 1374-1376 (D. Idaho 1994) (discussing the appeals process for Forest Service ac-



tions). Permitting judicial review of agency action by a district court improperly duplicates the administrative proceeding. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, . . . it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies."); *see also Defenders II*, 822 F.2d at 1302 (applying the same rationale to review of MBTA violations).

Under this authority, if CSB believed that the Forest Service violated the MBTA, the proper remedy would have been to petition the Forest Service for a timely administrative appeal rather than filing suit with the district court. *See Defenders II*, 882 F.2d at 1302. In *Defenders II*, the court of appeals held that the district court lacked jurisdiction under the APA to review the Environmental Protection Agency's ("EPA") actions under the Federal Insecticide, Fungicide and Rodenticide Act, which provided its own mechanism for agency action review. *Id.* at 1303. The Defenders challenged various EPA actions which had endangered various fowl protected by the MBTA. *Id.* at 1297. The court held that if the Defenders of Wildlife believed that the EPA had not acted "in accordance with law," it should have petitioned the EPA for review of the decision. *Id.* at 1301. Here, the Forest Service complied with the provisions of the NFMA and its normal procedures for both the development and sale of timber to Blackacre. Record 1. Accordingly, the Forest Service acted in accordance with law and within its authority under the NFMA. Therefore, the district court was without jurisdiction to hear CSB's claim under the APA.

- B. The Forest Service Was In Full Compliance With All Required Statutes And The Timber Sale Was Not Subject To Review Because The Sale Was In Accordance With The NFMA, Which Supersedes The MBTA.

The MBTA prohibits the killing of migratory birds. 16 U.S.C. § 703. Concurrently, the NFMA empowers the Forest

Service with the “management of the Nation’s renewable resources,” particularly the supply of timber. 16 U.S.C. §§ 1600(1), 1600(6). To ensure that migratory birds are adequately protected, the Forest Service, in compliance with the NFMA and the National Environmental Protection Act (“NEPA”), must provide a comprehensive EIS. 42 U.S.C. § 4332(C)(i). The NFMA recognizes that as a consequence of timber cutting migratory birds are killed, as is evident by the statutorily mandated EIS. The EIS and supporting regulations restrict agency actions which threaten the viability of native and certain non-native birds. The Forest Service acted under the statutory authority conferred by the NFMA, and complied with its regulations. *See* Part IV.B., *infra*. Therefore, the Forest Service acted “in accordance with,” rather than against the law, and its decision is not subject to judicial review. 5 U.S.C. § 706(2)(A).

Imposing the MBTA’s restrictions upon the Forest Service undermines the agency’s ability to manage the nation’s renewable resources. “Congress intended that the Forest Service follow the NFMA’s regulatory process, rather than the MBTA’s criminal prohibitions, in addressing conservation of migratory birds.” *Sierra Club v. Martin*, 110 F.3d 1551, 1556 (11th Cir. 1997). Congress enacted the NFMA approximately sixty years after its enactment of the MBTA. Congress contemplated the killing of birds when it vested the Forest Service with the authority to cut and sell timber. *See Martin*, 110 F.3d at 1556 (“Congress’s subsequent enactment of legislation relating to management of the National Forest System buttresses the conclusion that the MBTA does not apply to the federal government.”). Only if the Forest Service is exempt from the MBTA can the agency perform its statutorily imposed duties under the NFMA. The Forest Service did not violate the law when it sold the timber to Blackacre. The Forest Service acted in accordance with the NFMA. The timber sale is therefore not subject to review pursuant to the APA.

C. As A Government Agency, The Forest Service Is Not Subject To The MBTA's Restrictions.

The MBTA was designed to prohibit people—not government agencies—from killing migratory birds. To permit judicial review of an agency's actions pursuant to the APA, the aggrieved party “[m]ust identify a substantive statute or regulation that the agency action had transgressed and establish that the statute or regulation applies to the United States.” *Martin*, 110 F.3d at 1555. The prohibitions imposed by the MBTA are limited to “any person, association, partnership, or corporation” that “kills” various migratory birds. 16 U.S.C. § 707(a). Nothing in the statute expressly prohibits government agencies from engaging in activities which could harm migratory birds. Expansion of the MBTA's definition of “person” to include government agencies would offend both the congressional intent and the MBTA's statutory purpose.

