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Brief for Respondent: Tenth Annual Pace National Environmental Moot Court Competition

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA
AND
BLACKACRE FOREST PRODUCTS, INC.
Defendants-Petitioner,
—against—
CITIZENS TO SAVE THE BIRDS, INC.
Plaintiff-Respondents.

On Appeal from the United States District Court
for the District of New Union

BRIEF FOR RESPONDENT

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

- I. DOES THE FACT THAT BIRD DEATHS WILL OC-
CUR ONLY IF BLACKACRE LOGS DURING NEST-
ING SEASON, AN OCCURRENCE WHICH IS NOT
YET KNOWN, MAKE JUDICIAL REVIEW UNRIPE
OR ELIMINATE STANDING FOR CSB BECAUSE IT
SUFFERS NO PRESENT INJURY?
- II. IS THE MIGRATORY BIRD TREATY ACT, 16 U.S.C.
§ 703(a) (MTBA), A STRICT LIABILITY CRIMINAL
OFFENSE?

- III. DOES THE MBTA PROHIBIT THE KILLING OF MIGRATORY BIRDS BY CLEARCUTTING FORESTS DURING BIRD NESTING SEASON?
- IV. IS THE MBTA “LAW” WITH WHICH AGENCY ACTIONS UNDER NATIONAL FOREST MANAGEMENT ACT, 16 U.S.C. § § 1600 ET SEQ. (NFMA) MUST BE IN ACCORD FOR PURPOSES OF JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT 5 U.S.C. § 706 (APA)?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Article III, Section 2, clause 1 of the United States Constitution. The text is reproduced in Appendix E. This case also involves the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703 and 707. Also, under Title 16 are the relevant §§ 1600 and 1604. All sections of Title 16 are reproduced in Appendix B and G. Set forth in Appendix C and F are the relevant §§ 4332 and 4321 of Title 42 of the United States Code. In addition, 5 U.S.C. § 706 can be found in Appendix D.

STATEMENT OF THE CASE

The United States Forest Service (Forest Service), within the Department of Agriculture, developed a natural resource and management plan (the Plan) for the New Union National Forest. (R. at 1.) The Plan has been developed pursuant to

the National Forest Management Act, 16 U.S.C. §§ 1600 et seq. (NFMA). (R. at 1.) The Forest Service's goal is to balance the preservation of the forest with the need for development of the land and the natural resources of the New Union National Forest. (R. at 1.) To facilitate development, the Forest Service authorized a timber sale of the "Big Tree Tract" in May of 1997 to Blackacre Forest Products, Inc. (Blackacre). *See id.*

The National Environmental Policy Act, 42 U.S.C. § 4321 (NEPA), requires the Forest Service to prepare an Environmental Impact Statement (EIS) as part of the required procedure for developing the Plan and authorizing the timber sale to Blackacre. (R. at 1-2.) The Forest Service prepared an EIS pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 (NEPA) and followed the appropriate procedures. (R. at 2-3.) The EIS recognizes that Blackacre's clearcutting will cause habitat destruction, and the loss of habitat may add to long term bird population depletion. *See id.* Blackacre plans to clearcut all 500 acres of the Big Tree Tract, and although the area is used for outdoor recreation and study, it is considered valuable timber. (R. at 1.)

Citizens to Save the Birds Inc. (CSB), is a nonprofit organization incorporated to "protect the avian population resident in and migrating through the State of New Union." (R. at 2.) CSB has opposed the timber sale during the development of the Plan and the actual timber sale based on the impact the clearcutting will have on the migratory birds in the Big Tree Tract. *See id.* Members of CSB routinely observe the birds of the Big Tree Tract and use the area for outdoor recreation. *See id.* Blackacre is unrestricted as to the time it may clearcut the Big Tree Tract, and Blackacre stated at a hearing on the motion to dismiss that "it will harvest timber during bird nesting season, as well as during other times of the year." *Id.* CSB filed suit seeking judicial review of the Forest Service's timber sale to Blackacre under the Administrative Procedure Act, 5 U.S.C. § 706 (APA). The petitioners responded by filing a motion to dismiss CSB's suit. The District Court Judge for the District of New Union denied the

defendants' motion. The defendants have appealed to this court for further review.

SUMMARY OF THE ARGUMENT

I.

The Migratory Bird Treaty Act provides for standing in this case. Organizations have standing if they allege that they are aggrieved within the meaning of a relevant statute. The Administration Procedure Act allows jurisdiction over any agency action alleged to be in violation of the Migratory Bird Treaty Act (MBTA). Standing issues are only raised for evaluation of government action. The courts have clearly stated that standing is proper where an action alleged to be in violation of a statute is final, raises primarily legal issues and creates the possibility of environmental injury.

In this case, the Forest Service's wrongful clearcutting authorization, not Blackacre's response thereto, is the government action in violation of the statute relevant to the Citizens to Save the Birds' standing. The Forest Service's wrongful clearcutting authorization was made final in May of 1997. The Respondents' dispute with the authorization raises purely legal issues. The authorization clearly violates the MBTA. Whether Blackacre will actually clearcut during nesting season or any other time, raises a factual question, and a jury should resolve this question. Furthermore, the clearcutting authorization initially creates the possibility that migratory birds will be killed. Additionally, CSB would endure undue hardship if standing were denied. A dismissal based on lack of standing would mean that they have to wait until birds are killed and their habitat is destroyed before bringing suit, making the injunctive relief sought useless.

II.

The Forest Service and Blackacre are strictly liable for taking and killing migratory birds under the MBTA. The legislative history and the 1986 amendment to the penalties section of the MBTA evidence Congress' intent to leave the MBTA misdemeanor crime's requirement of strict liability

unchanged. All Circuits, except the Fifth Circuit, have concluded that a misdemeanor violation of the MBTA is a strict liability offense. The Fifth Circuit adds the scant requirement of "should have known" to the requisite liability. Following a finding of a violation of the MBTA by the Forest Service and Blackacre, the court need not inquire as to the petitioners intent or willfulness. However, should the court desire to apply the heightened standard of the Fifth Circuit, the petitioners would still be in violation of the statute. Both petitioners have evidenced during the hearing their knowledge of the statutory provisions and the possible resulting deaths of migratory birds. Under any test, the petitioners should be held strictly liable for their violations of the MBTA.

III.

