

Migratory Bird Treaty Act: What's Next?

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for

Association of State Wetland Managers

*Federalism Re-envisioned: Exploring Possibilities for Enhanced
State and Tribal Roles in Water Resources Protection,
Conservation and Management*

*Research assistance provided by Student Attorneys Heather Burley and Francis J. Marrano



ROADMAP



- **Bird is the Word! (or, why I have been thinking about this...)**
- **The Way-back Story of the Act**
- **Recent Proposals**
- **Potential Ramifications**
- **Questions/Discussion**

Bird is the Word!

(in the sense of the Migratory Bird Treaty Act research and advocacy by Student Attorneys at the University at Buffalo School of Law Environmental Advocacy Clinic)





First, why do we care?

- More than 45 million people watch birds around their homes and away from home (2016 FWS National Survey of Fishing, Hunting, and Wildlife-Associated Recreation), and wildlife watchers in contribute a total of nearly \$80 billion to the U.S. economy.
- Bird watchers spend nearly \$41 billion annually on trips and equipment, local community economies benefit from the \$14.9 billion that birdwatchers spend on food, lodging and transportation. In 2011, 666,000 jobs were created as a result of birdwatching spending.
- 2011 study for the National Fish and Wildlife Foundation reported that combined outdoor recreation sales (gear and trips) for hunting, fishing and wildlife watching - including bird watching - totaled \$325 billion per year.
- Birds have been estimated to consume 98% of certain insect pests and pollinate many plant species

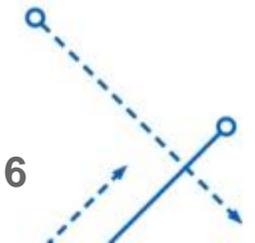
Way back in 1916, a new law was born...

- The precursor to the Migratory Bird Treaty Act was enacted in 1916 to implement the convention for the protection of migratory birds between the United States and Great Britain (acting on behalf of Canada).
- In 1918, an updated MBTA was passed by Congress...later amended to authorize treaties in Mexico, Japan, and what is now Russia.
- The MBTA is codified at 16 U.S.C. §§ 703–712, and was amended in 1974 statute (P.L. 93-300) with the following title: "An Act to give effect to the conventions between the U.S. and other nations for the protection of migratory birds, birds in danger of extinction, game mammals, and their environment."



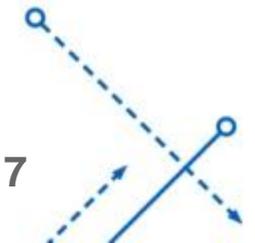
Why was the MBTA really passed?

- Throughout the 1800's into early 1900's, bird species were going extinct (including the Heath hen, Great auk, Labrador duck, Carolina parakeet and, sadly, the passenger pigeon, once the most numerous bird on the continent).
- What was happening to them? Hunting for food, yes, but also sought for their feathers to decorate hats...



Governing principles

- DOI's Fish and Wildlife Service governs
- Covers "hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any . . .bird, or any part, nest or egg" based on "due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times of migratory flight." (16 U.S.C. § 704)
- Makes unlawful any taking of domestic interstate and international transportation of migratory birds. (16 U.S.C. § 705)
- Enforcement can include seizure of birds illegally taken (16 U.S.C. § 706)
- Allows for fines, misdemeanors, and felonies (16 U.S.C. § 707)
- Provides authority for States to enact and implement laws or regulations to allow for greater protection of migratory birds, provided that such laws are consistent with the respective Conventions and that open seasons do not extend beyond those established at the national level. (16 U.S.C. § 708)



The MBTA in Action

- MBTA developed a legacy of protection: from preventing overhunting to supporting penalties for oil spills.
- More than 1,026 species of birds are protected.
- MBTA has long been a box to “check” as regulated community considers in development activities.



