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# Friends of Animals v. United States Fish & Wildlife Service

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# *Friends of Animals v. United States Fish & Wildlife Service*, 879 F.3d 1000 (9th Cir. 2018)

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In *Friends of Animals v. United States Fish & Wildlife Service*, the Ninth Circuit held that the plain language of the Migratory Bird Treaty Act allows for the removal of one species of bird to benefit another species. Friends of Animals argued that the Service's experiment permitting the taking of one species—the barred owl—to advance the conservation of a different species—the northern spotted owl—violated the Migratory Bird Treaty Act. The court, however, found that the Act delegates broad implementing discretion to the Secretary of the Interior, and neither the Act nor the underlying international conventions limit the taking of a particular species to enhance conservation of another species. In affirming the district court's ruling, the Ninth Circuit agreed with the Service's conclusions and granted summary judgment in their favor.

## I. INTRODUCTION

Friends of Animals and Predator Defense (collectively, "Friends") are non-profit organizations advocating for animals protected by the Endangered Species Act ("ESA") and Migratory Bird Treaty Act ("MBTA"), along with other conventions.[1] In 2014, Friends challenged a Fish and Wildlife Service ("Service") scientific collecting permit, arguing that the permit violated the National Environmental Policy Act ("NEPA") and the MBTA. Friends argued that the Service's permit, which allowed the taking of one bird to benefit another, was unlawful because neither the MBTA nor any foundational migratory bird conventions expressly allow the Service to take a migratory bird unless to advance conservation of that species.[2] The U.S. District Court for the District of Oregon, however, granted summary judgment for the Service.[3] Friends appealed pressing only the MBTA claim.[4]

The Ninth Circuit Court of Appeals affirmed the district court's decision and granted summary judgment for the Service on three main grounds.[5] First, MBTA language did not support Friends' argument.[6] Second, the underlying convention protecting owls—the Mexico Convention—failed to support Friends' argument.[7] Lastly, the court

1. Friends of Animals v. United States Fish & Wildlife Serv., 879 F.3d 1000, 1002 (9th Cir. 2018).
2. *Id*.
3. *Id*. at 1002.
4. *Id*. at 1003.
5. *Id*. at 1010.
6. *Id*. at 1004.
7. *Id*. at 1007.

determined that "slippery slope" concerns over the Service's action were ufounded because adequate and proper backstops were in place.[8]

## II. FACTUAL AND PROCEDURAL BACKGROUND

In 1990, the Service determined the northern spotted owl ("NSO") was a threatened species under the ESA.[9] NSO population decline primarily tracked removal of old-growth forest, their principal habitat. Remaining NSO populations suffered further when barred owls, native to the eastern United States, began encroaching on increasingly scarce NSO habitat from the east.[10] Because of the barred owl's better adaptability, it eventually came to greatly outnumber the NSO and consume up to 76 percent of the two species' shared diet.[11] Barred owls even began physically attacking NSOs at times.[12] Consequently, NSO populations continued declining and dispersing.[13]

### *A. Recovery*

In 2008, the Service created a recovery plan for the NSO.[14] The Service acknowledged that habitat destruction was responsible for the decline in the NSO population..[15] Although that plan focused significantly on habitat preservation, the Service also concluded that, "the barred owl constitutes a significantly greater threat to spotted owl recovery than was envisioned when the spotted owl was listed in 1990," and, "[a]s a result, the Service recommend[ed] specific actions to address the barred owl threat."[16] In areas of greatest NSO concentration, the Service planned to remove barred owls and determine the effects of that change on NSO site occupancy, reproduction, and survival.[17] In 2014, the Service granted the Oregon Fish and Wildlife Office a scientific collecting permit for 1,600 barred owls.[18]

### *B. The Four International Conventions On Migratory Birds*

The MBTA references four conventions for the protection of migratory birds with Canada, Mexico, Russia, and Japan.[19] Each convention is a bilateral treaty between the United States and one specific

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8. *Id*. at 1008.
9. *Id*. at 1001.
10. *Id*.
11. *Id*.
12. *Id*. at 1002.
13. *Id*. at 1001.
14. *Id*.
15. *Id*.
16. *Id*. at 1002.
17. *Id*.
18. *Id*.
19. *Id*. at 1004.

country.[20] The Mexico Convention is the only one that provides protection for owls, and as such, the Mexico Convention was the only convention analyzed by the Court.[21] Article II of the Mexico Convention establishes "close[d] seasons" that prohibit taking migratory birds during certain seasons, with an exception under three circumstances, one of which allows taking for scientific purposes.[22]