Numerous courts have held that the MBTA, by its plain language, does not apply to the federal government. As succinctly expressed by the United States Court of Appeals for the Eleventh Circuit, “The MBTA, by its plain language, does not subject the federal government to its prohibitions . . . . [Accordingly,] the MBTA does not apply to the federal government. As no violation of the MBTA could occur by any formal action of the Forest Service, the Forest Service may not be enjoined under the APA.” *Martin*, 110 F.3d at 1555-1556. Had Congress intended the term “person” to embody “government” it would have expressly included it within the statute's definitions. *See, e.g.*, 16 U.S.C. § 1532(13) (defining “person” as “any officer, employee, agent, department, or instrumentality of the Federal Government” in the Endangered Species Act). “[T]here is no expression of congressional intent which would warrant holding that ‘person’ includes the federal government, thus enabling the United States to prosecute a federal agency . . . for taking or killing birds and destroying nests in violation of the MBTA.” *Martin*, 110 F.3d at 1555; *see also Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941) (“Since, in

common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.")). The same rationale applies here. Because the MBTA does not apply to the Forest Service, the sale is not reviewable under the APA.

Moreover, the international convention indicates that Congress enacted the MBTA to protect migratory birds from "indiscriminate slaughter." See *Cerritos Gun Club v. Hall*, 96 F.2d 620, 627 (9th Cir. 1938). Government agencies are required to provide an EIS pursuant to the NEPA, 42 U.S.C. §§ 4332(C)(i), to restrain them from arbitrarily killing migratory birds. Congress's implementation of this statutory requirement makes expanding the term "person" to include "government" unnecessary in view of the treaty's purpose. The MBTA's purpose is to deter natural persons, not government agencies, from killing birds.

Congress did not intend to force the MBTA's provisions upon the Forest Service. To infer otherwise exceeds the statutory language and undermines the Forest Service's ability to perform its duties. "An agency's actions could only fail to be in ,accordance with law' when that agency's actions are *subject to that law* . . . . The MBTA, by its plain language, does not subject the federal government to its prohibitions." *Martin*, 110 F.3d at 1555 (emphasis in original). Moreover, sufficient deterrent and protective measures exist within the NEPA to ensure that government agencies refrain from the "indiscriminate slaughter" of migratory birds. The prohibitions imposed by the MBTA are unnecessary. Accordingly, the actions of the Forest Service are not subject to judicial review.

D. Judicial Review Is Improper Because Neither The Judiciary Nor Private Citizens Are Empowered With The Prosecution Of Crimes.

Judicial review is inapplicable to Forest Service actions relating to potential penal violations of the MBTA. The MBTA is a regulatory statute designed to protect migratory birds by imposing criminal sanctions on would-be offenders.

16 U.S.C. §§ 703, 707(a), 707(b). The statute provides sufficient and effective remedies designed to deter violations and redress any harm caused by killing migratory birds. Since the MBTA is a criminal statute, there is no basis for a private right of action. Accordingly, CSB's contention that the Forest Service's actions are subject to review is unfounded. *See Defendants II*, 882 F.2d at 1301-1302 ("Neither the Bald and Golden Eagle Protection Act nor the Migratory Bird Treaty Act contain provisions for private rights of action."). The discretion to prosecute MBTA violations remains with the Department of Justice. CSB cannot bypass the state's authority by invoking judicial review under the APA.

The remedy for a MBTA violation is the prosecution of the offending party. The Department of Justice has broad discretion, subject to Constitutional restraints, in deciding whether to prosecute the Forest Service. *See United States v. Batchelder*, 442 U.S. 114, 125-126 (1979). The executive branch, through the Department of Justice, is better situated than the courts to determine which violations to prosecute. Thus, substantial deference should be accorded to the prosecutor.