The MBTA and its legislative history indicate that the purpose of the statute was to protect migratory birds (game or non-game) and their habitat. The plain meaning of the statute indicates that it is unlawful to kill any migratory bird by any means. Courts have viewed the language of the statute broadly and narrowly. Courts, interpreting the statute narrowly, apply the MBTA only to hunting and trading of birds and bird parts. The broad view of the statute correctly construes the MBTA to protect migratory birds and their habitat and should be applied in the present case.

The issue of timber harvesting in National Forests' harboring migratory birds currently divides the courts. The purpose and intent of Congress is that the MBTA be applied broadly to include timber harvesting. A "taking" of a migratory bird, in any way, is a violation under the Act. The Forest Service and Blackacre are in violation of the MBTA.

The National Forest Service is required under the NEPA to provide an EIS. If the Forest Service fails to adequately apply the requirements under the NEPA, the Service will be in violation of the NEPA. The Forest Service must assess all alternatives prepared for a proposed action to comply with NEPA. The Forest Service has agreed with CSB that the proposed action, Blackacre's clearcutting the Big Tree Tract, will

kill a number of migratory birds and destroy their habitats. The Forest Service admitted that the clearcutting will directly kill a number of migratory birds, and this admission indicates that the Service did not adequately review the alternatives to clearcutting. In addition, the Service applied inadequate data during its planning procedures, and this action should be reviewed. The Forest Service should be aware of the scarcity of old growth stands within the State and their importance to the diversity of species found in this area. The Forest Service is either not aware of these facts or failed to rely on them during their decision making procedures.

The Forest Service and Blackacre have admitted that they do not intend to provide any additional notice concerning the harvesting of the Big Tree Tract. A notice and comment procedure is required by Congress. A failure by the Service to provide for a notice and comment period is unlawful. There are no exclusions provided under this Act to prohibit CSB to adequately address their concerns.

IV.

The APA provides for jurisdiction over agency action. Especially, when the agency action violates the MBTA. The Forest Service Plan to allow clearcutting will result in *direct* and *indirect* takings or killings of migratory birds in the Big Tree Tract. Further, Blackacre plans to clearcut during the nesting season of these migratory birds. Blackacre's action will directly violate the MBTA.

Courts review agency actions using the arbitrary and capricious, abuse of discretion, or not in accordance with the law standards of review. The Forest Service's Plan inadequately addresses the alternatives available to clearcutting, and the Service did not take a hard look at the information available. The Forest Service's actions under the NFMA violate the MBTA and should be reviewed under the APA because the Forest Service's actions do not meet the requirements set forth in the NEPA.

ARGUMENT AND AUTHORITIES

I. CSB's CLAIM IS RIPE FOR REVIEW
REGARDLESS OF WHETHER OR WHEN
BLACKACRE CLEARCUTS THE "BIG TREE
TRACT".A. CSB Has Standing to Dispute Any Government Action
Which Violates the MBTA.

Organizations have standing if they allege that they are "aggrieved by agency action within the meaning of a relevant statute," under the Administrative Procedure Act (APA). Administrative Procedure Act, 5 U.S.C. § 702 (1994). In the present case, the "relevant statute" is the MBTA. The APA provides jurisdiction over any agency action alleged to be in violation of the MBTA. See *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), *rev'd on other grounds*, 503 U.S. 429 (1992) (originally granting certiorari because a live controversy existed between an environmental group and a Forest Service concerning a timber sale enjoined under the NFMA); *Mahler v. United States Forest Service*, 927 F. Supp. 1554, 1576 (S.D. Ind. 1996). CSB filed suit against the United States Forest Service (Forest Service) for violating the MBTA by authorizing a timber sale to Blackacre Forest Products, Inc. (Blackacre). (R. at 2.) The MBTA affords plaintiff standing to dispute this harmful agency action.

B. The United States Forest Service's Wrongful
Authorization of the Timber Sale is Both Final and a
Primarily Legal Issue and Creates the Harm in
Question for Standing Purposes.

The Forest Service's invasion of the Respondent's legally protected right, ensuring the preservation of migratory bird habitat where they observe such birds, creates the harm in question. (R. at 4.) Although the environmental destruction would actually result from a third-party response, the government's authorization would be the "but for" cause of the destruction. This causation creates standing for CSB to oppose the Forest Service's authorization. See *Wilderness Soc'y*

v. Griles, 824 F.2d 4, 12, 18 (D.C. Cir. 1987); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515 (9th Cir. 1992). In this case, the third party response would be Blackacre's clearcutting of the Big Tree Tract. The court in *Wilderness Society* and *Idaho Conservation League* states that whether this will actually occur is not an issue for determining standing. An issue is ripe for judicial review if it is: (1) primarily legal ; and (2) where a final action is being challenged. *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989), cert. denied, 495 U.S. 904 (1990).

1. Whether CSB should be afforded standing is purely a legal issue.

Petitioners do not dispute that the Forest Service authorized the timber sale of the "Big Tree Tract" to Blackacre. This action gives rise to CSB's claim. Petitioners contest that it is unknown whether this authorization will actually kill migratory birds. (R. at 4.) This factual argument is both incorrect and irrelevant to Respondent's standing. The Supreme Court determined that a challenge to disposal requirements based on a claim of federal preemption to be ripe for review because the question of preemption is predominantly legal. See *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

Disposal requirements, similar to a clearcutting authorization, do not in themselves damage the environment. Rather the damage is dependent upon a third party response to the requirement or authorization. However, the Court found it unnecessary to show that the third party action would in fact damage the environment to determine standing. A jury should decide a factual question, such as actual environmental damage. See *Pacific Gas and Electric Co.*, 473 U.S. 190 (1983); *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820 (7th Cir. 1990). In later cases organizations had standing to challenge the Fish and Wildlife Service's decision to allow expanded hunting in wildlife refuges. See *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988); *Alaska Fish & Wildlife Fed'n and Outdoor*

Council, Inc., v. Dunkle, 829 F.2d 933, 935 (9th Cir. 1987) cert. denied, 485 U.S. 988 (1988).

Additionally in *Japan Whaling Association*, environmental organizations had standing to challenge the United States' failure to enforce whaling quotas. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). The organizations asserted injury by alleging that whale watching and studying whales by their members would be affected adversely by continued killing of whales. *See id.* In this instance, the government is liable as the 'but for' cause of third party destruction because of a failure to act.

An expanded hunting authorization and a whaling quota, similar to a clearcutting authorization, raise questions of legality but do not in themselves directly cause harm to game animals, whales, or migratory birds. Courts have consistently held that illegal authorization by the government coupled with the possibility that harm to the environment will result makes standing proper. *See Japan Whaling Ass'n*, 478 U.S. 221; *Alaska Fish & Wildlife Fed'n and Outdoor Council, Inc.*, 829 F.2d at 935.

