



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

March 8, 2021

M-37065

Memorandum

To: Secretary
Assistant Secretary – Fish and Wildlife and Parks

From: Principal Deputy Solicitor

Subject: Permanent Withdrawal of Solicitor Opinion M-37050 “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take”

On December 22, 2017, the Solicitor issued a legal opinion, M-37050, which concluded that the prohibitions of the Migratory Bird Treaty Act (“MBTA”) apply only to affirmative actions that purposefully take or kill migratory birds, their nests, or their eggs, and thus do not apply to incidental taking or killing. For the reasons set forth below, and pursuant to delegated authority, I now revoke and withdraw M-37050.

On August 11, 2020, a district court vacated M-37050 as contrary to the unambiguous language of the MBTA. *Natural Resources Defense Council v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020). The court concluded that MBTA “Section 2’s clear language making it unlawful ‘at any time or in any manner, to ... kill ... any migratory bird’ protected by the conventions is in direct conflict with [M-37050].” *Id.* at 481. The United States Court of Appeals for the Second Circuit, at the request of the United States, dismissed the appeal on March 2, 2021. The lower court decision is consistent with the Department of the Interior’s long-standing interpretation of the MBTA.

In addition, the Government of Canada has raised several concerns regarding whether M-37050 is consistent with one of the treaties underlying the MBTA, the 1916 Convention Between the United States and Great Britain (on behalf of Canada) for the Protection of Migratory Birds, as amended by the 1995 Protocol Amending the 1916 Convention for the Protection of Migratory Birds. M-37050 did not analyze the issues raised by Canada with regard to this Convention.

This Memorandum permanently revokes and withdraws M-37050.

Robert T. Anderson