MBTA's Leverage

- Federal Court circuit split: “incidental” takes; when to impose criminal liability for non-intentional bird deaths from otherwise lawful activities (development)
- Threat of liability tends to function as leverage favoring conservation safeguards.
- Led to some legislative proposals



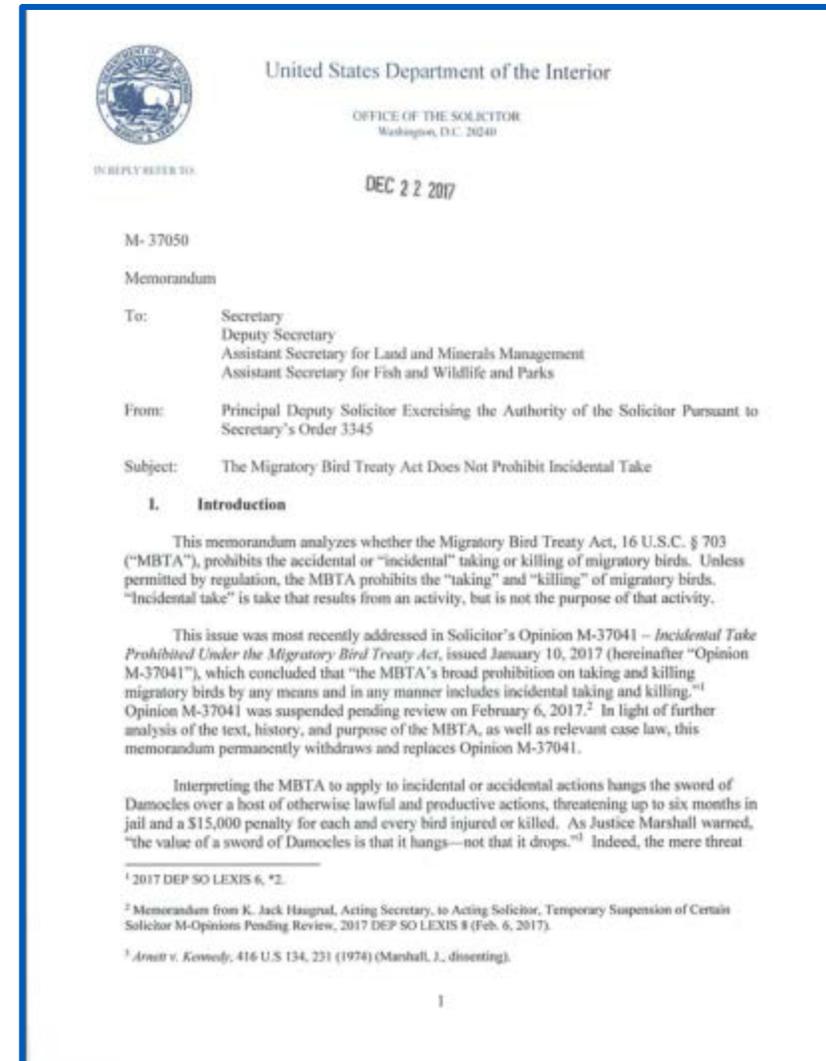
“America First” Energy Policy

- New Administration promotes domestic development in oil, natural gas, coal, and nuclear energy.
- Fossil fuel development viewed as at odds with bird conservation.
- MBTA was identified as a regulation that posed a “burden” to domestic development, pursuant to March 2017 Executive Order #13783.

The screenshot shows a news article header with a navigation bar containing 'ECONOMY', 'NATIONAL SECURITY', 'BUDGET', 'IMMIGRATION', and 'THE OPIOID CRISIS'. Below the navigation bar is a sub-header 'EXECUTIVE ORDERS'. The main title of the article is 'Presidential Executive Order on Promoting Energy Independence and Economic Growth'. Below the title, it says 'ENERGY & ENVIRONMENT' and 'Issued on: March 28, 2017'. There are three stars below the date. On the left, there is a 'SHARE:' section with icons for Facebook, Twitter, and a link icon. Below that is an 'ALL NEWS' button. On the right, the text reads: 'By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:'.