### *C. Procedural Posture*

In 2014, Friends brought this suit claiming the Oregon Fish and Wildlife Office's permit violated the National Environmental Policy Act ("NEPA") and the MBTA.[23] Friends dropped the NEPA aspect of their claim when they appealed to the Ninth Circuit.[24] The district court granted summary judgment in favor of the Service on both of Friends' claims, and Friends appealed the ruling as it pertained to the MBTA. In its ruling, the district court concluded that Friends' same-species theory was unsupported because "nothing in the MBTA or the international conventions it implements limits scientific purposes to the species taken."[25]

The main purpose of the recovery plan is to eliminate the barred owl from the most concentrated habitats of the NSO.[26] Friends argued this does not constitute "use[d] for scientific research," which Friends argued is the point of the "same-species theory" provision within the MBTA and underlying conventions.[27] The group also contended that MBTA and Mexico Convention language does not allow the Service to grant the scientific collection permit because when the Service "permits take for scientific purposes, the action must be intended to advance the conservation or scientific understanding of the very species being taken."[28]

## III. ANALYSIS

The Ninth Circuit reviewed the district court's summary judgment *de novo* and came to similar conclusions as the lower court on each of Friends' arguments.[29] The court first analyzed Friends' argument in the context of the authority given to the Service and its broad discretion to grant the permit and interpret the meaning of the language of the MBTA.[30] Second, the court looked at the language of the Mexico Convention and

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20. *Id.*
21. *Id.*
22. *Id.* at 1005.
23. *Id.* at 1003.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 1003-1004.

whether there was a limitation to enforce same-species takings. [31] Third, the court held that the Service's interpretation of "used'' was consistent with the language in the Mexico Convention. [32] Lastly, the court found provisions in place to control the abuse of takings of species not listed on the scientific collection permit. [33]

### *A. Broad Discretion Under the MBTA*

The MBTA regulates takings for migratory birds, except as permitted by the act.[34] Under 16 U.S.C. § 703(a), the Secretary of the Interior is "authorized and directed to determine" when the conventions may allow taking and thereby "adopts suitable regulations permitting and governing the same."[35] Also relevant was 50 C.F.R. 21.23, which governs the Service's issuance of scientific collecting permits for the taking of birds for "scientific or educational purposes." [36] Permits must describe "species and number of birds to be taken, the location of the collection, the purpose of the research, and the institution to which species will ultimately be donated." [37] The section also specifies that this applies to all migratory birds, and that the birds must be donated and transferred to the public, scientific, or educational institution in compliance with the permit.[38]

In reviewing the MBTA and the Secretary's authority, the court found that the Act imposes few substantive conditions itself, but rather delegates to the Secretary broad discretion to implement the act.[39] Further, neither the Act nor the regulation supported Friends' same-species theory.[40]

### *B. The Service's Plan was Specimen-Specific, Not Same-Species*

Friends' primary argument, its same-species theory, was that language in the Mexico Convention required the taking of a bird be only for scientific purposes regarding that bird, and that the MBTA's consistency provisions mandated compliance with that requirement.[41] The MBTA's "consistency provisions" dictate that regulations are "subject to the provisions [of]" and must act to further the "purposes of the conventions." [42] Friends relied on the Mexico Convention's language in Article II(A) providing that the only exception for taking a migratory bird is when it is "used for scientific purposes, for propagation or for

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31. *Id*. at 1005.
32. *Id*. at 1006.
33. *Id*. at 1008.
34. *Id*. at 1003.
35. *Id*.
36. *Id*. at 1004.
37. *Id*. at 1004.
38. *Id*.
39. *Id*. at 1004.
40. *Id*.
41. *Id*.
42. *Id*.

museums." [43] Friends argued that because the Service's NSO recovery plan required taking barred owls to help the NSO, such taking was therefore not for a scientific purpose specific to the barred owl, thus violating the convention.[44]

Friends relied on language in the Mexico Convention as its sole cause of action, and argued that "used for scientific purposes" mandates that a permitted take must be of the same species listed in the permit and to advance the conservation of that species.[45] Friends maintained that the language in the Mexico Convention bolstered their argument and provided a cause of action to protect the barred owl from being taken without benefiting conservation or scientific advancement of that particular species.[46] In the Service recovery plan, the scientific purpose related to the NSO rather than the barred owl.[47] Friends concluded and argued that the permit impermissibly allowed barred owl take, even though no scientific research was directed at that species.[48]