So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

*Wayte v. United States*, 470 U.S. 598, 607-608 (1985). CSB asked the district court to review the Forest Service's compliance with the MBTA, a criminal statute. CSB's request was improper because judicial review of the Forest Service's actions requires a finding that the agency failed to act "in ac-

cordance with law.” In other words, review would result in a judicial declaration that the Forest Service committed a crime. However, it is not the function of the court to determine whether a crime was committed. *See United States v. Calandra*, 414 U.S. 338, 343-344 (1974) (discussing the grand jury’s role in determining whether probable cause exists that a crime occurred). It is the prosecutor’s function to charge crimes and the grand jury’s function to indict. Only thereafter is judicial review warranted under the APA. Otherwise, judicial review would improperly circumvent the government’s authority to prosecute.

III. THE MBTA IS A REGULATORY STATUTE  
DERIVED FROM AN INTERNATIONAL  
TREATY, WHICH PROTECTS PUBLIC  
WELFARE BY IMPOSING MINOR  
PENALTIES FOR STRICT LIABILITY  
MISDEMEANORS.

A violation of the MBTA is a strict liability crime. The MBTA misdemeanor provision, 16 U.S.C. § 707(a), pertaining to the killing of migratory birds, does not mention intent or any other culpable mens rea element. An analysis of the statute, its penalties, and legislative history indicates that Congress specifically intended the MBTA’s misdemeanor offense to be construed without a scienter requirement. In determining whether an otherwise silent criminal statute is one of strict liability, the court must consider whether: 1) the statute is regulatory in nature; 2) the statute was enacted to protect public welfare; 3) the offense and statute have their origins in the common law; and 4) the penalties imposed for a violation are relatively minor. *Morissette v. United States*, 342 U.S. 246, 256-259 (1952).

The MBTA protects migratory birds that are instrumental to the well-being of our nation’s agricultural industry. *United States v. Schultze*, 28 F. Supp. 234, 236 (W.D.Ky. 1939); *Missouri v. Holland*, 252 U.S. 416, 431 (1920). The MBTA is derived from an international treaty and has undergone substantial modifications since its enactment. These

changes led to an efficient regulatory scheme with proportional criminal sanctions. In addition, Congress specifically reiterated its intention to maintain an absence of scienter with respect to the MBTA's misdemeanor provision in its enactment of various amendments. In view of these factors, the district court properly concluded that the MBTA is a strict liability offense.

A. Although Originally Enacted To Implement An International Treaty, The MBTA Was Expanded Beyond The International Convention's Concerns To Include Additional Protection Of Migratory Birds.

The MBTA developed into a formidable and effective regulatory statute as a result of numerous amendments and revisions. Congress enacted the MBTA in 1918 to implement the goals of a 1916 treaty between the United States and other nations. *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 114-115 (8th Cir. 1996). Despite the original intention of the 1916 international accords, the MBTA was expanded to invoke congressional powers to accomplish purposes other than those enumerated in the international treaty. *Cerritos Gun Club v. Hall*, 96 F.2d 620, 627 (9th Cir. 1938).

As a result of numerous international conventions, the MBTA developed to include treaties signed with other nations. See *United States v. North Dakota*, 650 F.2d 911, 913 n.2 (8th Cir. 1981). Additionally, the Act was augmented to include regulations restricting various activities not otherwise required by the international treaty. See *Cerritos Gun Club*, 96 F.2d at 627. The Migratory Bird Treaty of 1916 sought to protect birds by restricting the killing of birds to seasons when impact on breeding would be minimal. Congress expanded the "seasonal" based restrictions by additionally prohibiting the "manner" and "means" by which a legal killing may occur.

Here again Congress provides not only for the ,extent, if at all' to ,allow hunting,' but also the ,means' of ,taking, cap-

turing, killing,' the migratory fowl. Such ,means' are compatible with the terms of the convention limiting the ,time' of hunting, for they are not only not derogatory to it, but, on the contrary, also carry out the purposes of the convention preamble. It therefore appears that *Congress intended to invoke its own powers to accomplish other purposes than those enabled by the treaty*, and that it has done so.

*Id.* at 628 (second emphasis added). Although the treaty's purpose was to protect migratory birds by imposing "seasonal" restrictions, the United States, by its own initiative, sought to impose "manner" regulations as well.

Congress not only departed from the international treaty by regulating the "manner" by which migratory birds may be killed, but also expanded the MBTA prohibitions to include migratory bird products.