2. The issues in dispute do not require further factual development and are a final government action.

The Forest Service has already authorized the illegal timber sale giving rise to Respondent's cause of action against the government. In order to afford respondents standing, they must demonstrate an injury which has become final, an injury in fact. The illegal authorization to clearcut the Big Tree Tract has been made final and is now ripe for review. (R. at 3.) Even where the government's action is not yet final, a facial challenge to the legality of a law may be ripe for judicial review. It is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions come into effect. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (citation omitted). In this case the government's illegal action has already occurred, more than satisfying the minimum ripeness requirements. (R. at 1.)

An injury in fact is an "invasion of a legally protected interest which is . . . concrete and particularized, and . . . actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). Respondent's legally protected interest is securing the lives of migratory birds in the Big Tree Tract where they regularly observe migratory birds. This interest has been invaded by the Forest Service's allocation of the Big Tree Tract for clearcutting. Because the authorization became final in May of 1997, the harm is not merely "imminent" but is "actual." (R. at 3.) When the challenged action has already occurred, courts have held that the "harm asserted has matured sufficiently to warrant judicial intervention." *Pacific League Found. v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903, 915 (9th Cir. 1981); see also *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 457 U.S. 1132, cert. denied, 457 U.S. 1133 (1982), *aff'd*, 461 U.S. 190 (1983) (quoting *Warth v. Seldon*, 422 U.S. 490 (1975)).

Respondent seeks injunctive relief against Blackacre to prevent clearcutting of the Big Tree Tract in the New Union National Forest. (R. at 1.) Further factual development would require waiting for Blackacre to begin clearcutting, the specific action which the Respondents seek to prevent. Waiting for Blackacre to begin clearcutting undermines the preventative purpose of injunctive relief. See e.g., *Lujan*, 497 U.S. 871.

Petitioners misconstrue standing in this case to be dependent upon Blackacre's commencement of clearcutting rather than upon the United States Forest Service's authorization of that clearcutting. Questions of standing are at issue in a contentment of government action, not private action. In this case the government action is the Forest Service's authorization of clearcutting.

C. Standing Is Proper Because the *Possibility* of Harm Exists. Whether Blackacre *Actually* Kills Migratory Birds in the Future Is Irrelevant to Standing.

“Harm” is not limited to actual, physical, or economic injury. Any adverse effect on an individual’s use and enjoyment of land is a sufficient non-economic injury to confer standing to challenge governmental actions. *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983). In the present case CSB’s harm is the government’s infringement of their legally protected interest in ensuring the maintenance of migratory bird habitat in the Big Tree Tract where they regularly observe birds. (R. at 1-3.) Petitioners argue that this case is not ripe for review because bird deaths will only occur if Blackacre logs during nesting season, an occurrence which is not yet known. (R. at 3.) This argument is false on three counts.

First, migratory birds will die as a result of the clearcutting regardless of when Blackacre chooses to clearcut. The district court noted that the cutting of trees from the Big Tree Tract would cause the indirect deaths of migratory birds due to the destruction of habitat caused by the loss of mature forest irrespective of when such destruction takes place. (R. at 2.)

Second, the district court also points to Blackacre’s statement at the hearing on this Motion in which it makes clear that it intends to harvest timber during bird nesting season, as well as at other times of the year. (R. at 2.) The Forest Service’s own Environmental Impact Statement acknowledged that clearcutting during the nesting season “will undoubtedly result in the loss of nests with their eggs or chicks.” (R. at 2.)

Third, even if it were not certain whether Blackacre would kill migratory birds as a result of the Forest Service’s authorization to do so, the *possibility* that it may kill migratory birds affords CSB standing to dispute that authorization. The Forest Service’s authorization creates a possibility that migratory birds will die as a direct result of the clearcutting since there is no restriction concerning the seasons during

which clear cutting is allowed. (R. at 2.) Environmental groups need not prove that the alleged results will undoubtedly occur in order to maintain standing. A requirement of standing is that the party's claims not be frivolous, and the party need not establish that it will prevail on the merits of its case. *See City of St. Louis v. Dept. Of Transp.*, 936 F.2d 1528 (9th Cir. 1991).

In *Idaho Conservation League*, the court held that where the failure to make wilderness recommendations would not have occurred "but for" the Secretary's decision, the fact that development in those areas might never take place or that a redrafted Environmental Impact Statement might change the Secretary's recommendation, was irrelevant. As in the present case, the issue of whether the environmental destruction would occur was unknown. The court noted that the asserted injury at issue was that, due to a deficient Environmental Impact Statement, environmental consequences might be overlooked. Therefore, the ultimate outcome after additional procedures were followed was not at issue. *See Idaho Conservation League*, 956 F.2d at 1518.

Similarly, the court in *Duke Power Co.* allowed suit by groups and individuals living near the proposed sites of nuclear power plants. The court found that the *possibility* of adverse consequences to lakes near power plants was sufficient to constitute "injury in fact." In this case, the plant-site was merely proposed. Also, the government did not open the land to power plant development in general. Had Duke Power Company decided to build plants on the proposed site, the environment would have been harmed. However, it was not necessary to prove that the plants would be built. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978).

D. Judicial Review Is Proper in This Case Because a Denial Will Cause CSB to Incur Undue Hardship.

In deciding whether an issue is ripe for review, the court evaluates "the hardship to the parties of with-holding court consideration." *Abbott Labs v. Gardner*, 307 U.S. 136, 149

(1967). A finding for the Petitioners in this matter would mean that CSB would have to wait for Blackacre to actually kill migratory birds and destroy their habitat before bringing suit. CSB does not seek monetary damages but injunctive relief. After clearcutting begins, injunctive relief becomes useless, and clearly imposes undue hardship upon CSB. It is for this reason that environmental groups have consistently been granted standing without showing that the harm sought to be prevented through injunction will undoubtedly occur. See *City of St. Louis*, 936 F.2d 1528; *Duke Power Co., Inc.*, 438 U.S. 59; *Japan Whaling Ass'n*, 478 U.S. 221; *Humane Society of the United States*, 840 F.2d 45; *Alaska Fish & Wildlife Fed'n and Outdoor Council, Inc.*, 829 F.2d at 935.