New Interpretation of MBTA

- Thereafter, the Department of the Interior undertook a review of the MBTA for possible changes
- 22 December 2017: D.O.I. memorandum M-37050 provided new policy. **No MBTA prosecutions** for “incidental” (non-intentional) bird deaths.
- Solicitor’s Opinions set direction for how the Department applies and interprets the laws under which its agencies operate.



One pithy quote from Memorandum

“Interpreting the MBTA to apply to incidental or accidental actions hangs the sword of Damocles over a host of otherwise lawful and productive actions, threatening up to six months in jail and a \$15,000 penalty for each and every bird injured or killed. As Justice Marshall warned, ‘the value of a sword of Damocles is that it hangs-not that it drops.’ Indeed, the mere threat of prosecution inhibits otherwise lawful conduct.”



Scientific/Regulatory experts opine

“Mining, oil and gas, wind, solar and transmission companies who have struggled to comply with the [MBTA] received an early Christmas present from the [D.O.I.]’s lawyer.”

-Rebecca Watson, Regulatory Compliance Attorney, former D.O.I. employee

The Honorable Ryan Zinke
Secretary of the Interior
1849 C St., NW
Washington, D.C. 20240

January 10, 2018

Dear Secretary Zinke:

We are all conservation professionals who have formerly served the Department of the Interior, from 1971 to 2017: Deputy Secretaries, Assistant Secretaries, U.S. Fish and Wildlife Service Directors, and Migratory Bird Conservation Chiefs. We are former Senate-confirmed political appointees, of Republican and Democratic Presidents, and we are former career civil servants. We are, each and all, very concerned by the Interior Department’s December 22, 2017 announcement of a new legal memorandum (M-37050) reinterpreting the Migratory Bird Treaty Act.

This legal opinion is contrary to the long-standing interpretation by every administration (Republican and Democrat) since at least the 1970’s, who held that the Migratory Bird Treaty Act strictly prohibits the unregulated killing of birds. This law was among the first U.S. environmental laws, setting this nation and continent on the enviable path to conserving our natural resources. It was passed to implement the first of four bilateral treaties with countries with which we share migratory bird populations (Canada, Mexico, Japan, and Russia). Its intent, and your obligation in enforcing it, is to conserve migratory bird populations. Therefore, we respectfully request that you suspend this ill-conceived opinion, and convene a bipartisan group of experts to recommend a consensus and sensible path forward. We would be pleased to work with you, involving the public, toward this end.

Regulated Industry opines

*“The U.S. oil and natural gas industry supports protection of migratory birds . . . [the MBTA] should not be used for overzealous enforcement of . . . **otherwise lawful activities.**”*

-Erik Milito, Director of Upstream and Industry Operations, American Petroleum Institute



Trade Associations opine

*“The solicitor’s opinion . . . rightly restores the rule of law.” “The MBTA was . . . not meant to address activities that . . . carry unintended effects, such as **noise or habitat impacts.**”*

-Western Energy Alliance, website post.



Conservation Experts opine

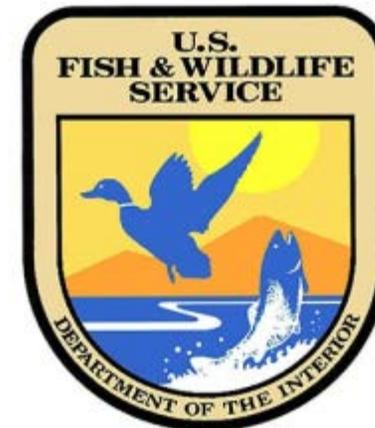
*“[T]he White House is parting ways with more than **100 years of conservation legacy.**”*

-David O’Neill, Chief Conservation Officer, the Audubon Society



What is “Next” - Potential Ramifications?

- D.O.I. (and Secretary Zinke) will almost certainly continue to adhere to “America First” energy policy goals.
- Bird conservation increasingly threatened wherever it would hinder domestic development.
- Look for continuing protests, and likely (okay, certain) legal challenges, in the foreseeable future.



...Imagine a World Without “Stop Signs.”