The court bifurcated this argument into specimen-specific and same-species interpretations.[49] Specimen-specific permits are allowable, but same-species permits are not under the Mexico Convention.[50] Examples of specimen-specific permits are those where migratory birds are taken for scientific purposes, such as studying human hearing (barn owl) and aerodynamics (hummingbird).[51] In those cases, the scientific collection permits listed the species but had nothing to do with its advancement, yet the take still qualified as a permissible scientific purpose. The court found this analogous to the case at hand.[52]

### *C. The Service's Interpretation of "Used" Is Consistent With the Mexico Convention*

In distinguishing same-species from specimen-specific, the court analyzed the meaning of the word "used" in the phrase "used for scientific purposes."[53] First, the court analyzed the word "used" according to "its ordinary or natural meaning, concluding the Mexico Convention allows a bird to be "employed" even if it is "to procure its demise . . . [and it] . . . is not the subject of scientific experiment."[54] However, due to remaining

43. *Id*. at 1008.
44. *Id*. at 1003.
45. *Id*. at 1004-1005.
46. *Id*.
47. *Id*.
48. *Id*. at 1007.
49. *Id*. at 1005.
50. *Id*. at 1005.
51. *Id*.
52. *Id*. at 1007.
53. *Id*. at 1008 (citing Smith v. United States, 508 U.S. 223, 113 S. Ct. 2050 (1993)).
54. *Id*. at 1006.

ambiguity after the plain meaning analysis, the court continued analyzing the meaning of "used."[55]

The court next reviewed the word "used" in the context of the rest of the Mexico Convention's language because "interpretation of legal text is a holistic endeavor."[56] In doing so, the court concluded that "read in full context of Articles I and II, it clearly encompasses a controlled scientific study to save a threatened species covered by the Convention when that study" will have a negligible effect on the taken species population.[57]

Lastly, the court rejected Friends' argument that the canon of *noscitur a sociis* compelled the same-species argument. *Noscitur a sociis* stands for the proposition that "words grouped in a list should be given related meaning."[58] Friends claimed that Article II(A)'s exception requires that the phrase "used for scientific purposes . . . be read to be limited by the other elements in that series," such as "for propagation or for museums" because if one is taking a bird for propagation or for museums, it must be "used for the propagative or museum purpose;" thus, if a bird is taken for a scientific purpose, similar restrictions should apply by requiring the scientific purpose be for the bird taken. [59] However, the court found the words "'scientific purposes,' 'propagation,' and 'museums' are sufficiently distinct that there is no obvious common denominator among them" for the canon to apply.[60] Even if it did apply, the court held it failed to support Friends' argument because such a reading would be contrary to the Mexico Convention's Article I's language that "articulate[s] aims to assure that protected 'species may not be exterminated.'"[61] Thus, "to promote a broad set of uses" such a narrow reading of "scientific purposes" was unjustified.[62]

### *D. The Service's Interpretation Does Not Lead to A Slippery Slope*

Lastly, the court rejected Friends' argument that "the Service's loose definition of scientific purposes invites a slippery slope, and this position would allow for an entire migratory bird species to be exterminated so long as there is a scientific basis to do so."[63] The court agreed with the Service that there is a "backstop against Friends' parade of horribles," concluding that reading "Articles I and II of the Mexico Convention in concert, they require that parties 'establish laws, regulations and provisions' to assure that covered 'species may not be exterminated.'"[64] Therefore, the court concluded that the Mexico

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55. *Id.*
56. *Id.* (quotation omitted).
57. *Id.* at 1007.
58. *Id.* at 1008.
59. *Id.*
60. *Id.*
61. *Id.* at 1009.
62. *Id.*
63. *Id.*
64. *Id.* at 1008.

Convention's conservation purpose could be achieved "without reading into it a same-species limitation that is unsupported by its text."[65]

The court again referred to the language of Articles I and II from the Mexico Convention, which explicitly requires that parties "establish laws, regulations, and provisions so that a species may not be exterminated."[66] The court concluded that this slippery-slope argument did not advance the issue of whether a permitted take is limited to the same-species.[67]

## IV. CONCLUSION

A major implication of the court's holding is the broad level of agency discretion when interpreting statutes. Allowing the take of an animal without any scientific use required may result in agency overreach. So long as the courts use judicial boundaries, the taking of an endangered animal can be legally sound.

65. *Id*. at 1009.
66. *Id*.
67. *Id*.