This section amends section 2 of the Migratory Bird Treaty Act (16 U.S.C. 703) by making it unlawful, except as the Secretary of the Interior may determine by regulation, to take, sell, purchase, exchange, or ship ,any part, nest, or egg of such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part nest, or egg thereof . . . .' Although the word ,product' is not mentioned in the Act itself or in the Canadian Convention . . . H.R. 10942 would amend the Migratory Bird Treaty Act to make it clear that the above prohibition extends to the product of any bird, or any part, nest, or egg thereof.

S. Rep. No. 93-851, at 1 (1974). Migratory birds gained additional protection as a direct result of this amendment. The amendment deters acquisition of "bird products." Since the possession of a migratory bird "product" is now restricted, bird habitats and nesting sites are less likely to be encroached upon.

Closely related to the prohibition of "bird products" is the commercial exploitation of migratory birds. "As originally enacted, violations of the MBTA or regulations promulgated thereunder were punishable as misdemeanors." *United*



*States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986). However, Congress amended the MBTA in 1960 to include a felony provision with substantially harsher penalties to deter the commercial exploitation of migratory birds. 16 U.S.C. § 707(b)(1-2). "This amendment was intended to differentiate between ,an individual who hunts migratory birds for pleasure' and ,a person who slaughters these wildfowl for commercial purposes as a means of livelihood' and therefore to ,better protect our migratory game birds.'" *Engler*, 806 F.2d at 431 (quoting S. Rep. No. 86-1779, at 1 (1960)). The United States satisfied the international treaty's provisions by creating a misdemeanor offense. The felony provision, extending further protection to birds by increasing criminal penalties, was enacted by Congress to serve the goals of the United States, independent of those contemplated in international conventions.

The United States departed from the original treaty provisions establishing a regulatory scheme to efficiently protect migratory birds by expanding the treaty to include additional activities and increased penalties. The MBTA is not simply an extension of an existing treaty, but has evolved into a regulatory statute in its own right. The regulatory nature of the MBTA indicates Congress's intent to enact a strict liability offense in an otherwise silent statute. See *Staples v. United States*, 511 U.S. 600, 606, 608 (1994) (discussing the regulatory nature of a statute as an indication of a strict liability crime).

B. The Protection Afforded By The MBTA Is Not Only Conferred Upon Migratory Birds, But Serves To Benefit Society As A Whole.

The absence of a mens rea element in a criminal statute emphasizing the "achievement of some social betterment rather than the punishment of the crimes" is not uncommon. *United States v. Balint*, 258 U.S. 250, 252 (1922).

[A] now familiar type of legislation whereby penalties serve as effective means of regulation . . . dispenses with the conventional requirement for criminal conduct—aware-

ness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

*Morissette*, 342 U.S. at 259-260. The MBTA protects migratory birds by restricting hunting practices and prohibiting commercial exploitation. While the birds are the direct beneficiaries of the regulations, the MBTA is a public welfare statute benefitting society as a whole. The "public welfare" purpose of the MBTA favors a strict liability interpretation in a statute lacking a mens rea element. See *Staples*, 511 U.S. at 606-608 (discussing the 'public benefit' purpose of a statute as an indication of a strict liability crime where the statute is without an obvious expression requiring a mens rea). Regardless of the offender's intent, a scienter requirement would result in lengthy prosecutions for misdemeanor violations and congestion of court dockets, while the harm to the environment and agriculture continues.

Migratory birds are "a great value as a source of food and in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops in the United States and abroad." *United States v. Schultze*, 28 F. Supp. 234, 236 (W.D.Ky. 1939); see also *Missouri v. Holland*, 252 U.S. 416, 431 (1920) (discussing the importance in protecting migratory birds as both a food resource and as a natural form of insect containment). In light of the potential for widespread agricultural destruction caused by herbivorous insects, efficient enforcement of the MBTA is extremely important. "[A]n interpretation requiring proof of the subjective intent of the person . . . would stymie enforcement of the MBTA." *United States v. Boynton*, 63 F.3d 337, 344 (4th Cir. 1995). MBTA prosecutions need to be swift. A mens rea element would require the prosecutor to prove, beyond a reasonable doubt, the intention of the offending party. This would necessarily require additional evidence from which to infer a mens rea. To secure a lawful arrest and ensure a successful conviction, law enforcement agents would be forced to wait until an offender's actions were unambiguous prior to arrest.