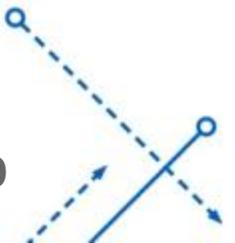
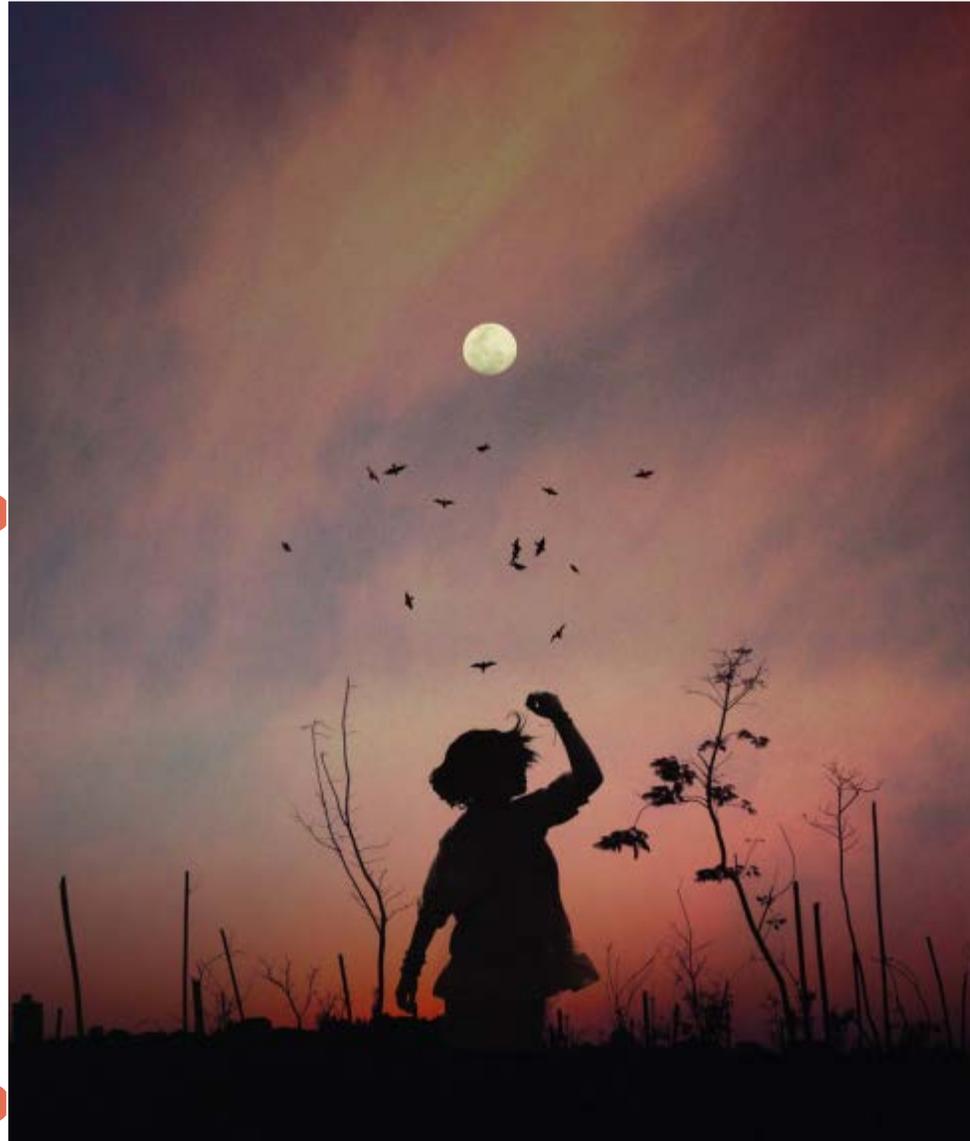
My students put together this visual to ask: What if there was no one saying “stop” to bird deaths?



My Student Attorneys' Comment

Ecological Conservation may not be a hot topic in news feeds today. Yet, these are the times to pay attention the most...

lest we end up in a world where "stop signs" are meaningless.



Your questions/ discussion