II. A VIOLATION OF THE MIGRATORY BIRD TREATY ACT, 16 U.S.C. § 703(a) (MBTA), IS A STRICT LIABILITY CRIMINAL OFFENSE.

A. The Legislative History and Language of the MBTA Evidencing Congress's Intent to Create a Strict Liability Offense.

In 16 U.S.C. § 707(a), the penalty for violating 16 U.S.C. § 703(a) is a misdemeanor crime carrying with it a fine "of not more than \$ 500" or imprisonment not to exceed six months, or both. 16 U.S.C. § 707 (a) (1994). Congress intended the misdemeanor penalty under § 707(a) to be one of strict liability, and their statements following the 1986 amendment of § 707 (b) evidenced this intent. See *Mahler v. United States Forest Service*, 927 F. Supp. 1559, 1580 (S.D. Ind. 1996) (quoting Sen. Rep. No. 445, 99th Cong., 2d Sess. 16 (1986) (which states in part that "[n]othing in this amendment is intended to alter the 'strict' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld in many Federal court decisions."); See also *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995)).

Congress specifically did not add a knowledge requirement to the misdemeanor charge outlined in § 707(a). See *Mahler*, 927 F. Supp. at 1578. Although the courts are continually interpreting the MBTA and the 1986 amendment ad-

ding “knowingly” to § 707(b), the strict liability requirement in § 707(a) is applied in all circuits, except the Fifth, whose variation is a slightly heightened standard. See *United States v. Sylvester*, 848 F.2d 520, 522 (5th Cir. 1988); Dennis Jenkins, *Comment: Criminal Prosecution and the Migratory Bird Treaty Act: An Analysis of the Constitution an Criminal Intent in an Environmental Context*, 24 B.E. ENVTL. AFF. L. REV. 595, 618 (1997). The Supreme Court has not ruled on this issue, so currently the legislature’s creation of §707(a) which excludes a requirement of intent does not violate due process under the Constitution. See Jenkins, *supra*, at 622.

B. In Any Circuit, Blackacre and The Forest Service Are Strictly Liable

The language of § 703 states that “it shall be unlawful at any time, by any means or in any manner” to commit the listed actions. 16 U.S.C. § 707(a). The Second Circuit outlined this portion of the MBTA in a jury charge and intentionally added that the “Government in this case does not have to prove that the defendant intended to kill the birds” to ensure the jury applied strict liability. *United States v. FMC Corp.*, 572 F.2d 902, 904 (2d Cir. 1978). All circuits, excluding the Fifth Circuit, have interpreted the statute and legislative history to apply strict liability to misdemeanor crimes under the MBTA. See *Boynton*, 63 F.3d at 343.

The Fifth Circuit has added a “should have known” level of scienter as a “necessary element for an offense under the MBTA.” *Sylvester*, 848 F.2d at 522 (quoting *United States v. Delahoussaye*, 573 F.2d 910, 913 (5th Cir. 1978.)) The Seventh Circuit followed the Third Circuit in applying strict liability but pointed out the possibility of unintended results, such as a person being held liable for ridding his land of pigeons. *United States v. Van Fossan*, 899 F.2d 636, 638 (7th Cir. 1990) (construing *United States v. Engler*, 806 F.2d 425, 432 (3d Cir. 1986)).

The legislature left the possibility of misapplication of the strict liability requirement to the “sound discretion of prosecutors and the courts.” *FMC Corp.*, 572 F.2d at 905; See

also Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 18 (1996). Prosecutors and judges are better able to carry out the intentions of Congress because Congressional statements and legislative history clearly outline the strict liability provision of § 707(a). See Finet, *supra*, at 18. The courts and prosecutors have been given great discretion to apply the statute broadly, which has not led to widespread abuse, and “the strict provisions should not impede use of the MBTA for habitat protection purposes. *Id.* The *Mahler* court’s lack of faith in prosecutors’ judgment in prosecuting strict liability cases under § 703 is not shared by other courts or Congress. *Mahler*, 927 F. Supp. at 1579. The potential prosecution of “trivial violations” and abuse of the law exists in many contexts other than the MBTA, so if possible abuse of the statute determines its validity, many laws would be invalid. Finet, *supra*, at 19.

C. Blackacre and the Forest Service are Strictly Liable for Violating the MBTA

The Forest Service admits that migratory birds would be killed as a result of the timber sale to Blackacre. (R. at 3.) The United States agrees that § 703 is penalized as a strictly liable offense under § 707(a). (R. at 3.) Blackacre argues that *Mahler* concludes the MBTA is not a strict liability statute. This is incorrect because the court in *Mahler* concluded that the MBTA did not include the actions of the defendants, but § 707(a) does hold a violator under §703 strictly liable. *Mahler*, 927 F. Supp. at 1573, 1580-81.

Even under the Fifth Circuit’s “should have known” test or the “knowingly” requirement under the felony charge of § 707(b), Blackacre and the Forest Service would still be liable. Blackacre stated at the hearing on the Motion to Dismiss the suit that it intended to harvest timber during bird nesting season and argued the MBTA would not be violated. (R. at 2.) Blackacre is aware of the law and plans to knowingly and intentionally kill migratory birds by harvesting timber from the Big Tree Tract year around. (R. at 2.) Therefore, provided Blackacre’s actions are found to be in violation of § 703, the court may hold Blackacre strictly liable for a mis-

demeanor violation under § 707(a), and possibly a felony since Blackacre will knowingly violate the MBTA under § 707(b).

III. THE MBTA PROHIBITS THE KILLING OF MIGRATORY BIRDS BY CLEARCUTTING FORESTS DURING BIRD NESTING SEASON.

A. The Legislative History and the Pertinent Language of the MBTA Makes it Unlawful to Take or Kill a Migratory Bird.

The pertinent language of the Migratory Bird Treaty Act of 1918 is, "Unless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture or kill . . . any migratory bird, any part, nest, or egg of any such bird . . . included in the terms of the conventions . . . " *Convention for the Protection of Migratory Birds*, Aug. 16, 1916, U.S.-Can., 39 Stat. 1702, T.S. No. 628 (codified and amended as 16 U.S.C. § 703 (1994)). The plain meaning of the statute indicates that the killing of any migratory bird is unlawful. *See id.* The Convention between the United States and the Government of Japan, concluded on March 4, 1972, provided for the protection of migratory birds and birds in danger of extinction, and their environment. *Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and their Environment*, March 4, 1972, U.S.-Japan, 25 U.S.T. 3329. Additionally, the convention between the United States and the former Soviet Union adds for the conservation of migratory birds and their environment. *Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment*, May 23, 1972, U.S.-U.S.S.R., 29 U.S.T. 4647. *See also Convention for the Protection of Migratory Birds and Game Mammals*, Feb. 7, 1936, U.S.-Mex. 50 Stat. 1311, T.S. No. 912. The resulting treatises between the United States and

the aforementioned countries during the conventions provide the foundation and structure for the MBTA. These treaties indicate the concern for the protection of migratory birds and their habitats. Additionally, the legislative history of the MBTA illustrates that the purpose of the statute was for the management of game birds, the protection of non-game birds, and the protection of bird habitats. *See* 56 CONG. REC. 7364 (1918); H.R. REP. NO. 65-243, at 2 (1918); 56 CONG. REC. 7360-61 (1918).