As prosecutions and enforcement increase in complexity, efficiency of the statute and its beneficial impact diminish. The benefit to society as a whole considerably outweighs requiring a mens rea element to sustain a conviction for a MBTA misdemeanor violation.

C. The MBTA Is Not Rooted In Traditional Common Law Where A Mens Rea Element May Have Been Required.

Congress did not expressly provide a mens rea element within the statute, nor is the statute derived from common law where a culpable mental state element may be inferred. The advent of the industrial revolution resulted in a departure from the common law contention that an injury can amount to a crime only when supported by an evil intention. *Morrisette*, 342 U.S. at 251. Legislatures sought to govern various activities, in part, by implementing criminal sanctions, otherwise known as public welfare offenses. *Id.* Traditional notions of crime focused on direct and immediate harm to persons or property. However, welfare regulations minimized the risk and probability that harm would occur by preemptively regulating certain activities. “[W]hatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.” *Id.* at 256.

The MBTA is a policy-driven statute. It serves as a “regulatory measure designed to protect the public welfare, derived not from the common law but from a series of treaties with other states.” *Engler*, 806 F.2d at 432. Congress enacted the MBTA in 1918 to implement the goals of a 1916 treaty between the United States and other nations. *Newton County Wildlife Ass’n v. United States Forest Serv.*, 113 F.3d 110, 114 (8th Cir. 1996). The international treaty called for the protection of certain migratory birds which “were a great value as a source of food and in destroying insects injurious to vegetation.” *Missouri v. Holland*, 252 U.S. at 431. The MBTA enforced the treaty by regulating the killing, capturing, and selling of migratory birds included in the conven-

tion's terms. Part of the enforcement provided penal sanctions for violations of the act. Since the MBTA's misdemeanor violation is derived from a treaty rather than traditional common law, there is no "interpretive presumption . . . in favor of implying a scienter requirement into an otherwise silent statute." *Engler*, 806 F.2d at 431.

D. In View Of The Statutory Scheme, A Scienter Requirement Is Not Required Because The MBTA's Misdemeanor Provisions Levy Relatively Small Penalties.

The MBTA's misdemeanor provision with its minor penalties favors a strict liability interpretation of the statute. "Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea." *Staples v. United States*, 511 U.S. 600, 616 (1994). Generally, the conviction of a crime results in the offender's extensive incarceration, burdensome fines, and the loss of fundamental privileges. In view of these particularly harsh ramifications, the requirement of a culpable mens rea is significant. However, where "penalties . . . are relatively small, and conviction does no grave danger to an offender's reputation," proof of a culpable mens rea is unnecessary. *Morissette*, 342 U.S. at 256. In determining whether the MBTA's misdemeanor offense falls within the category of minor-penalty strict liability crimes, "the MBTA . . . should be read as a whole to derive its plain meaning." *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997). The MBTA's misdemeanor offense, which does not specify a mens rea element, makes it unlawful to "take," "kill," or "capture," certain migratory birds. 16 U.S.C. § 703. The penalties for violating the statute provide that a "person, association, partnership, or corporation" is guilty of a misdemeanor and subject to a \$500 fine and/or imprisonment not to exceed six months. 16 U.S.C. § 707(a). In contrast, the felony provision of the MBTA, which explicitly requires a mens rea, prohibits the commercial exploitation of migratory birds and subjects the offender to a \$2000 fine and/or imprisonment not to exceed two years. 16 U.S.C. § 707(b).

Proof of scienter in a MBTA misdemeanor prosecution, with its comparatively light penalties, would defeat the purpose of the regulatory statute and contradict the congressional intent to enact a strict liability criminal provision.

The statute prohibits a wide array of activities that may harm migratory birds, including, but not limited to the hunting, killing, taking, shipping, selling, importing, exporting, possessing of migratory birds. 16 U.S.C. § 703. The harm caused by a violation of the misdemeanor provision is not contingent upon the intent of an individual. Therefore, scienter is not an element necessary for prosecution.

