

California Affirms State Law Prohibition of Incidental Take of Migratory Birds Despite Contrary Federal Stance

The California Department of Fish and Wildlife and the California attorney general have jointly issued an advisory regarding California's state law protections for migratory birds. The three-page advisory affirms that "California law continues to provide robust protections for birds, including a prohibition on incidental take of migratory birds, notwithstanding the recent reinterpretation of the Migratory Bird Treaty Act (MBTA) by the U.S. Department of the Interior (DOI)."

The MBTA prohibits the "take" of migratory birds, but it does not specify whether that is limited to intentional takes only, or whether it also includes "incidental takes"—which are unintentional takes that are incidental to an otherwise lawful activity. The advisory explains that the "longstanding interpretation" of the MBTA is that it prohibits incidental take. This position was affirmed by the Obama administration in a January 2017 DOI memorandum. However, in December 2017, the acting DOI solicitor issued a new memorandum reversing course and concluding that the MBTA does not prohibit incidental take.

The advisory notes that three lawsuits, including one joined by the attorney general, are challenging the new DOI memorandum's legality. In the meantime, "California's protections for migratory birds, including a prohibition against incidental take, remain clear and unchanged." The advisory then describes California's robust protection of migratory birds, pointing to several provisions in the California Fish and Game Code, as well as California Supreme Court caselaw, prohibiting the take of migratory birds.

The advisory states that more than 600 migratory bird species live in or migrate through California. It concludes by asserting that "CDFW and the Attorney General will continue to implement and enforce California law to protect these birds."

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Authors



[Laura G. Zagar](#)

Partner

LZagar@perkinscoie.com [415.344.7198](tel:415.344.7198)

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