B. The Courts are Divided on How to Treat Cases Dealing with Habitat Modification or Degradation by Timber Harvesting.

After examination of a series of cases concerning timber harvesting on public lands, the courts tend to view Forest Management Plans either narrowly or broadly. As previously discussed, the language of the statute is broad. For example, "by any means or in any manner" includes a number of offenses for the killing or taking of migratory birds. However, if a court finds that a plaintiff can prove that the planned harvests, approved in a Forest Management Plan, *directly* constitutes a "taking" of migratory birds, the Forest Service would be in violation of the MBTA. Other cases have found that an indirect or unintentional "taking" of migratory birds is a violation of the MBTA.

In *Sierra Club v. United States Department of Agriculture*, the Forest Service adopted an Amended Land and Resource Management Plan (ALRMP) for the harvesting of timber in the Shawnee National Forest in Illinois. *Sierra Club v. United States Dep't of Agric.*, No. 94-CV-4061-JPG (S.D. Ill. 1995). The Sierra Club objected to the ALRMP as it violated the MBTA. The plaintiffs stated the violation as destroying the essential habitat for neo-tropical migratory birds and thereby directly killing such birds by allowing logging during neo-tropical nesting periods. *See id.* The issues the court identified were: (1) whether the ALRMP resulted in habitat modification or degradation that was a "taking" under the MBTA; and (2) whether the ALRMP instigated di-

rect "takings" of young migratory birds by allowing timber harvesting during the nesting seasons. *Id.* at 33-34.

Regarding the first issue, the court held that a "taking" does not occur simply because of habitat modification or degradation." *Id.* at 33. The basis for the court's holding on the first issue was based on the analysis in *Seattle Audubon Society v. Evans*, 952 F.2d 297, 302-03 (9th Cir. 1991). In *Evans*, the court looked at the meaning of the word "take" in the Endangered Species Act (ESA) and the MBTA. In *Sierra Club*, the court found the comparison of the term "take" persuasive. "[T]he statutory language of the MBTA differs from the ESA in that the word harm (along with the words, harass, wound, and trap) is not included. This is strong evidence that the MBTA does not include a prohibition of habitat modification or degradation." *Sierra Club v. United States Dep't of Agric.*, No. 94-CV-4061-JPG at 34.

The second issue addressed by the court concerned the provision by the ALRMP establishing Forest Interior Management Units (FIMUs). The ALRMP requires that "750 acres of each FIMU consists of trees at least 50 years old." *Id.* at 13. FIMUs consist of 1,100 acre units of forest. *See id.* FIMUs are designed to protect the habitat of bird species in the forest interiors requiring a "nesting and breeding habitat consisting of large blocks of unfragmented or closed-canopy, mature hardwood forest." *Id.* at 12. The ALRMP prohibits the harvesting of timber in the FIMUs during the nesting season, but not outside the FIMUs. *See id.* at 34. The court stated, "There is no attempt [by the Forest Service] to respond to the plaintiff's logical assumption that forest interior birds will be killed if they are nesting outside the FIMUs and there are no seasonal restrictions . . . placed on logging in these non-FIMU areas." *Id.* at 35. The court directed the Forest Service to "more fully address this issue on remand." *Id.*

In a recent timber harvesting decision, the Forest Service planned to "clearcut" forty-six acres, "shelterwood" cut four acres and sell the timber. *Mahler*, 927 F. Supp. at 1559. The plaintiffs argued that the planned harvest by the Forest Service would "indirectly 'take' migratory birds by destroying

their habitat . . . ,” and that “logging during nesting season would directly ‘take’ migratory birds.” *Id.* at 1573. The court held that “habitat destruction and logging during nesting season do not produce ‘takings’ of migratory birds within the purview of the MBTA.” *Id.* In reaching its decision, the court relied on the comparison of the term “take” as outlined in *Seattle Audubon Society. Mahler*, 927 F. Supp. at 1574 (citing *Seattle Audubon Soc’y*, 952 F.2d at 302-03). The court found that “a ‘taking’ under the MBTA does not include habitat modification resulting from Forest Service sales activity.” *Id.* The plaintiffs asserted that the cases of *United States v. FMC Corp.* and *United States v. Corbin Farm Services* supported that the timber harvest constituted a “taking.” *FMC Corp.*, 572 F.2d 902; *United States v. Corbin Farm Services*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff’d*, 578 F.2d 259 (9th Cir. 1978). The *Mahler* court distinguished their case from the two cited cases, as they were hazardous substance cases. The court stated that it would not extend the scope of the MBTA as it was intended to regulate hunting and trade in bird parts. *Mahler*, 927 F. Supp. at 1574 n.8.

The present case is distinguishable from *Mahler*. In *Mahler*, the court misinterpreted the legislative history of the MBTA when it concluded that the scope of the MBTA was intended to regulate hunting and trading in bird parts. *See id.* As the legislative history indicates, the MBTA is not an exclusive hunting and trading regulation. The purpose of the Act was to protect and preserve migratory birds and their habitats. Further, the *Mahler* court erred in not considering the plaintiff’s argument for the court to consider the hazardous substance cases. For example, in *Van Fossen*, the court stated, “Neither the common grackle . . . nor the mourning doves . . . is endangered or even threatened . . . Although neither species seems to need protection, each is ‘migratory’ and the regulations under the MBTA do not allow people to poison them . . .” *Van Fossen*, 899 F.2d at 637. *See also FMC Corp.*, 572 F.2d 902 (deciding the toxic wastewater leak was an unintentional act by FMC, but still a violation of the MBTA). The court in *Mahler* incorrectly reached the decision that only *direct* “takings” violate the MBTA. Hazardous sub-

stance cases have indicated that the unlawful killing of even one migratory bird is an offense under the MBTA. *Corbin Farm Servs.*, 444 F.Supp. at 536. The *Corbin* court also indicated that the sole purpose for the enactment of the MBTA was not for just hunting and trading, but for the protection of migratory birds. *See id.* at 532.