To require the government to prove the intent of the person . . . in every case charging a misdemeanor violation of the MBTA would produce the absurd result, clearly not contemplated by Congress, of nullifying the ease of prosecution created by the designation of . . . a strict liability crime.

*United States v. Boynton*, 63 F.3d 337, 344-345 (4th Cir. 1995). Moreover, "an innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal fine." *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978). On the other hand, the felony provision requires the active, intentional exploitation of migratory birds for commercial purposes. See *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986) ("In effect, the statutory schema presented two factual scenarios for imposing strict liability on those who hunt migratory birds – if the actor hunts for pleasure, it is a misdemeanor; if for commercial purposes, it is a felony."). A commercial felony infraction not only results in the death of birds, but also contributes to additional harm by a direct pecuniary gain to the offender resulting from the birds' exploitation. Accordingly, the imposed felony penalties are harsher than the misdemeanor penalties.

Congress specifically addressed the felony/misdemeanor distinction in the 1986 amendment to the MBTA. "Nothing in this amendment is intended to alter the strict liability standard for misdemeanor prosecutions under 16 U.S.C. 707(a), a standard which has been upheld in many Federal

court decisions.” S. Rep. No. 99-445 at 35 (1986); *see also United States v. Boynton*, 63 F.3d at 343 (“All circuits which have been faced with the question save one – the Fifth – have now held that the misdemeanor crimes created by the MBTA are strict liability crimes.”).<sup>5</sup> *See also United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997); *United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994); *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986); *United States v. Chandler*, 753 F.2d 360, 363 (4th Cir. 1985); *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984); *United States v. FMC Corp.*, 572 F.2d 902, 906 (2d Cir. 1978); *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971); *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966).

The contraposition between the felony and misdemeanor provisions of the MBTA supports the contention that a felony prosecution requires proof of a scienter, while a misdemeanor prosecution is a strict liability offense. Indicative of a strict liability crime, the penalties imposed upon conviction of the misdemeanor offense are comparatively light. Requiring a mens rea element in a MBTA misdemeanor prosecution contradicts both congressional intent and the statutory scheme protecting migratory birds. Therefore, the district court properly concluded that the MBTA is a strict liability offense.

#### IV. THE FOREST SERVICE SATISFIED ALL STATUTORY REQUIREMENTS IN IMPLEMENTING A FOREST MANAGEMENT PLAN THEREBY EXEMPTING ITSELF FROM LIABILITY UNDER THE MBTA.

Although killing migratory birds by clearcutting forests is a violation of the MBTA, the government’s compliance with the NFMA precludes liability under the MBTA. The Forest Service is subject to the NFMA and derives its authority to manage the National Forest System from this statute. 16

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5. The Fifth Circuit requires a “should have known” standard of scienter, not full-fledged intent or knowledge. *United States v. Delahoussaye*, 573 F.2d 910, 913 (5th Cir. 1978).

U.S.C. §§ 1600 et seq. While Congress did not expressly exempt the Forest Service from the MBTA's restrictions, a reasonable interpretation of the statute permits the Forest Service to sacrifice migratory birds when executing its duties in accordance with the NFMA. *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (holding that an agency's reasonable interpretation of a statute it administers is binding). The NFMA requires the Forest Service to develop a forest management plan prior to any sale of timber. See 16 U.S.C. § 1604(a). A forest management plan must consider "multiple-use" and "sustained-yield" provisions regarding the nation's renewable resources. 16 U.S.C. § 1600(3). Additionally, the Forest Service must issue an EIS regarding any significant action affecting the environment. 42 U.S.C. § 4332(C)(i). By requiring the Forest Service to consider numerous alternatives and take into account economic, environmental, and social concerns, Congress concluded that the benefits of the timber sale made in accordance with the NFMA considerably outweigh any potential harm caused to birds from clearcutting. Therefore, the Forest Service, in compliance with all requisite statutes and regulations is excused from liability pursuant to the MBTA.