The following day after *Mahler's* decision, in a similar case, the District Court for the Northern District of Georgia issued an injunction against timber harvesting. *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996). In this case, the court found that the planned harvesting during nesting season would result in the deaths of 2,000 to 9,000 juvenile birds. *See id.* at 1563. The court found that a taking "does not occur simply because of habitat destruction or modification." *Id.* at 1564. The court relied on the decision of *Sierra Club v. United States Department of Agriculture* and stopped the harvesting after the court determined that the cutting of timber during the nesting season would violate the MBTA. *See id.* at 1565 (citing *Sierra Club*, No. 94-CV-4061-JPG at 35. The court reasoned that, "The instant case is even stronger than *Sierra Club v. United States Department of Agriculture*, since in this case, plaintiffs have affirmative evidence of the number of deaths that will occur and are not merely relying upon assumptions." *Sierra Club*, 933 F. Supp. at 1565-73 (discussing *Sierra Club*, No. 94-CV-4061-JPG). The court found that the affirmative evidence of the deaths of thousands of migratory birds would violate the MBTA. *See id.*

After the *Martin* decision, the plaintiffs petitioned the District Court in *Mahler* to reconsider its decision concerning the MBTA. The motion to reconsider, draws a distinction between the timber harvesting cases, which finds direct "takings" a violation of the MBTA, but not indirect "takings." *Mahler*, 927 F. Supp. at 1576. The court found that "planned salvage logging activity in the Hoosier National Forest" did not violate the MBTA even during nesting season. *Id.* at 1576. The court also rejected the Forest Service's argument that "no one other than the United States government may invoke the MBTA." *Id.* at 1578.

However, the Eleventh Circuit reversed the preliminary injunctions of the District Court in *Sierra Club v. Martin*. *Sierra Club*, 110 F.3d 1551. In reversing the preliminary injunction, the court held that the MBTA is a criminal statute and does not apply to the federal government. *See id.* at 1555. In addition, the court held that the Forest Service's action did not violate the MBTA and that the Sierra Club was unable to seek judicial relief under the APA. *See id.* at 1555-56. However, the *Martin* court was incorrect in finding that the Forest Service did not violate the MBTA, nor was Sierra Club able to seek judicial relief under the APA. As will be discussed, the Service, through its planning and actions may violate the MBTA. The flaws of the Forest Service's planning and actions are reviewable under the APA.

C. The Forest Service's Plan for the New Union National Forest Agrees with CSB that Habitat Destruction Will Occur by Blackacre, because the Current Violation of the MBTA.

1. The Forest Service's Plan is not in Compliance With 16 U.S.C. § 1600 et. seq.

The Forest Service has employed some form of planning for a number of years. After the passage of the Multiple-Use, Sustained Yield Act (MUSYA), the Forest Service developed formal district and regional Multiple-Use Planning Guides. *See* 16 U.S.C. §§ 528-531 (1994). The National Forest Management Act's (NFMA's) main focus and the implementing regulations is on "where" timber may be harvested (based on the physical and economic suitability of the land); "how much" timber may be cut (analyzing the concepts of sustained yield, non-declining even-flow, rotation age, culmination of mean annual increment of growth, and earned harvest effect); and "how" by using even-aged management techniques, along with whether restrictions should be placed on clearcutting. 16 U.S.C. §§ 1600-1614 (1994). Three sections of the Act are pertinent to timber harvesting cases.

First, section 1604 states that the Forest Service is precluded from harvesting "marginal' lands (where resource pro-

tection or reforestation cannot be insure[d]" and lands on which logging would destroy the "diversity of plant and animal communities." Second, the Forest Service is required to insure that clearcutting is the "optimum method. . . to meet the objectives and requirements of the relevant land management plan." 16 U.S.C. § 1604 (g)(3)(F)(i) (1994). Third, the statute also requires an adequate assurance that the land, which is to be harvested for timber, can be restocked within five years. See 16 U.S.C. § 1604 (g)(3)(E)(ii) (1994).

In *Sierra Club v. Cargill*, the district court enjoined timber harvesting in the Bighorn National Forest. The Forest Service plan contained a seven-year regeneration plan in violation of 16 U.S.C. § 1604 (g)(3)(E)(ii). *Sierra Club*, 732 F. Supp 1095. The court remanded the case so that the Forest Service could revise its plan to meet the five-year regeneration period. On remand, the Forest Service only changed the seven-year period to five-years with no considerable changes. The court rejected the modification and upheld the injunction. The Tenth Circuit incorrectly viewed the case as if it were on appeal from the original decision of the District Court. The court held that the Forest Service's expertise and discretion of the plan was adequate. The Tenth Circuit remanded the case to the District Court for dissolution of the injunction. *Sierra Club v. Cargill*, 11 F.3d 1545 (10th Cir. 1993) *reh'g denied* (1994).

2. The Forest Service Did Not Adequately Consider the Alternatives, Nor Adhere to the Requirements of NEPA.

The Forest Service utilizes computer-based models in their planning. George C. Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 301, 342 (1989). The regulations require that the Forest Service generate and consider a minimum of four alternatives: (1) the most cost-efficient means of meeting the Forest and Rangeland Renewable Resources Planning Act (RPA) (codified under the NFMA), targets assigned to the forest in the regional guide; (2) a "no action" alternative that continues current forest management practices; (3) an alternative that

maximizes marketable resources; and (4) an alternative that maximizes nonmarket resources. 36 C.F.R. § 219.12(f) (1994). The District Court in Colorado reviewed the types of alternatives the Forest Service needs to generate, and looked at the consideration the Forest Service must give to each alternative. This case concerned the creation of an LRMP for the Rio Grande Forest. The court found that the Forest Service had not given an adequate explanation of the LRMP. Further, the court required the Forest Service to generate a wide range of alternative plans and not those that only support the Forest Service's goals. The court also instructed the Forest Service to take a harder look at differing alternatives that do not meet the desired result of the Forest Service. *Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 979-80 (D. Colo. 1989). As with most computer-generated models, the only way to achieve the best-utilized model is by inputting the accurate information. The Forest Service recognizes that the planning documents are legal documents and that courts will review these plans substantively and procedurally. *Coggins, supra*, at 345.