A. Substantial Deference Should Be Given To The Forest Service's Decision To Exempt Itself From The MBTA.

Congress's failure to specifically include the Forest Service in the MBTA's exemptions should not be construed to remove such a privilege from the Forest Service. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Here, Congress enacted the NFMA to authorize the Forest Service's management of the National Forest System. Effective management, in accordance with the NFMA, implicitly entails clearcutting and the concomitant killing of migratory birds. The Forest Service's decision to sacrifice birds to benefit the greater good

of maintaining national forests should be given substantial deference by the courts. See *Chevron*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme . . ."). Consistent with its interpretation of the MBTA and its mandate under the NFMA, the Forest Service maintains that when it sold timber to Blackacre, it was precluded from liability under the MBTA. This interpretation of the statute is both reasonable and necessary for compliance with the NFMA.

B. The Forest Service Exempted Itself From Liability Under The MBTA By Complying With The Requisite Components Of The Forest Management Plan.

The Forest Service satisfied the multiple-use provision as required by the NFMA. 16 U.S.C. § 1600(3). Multiple-use is defined as

the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, *with consideration being given to the relative values of the various resources*, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

16 U.S.C. § 531(a) (emphasis added). Mandating absolute conservation of avian populations by prohibiting a timber sale is inconsistent with multiple-use provisions. See *Headwater v. BLM*, 914 F.2d 1174, 1183-1184 (9th. Cir. 1990) (holding strict conservation of habitat and old growth forest contradicts congressional intent). The old growth forest, in the present case, is used for outdoor recreation and study, but



is also a valuable timber resource. Record 1. To balance these diverse interests, the Forest Service constructed a plan which designated some parts of the old growth forest, including the Big Tree Tract, for logging and other parts for preservation. Record 1. The Forest Service limited its timber sale to a part of the old growth forest, including the Big Tree Tract, thereby complying with the multiple-use provision of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528. As a result, economic efficiency is preserved by the capital gain from the sale while the environmental quality is preserved because new trees will grow in place of the old forest. The part of the forest not designated for clearcutting will maintain viable bird populations, giving CSB continued use and enjoyment.

The Forest Service also satisfied the sustained-yield provision required by the NFMA, 16 U.S.C. § 1600(3). Sustained-yield is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." 16 U.S.C. § 531(b). The Forest Service did not authorize the clearcutting of the entire New Union National Forest. Record 1. Rather, substantial amounts of the forest will remain intact. The designated clearcutting area is a renewable resource that will regenerate over time. There is no indication that this land will be used for anything other than conservation subsequent to the sale. Therefore, the sale maintains the output of the renewable resources without impairing the productivity of the land. Such result is a manifestation of congressional intent to delegate to the Forest Service authority to manage forests while at the same time to protect avian populations. Congress permits the Forest Service to balance interests, but requires compliance with the NFMA.

The Forest Service, in compliance with the NFMA and its regulations, issued an EIS which is required by the NEPA any time an agency action will significantly affect the environment. 42 U.S.C. § 4332(C)(i). An EIS discloses all possible economic and social reactions to a forest management plan. The regulation explicitly refers to maintaining viable

bird populations. 36 C.F.R. § 219.19. In its EIS, the Forest Service declared that clearcutting will only destroy about a hundred nests if the timber is cut during nesting season. Record 2. Additionally, the Plan will not concentrate its clearcutting during the nesting season. The Plan authorizes clearcutting over the course of the year, thereby minimizing its impact on bird reproduction. Record 2. As a result, the Plan will not jeopardize any viable bird populations in the Big Tree Tract. In constructing a plan authorizing the timber sale, the Forest Service considered various alternatives to find one that best met the diverse interests that are served by the old growth forest. Since the current Plan complied with multiple-use and sustained-yield provisions, it was deemed the best alternative by the Regional Forester and accordingly, was approved. Record 1; *see also* 36 C.F.R. § 219.10(c) (requiring the Regional Forester to consider alternative plans to comply with normal procedure). The Forest Service provided a plan satisfying all the requirements of the NFMA, thus exempting the Forest Service from any liability under the MBTA.

### CONCLUSION

For the foregoing reasons, the United States of America respectfully requests that this Court reverse the district court's decision that the issue is ripe for decision and that CSB had standing to bring suit; reverse the district court's decision that the MBTA is "law" with which agency actions under the NFMA must be in accord for purposes of judicial review under the APA; affirm the district court's decision that the MBTA's misdemeanor offense is a strict liability crime; and reverse the district court's decision that the United States is not exempt from liability under the MBTA.