Under the National Environmental Policy Act (NEPA), federal agencies must include a detailed statement on the environmental impact of the proposed action in every recommendation of legislation or federal action that significantly affects the quality of the human environment. *See* 42 U.S.C. §§ 4321-4370 (1994). In order to satisfy the NEPA requirements, an agency generally performs an environmental assessment (EA) before performing an environmental impact statement (EIS) to determine if the EIS is necessary. *See* 40 C.F.R. §§ 1501.3, 1508.9 (1997). If there is no finding of a significant impact by the agency, an EIS is not necessary. *See* 40 C.F.R. § 1508.9 (a)(1) (1997). The Forest Service does not need to engage in the NEPA provisions, during its planning process, until after the Land Resource Management Plans (LRMPs) have been adopted for specific timber sales. *See generally Citizens for Envtl. Quality*, 731 F. Supp. at 970. However, the Forest Service generally does prepare an EIS within the context of the NFMA planning process. *See* 36 C.F.R. § 219.10(a), (b) (1997).

Recent Congressional legislation has provided for the Forest Service to develop a notice and comment procedure for actions taken under LRMP's. See *Department of the Interior and Related Agencies Appropriations Act*, 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1374, 1419 (1992). The Forest Service pronounced regulations for appeals of project-level decisions. See 36 C.F.R. § 215 (1996). Comments are to be received within 30 days after the publication date for the notice of public comment. See *id.* After the officer in charge of making the decision has issued its finding, another forty-five day period for an appeal of decision is allowed. An appealed decision is stayed until fifteen days after the date the officer decides the appeal. See *id.* The only exclusions of appeals are actions not subject to NEPA, actions provided for in a draft EIS covered by other notice and comment procedures, and insignificant amendments to LRMP's subject to appeal under 36 C.F.R. § 215.

The Petitioners contend that they did not contemplate notice to or action by the Forest Service before Blackacre begins to harvest timber. (R. at 3.) As indicated above, Congress enacted a notice and comment period for LRMP's. No exclusions under 36 C.F.R. § 215 are applicable to the Forest Service's failure to provide for a notice and comment procedure. On the contrary, timber harvest actions are subject to notice and comment. See 36 C.F.R. § 215.4(b) (1996). As indicated in the record, CSB has complied with all the necessary appeals before bringing this action to the District Court. (R. at 2.) Therefore, the Forest Service has failed to comply with the requirements of providing for a notice and comment procedure.

In the present case, the CSB contends that the MBTA does prohibit the killing of migratory birds by clearcutting forests during bird nesting season. Blackacre disagrees. However, the United States answers that the MBTA prohibits the killing of migratory birds, except when the birds are killed in accordance with specifically allowed actions in a forest management plan or logging sale.

The plain reading of the statute indicates that the killing of migratory birds is unlawful. The legislative history and the

conventions affirm that the purpose of the statute was to protect birds and their habitats. The court in *Sierra Club v. United States Department of Agriculture* found that the Forest Service's review of FIMU's was inadequate as the timber harvesting of non-FIMU's would be killed, while nesting. The court also found no seasonal restrictions placed on the logging of these FIMU's. In the present case, "The Plan nor the timber sale restrict the season of the year in which clearcutting is allowed." (R. at 2.) The Forest Service's own EIS is in accordance with CSB's contention. The EIS states, "... If cutting occurs during spring or summer months, it will undoubtedly result in the loss of nests with their eggs or chicks." *Id.* The EIS has clearly established, based on a baseline study, the various species of birds that would be affected by this clearcutting and the approximate number of nests and birds that would also be affected. *See id.* Further, the EIS acknowledges that habitat destruction will occur as a result of the clearcutting. This may contribute to long-term bird population depletions, however the EIS does not quantify this impact. *See id.* The EIS prepared by the Forest Service is in agreement with CSB's contention that there will be a *significant impact* on the proposed timber sale agreement. In addition, the Forest Service has failed to provide for a notice and comment period before proceeding with the harvesting of timber in Big Tree Tract. This act is in violation of §§ 215.

The District Court correctly assessed the Forest Service as being highhanded. The United States has argued that it is above the law when it violates the MBTA. Congress clearly added for the protection for Department of Interior employees in specific instances from being in direct violation of the MBTA. *See* 50 C.F.R. § 21.12(a) (1996). Had Congress intended to preclude the government, in its entirety, from violations under the MBTA, it would have expressed its intent in the statutory language of the Act.

The proposed timber harvest site is an "old growth" stand within the New Union National Forest, and the United States District Court for the District of New Union correctly identified the "old growth" stand in the Big Tree Tract. "[O]nly recently have scientists studied the ecological value of

old-growth forest. Now scientists widely recognize old-growth stands as unique ecosystems noted for the rich soil they generate . . . the still unidentified genetic diversity of valuable species found in these forests . . . “ Alyson C. Flournoy, *Beyond the “Spotted Owl Problem”: Learning from the Old-Growth Controversy*, 17 HARV. L. REV. 261, 265 (1993).

As previously discussed, the NFMA states that the Forest Service is precluded from harvesting on marginal lands, where reforestation cannot be insured. In addition, the Service is precluded from logging on lands, which would destroy the “diversity of plant and animal communities.” 16 U.S.C. § 1604 (1997). The statute also requires the Forest Service to inquire if clearcutting is the “optimum method . . . to meet the objectives and requirements of the relevant land management plan.” *Id.*

The Forest Service has agreed that the EIS will result in habitat destruction in the old-growth area of the Big Tree Tract. (R. at 2.) However, the Forest Service has failed to prove that the clearcutting in the Big Tree Tract is the “optimum method” to meet the objects and requirements of its land management plan. Further, the Forest Service’s Plan does not adequately insure the Big Tree Tract will be regenerated within a five-year period. The United States has asserted, there are exceptions to the MBTA. As provided in § 1604, the Secretary of the Interior may allow some taking of migratory birds from time to time, “having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds,” in order to determine the extent and when, if allowed at all, and by what means, being compatible with the conventions “to allow hunting, taking, capture, killing . . . of any such bird, or any part, nest, or egg thereof . . . “ § 1604. In the present case, due regard should be given to the zones of breeding habits, and times and lines of flight of migratory birds. To allow the taking and death of the migratory birds in Big Tree Tract would be a violation of the conventions, which established the structure of the MBTA.

IV. THE MBTA AND THE NFMA ARE IN ACCORD FOR PURPOSES OF JUDICIAL REVIEW UNDER THE APA

A. The Language of the APA Applies to Agency Action Including NFMA's Violation of the MBTA.

The Administrative Procedure Act states that, "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional provisions, and determine the meaning or applicability of the terms of an agency action." § 706. The APA provides for jurisdiction over an agency action alleged to be in violation of the MBTA. See *Seattle Audubon Soc'y*, 914 F.2d 131, 503 U.S. 429. In *Mahler*, the court conducted an extensive search and concluded that the APA "may be used by a party with standing to challenge government action that would violate the MBTA." *Mahler*, 927 F. Supp. at 1579.

B. The NFMA is Subject to Review Under the APA if its Decisions are Inadequately Determined.

Challenges to timber harvesting sales generally consist of allegations that the Forest Service violated one or more statutes. Courts will determine if the Forest Service reached a decision which was "arbitrary and capricious, an abuse of discretion, or not in accordance with the law." § 706. Under NEPA, the Forest Service must include detailed statements concerning the environmental impacts of the proposed action. See 42 U.S.C. § 4332(c) (1994). The Supreme Court has recognized that the primary function of an EIS under NEPA is to insure a fully informed and well-considered decision. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

The Petitioner's argue that the MBTA is not law that governs timber sales. The court in *Mahler* states that the MBTA does apply to all actions that directly kills migratory birds. See *Mahler*, 927 F. Supp. at 1576. Blackacre has stated that it intends to kill migratory birds during their nesting season. (R. at 2.) The Forest Service's EIS shows that various migratory birds will be killed as a direct result of the

clearcutting on Big Tree Tract. (R. at 2.) Under NEPA, an EIS is required in every recommendation of legislation or federal action that significantly affects the quality of human environment. See 42 U.S.C. §§ 4321-4370 (1994). The EIS performed by the Forest Service is in direct violation of NFMA. The Forest Service's EIS does not adequately assure the resource protection or reforestation in the old growth tracts, where the logging is to occur. Further, the Forest Service does recognize that the logging will destroy a diversity of plant and animal communities. See § 1604: See also *Sierra Club*, 732 F. Supp 1095.

The Forest Service is to review and consider all types of alternatives. See *Citizens for Envtl. Quality*, 731 F. Supp. at 979-80. All of the aforementioned acts preclude the Forest Service from timber harvesting on the Big Tree Tract under the NFMA. The Petitioner's argue that if Blackacre were not to clearcut during the nesting season, then the MBTA would not apply. This argument is incorrect, as Blackacre has stated that it intends to clearcut during the spring and summer nesting seasons. (R. at 2.)

The NFMA may not in any way violate the MBTA without incurring criminal or civil liability from the violation. See *Mahler*, 927 F. Supp. at 1576. The MBTA is no different from any criminal statute insofar as the enactment of the NFMA or any other law cannot obviate the effectiveness of the statute. See 5 U.S.C. § 702 (1994). The NFMA cannot legally violate any criminal statute, just as the government's right to build power plants to generate necessary power is superseded by laws created to preserve clean water conditions in lakes, so is the NFMA's power qualified by the MBTA. *Duke Power Co.*, 438 U.S. 59; *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

The Ninth Circuit in *Evans*, rejected plaintiff's claims under the MBTA. See *Seattle Audubon Soc'y*, 952 F.2d 297. The court distinguished between the terms "take" in the MBTA and in the Endangered Species Act (ESA). See *Endangered Species Act*, 16 U.S.C. § 1531 (1997). The court noted that only the ESA explicitly prohibits the indirect killing through habitat modification. The court held that "the differ-

ences in the proscribed conduct under the ESA and the MBTA are 'distinct and purposeful.'" *Seattle Audubon Soc'y*, 952 F.2d at 303. Accordingly, the court concluded that habitat destruction, which causes incidental "harm" to owls under the ESA, does not necessarily "take" them within the meaning of the MBTA. *See id.* However, the court said that actions leading to the *direct* death of birds, such as clearcutting during nesting season would fall within the purview of the MBTA. *See id.*

The MBTA's prohibition against the "taking" of owls "at any time, by any means or in any manner," in the absence of appropriate regulations, did not apply to harm caused indirectly by habitat degradation. *Id.* The MBTA separates the proscription against "killing" listed species and the record establishing that logging killed spotted owls. This means that the MBTA is law insofar as it makes it a crime to directly kill migratory birds by destroying trees bearing their nests. *See id.* However, the general destruction of trees that contain migratory bird nests, is a direct killing of these birds. Blackacre has stated it plans to clearcut during nesting season, therefore, the MBTA provides CSB with injunctive relief to prevent such cutting. (R. at 2.)

Furthermore, while courts have not yet expanded the MBTA to include just any cutting of trees that might later harm migratory birds, the NEPA has stated requirements for the NFMA to follow to protect the bird's habitat. In the present case, 500 acres of the Big Tree Tract of the New Union National Forest has been set aside for clearcutting. As the lower court notes, whether this is done during or before nesting season, the migratory birds will suffer an appreciable loss of their habitat. (R. at 2.) The lower court chose not to participate in a form of judicial activism, as have other courts. *See Sierra Club*, 110 F.3d 1551; *Newton County Wildlife Assn. v. United States Forest Service*, 113 F.3d 110 (8th Cir. 1997); *Mahler*, 927 F. Supp. 1554. The plain language of the APA statute indicates that the MBTA is an agency under its review, as is the NFMA. The Forest Service is in violation of the NFMA as stated above. The NFMA is in accordance with the violation of the MBTA by directly "taking" or "killing" any

migratory birds. Therefore, the MBTA is "law" with which agency actions under the NFMA must be in accord for judicial review under the APA.

Conclusion

The District Court for the District of New Union correctly denied Petitioners' motion to dismiss the action brought by Citizens to Save the Birds. CSB's claim is ripe for review as the MBTA affords cause of action created by the clearcutting authorization. Because this authorization is final, primarily legal issues are raised and the possibility that birds will be killed is created. Standing is proper. In addition, Respondents would incur undue hardship if this court denied them standing.

Under the MBTA, the Forest Service and Blackacre are strictly liable for taking and/or killing migratory birds by clearcutting the Big Tree Tract. The legislative history evidences Congress's intent to create a strict liability, misdemeanor offense under the MBTA. The MBTA prohibits the killing of migratory birds during bird nesting season without providing an exception for a forest managing plan or logging sale. The legislative history shows that the purpose of the statute is to protect migratory birds and their habitat, and it is unlawful to kill any migratory bird by any means.

The MBTA is 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. The Forest Service must follow the MBTA in formulating management plans under the NFMA and any actions by the agency fall within the jurisdiction of the APA.

For the reasons stated in this brief, the Respondents respectfully request this Court to uphold the decision of the United States District Court for the District of New Union and render judgement for Citizens to Save the Birds.