

A Century of Saving Birds

Since 1918, the Migratory Bird Treaty Act has protected winged wildlife from wanton destruction. A new legal opinion could weaken it. **By PJ DelHomme**



RESTING EASY Cinnamon teal are one of hundreds of Montana species protected from “incidental take” by the 1918 Migratory Bird Treaty Act.

PHOTO BY NICK FUCCI

For centuries, people made hats out of wildlife parts—mainly wolf, raccoon, and beaver pelts—with little regard for wildlife conservation. That indifference ended when a fashion boom in women’s hats adorned with wild bird feathers and skins ignited a public uproar that produced one of the first wildlife laws in the United States.

The outcry began in the drawing rooms of Boston. In 1896, Harriet Hemenway and her cousin Minna Hall learned that populations of snowy egrets, great egrets, and other bird species were being decimated for the millinery trade. Women were increasingly wearing hats adorned with feathers and wings of the egrets’ brilliant white plumage, or the colored pelts of woodpeckers, bluebirds, herons, and even hummingbirds. The two socialites were shocked to learn that hundreds of thousands of egrets and other species were being slaughtered each year for the plume trade in the United States and Europe.

Hemenway convinced her cousin to help host tea parties to convince women to denounce feathered headwear. Eventually 900 women in Boston agreed and were joined by several prominent ornithologists. The resulting bird hat boycott culminated

in formation of the Massachusetts Audubon Society, other state Audubon groups, and eventually the National Audubon Society.

While the Boston conservationists fought to end the slaughter of birds for fashion, Winchester Repeating Arms became concerned about the dramatic decline of game birds and mammals across the country, not only from market hunting but also habitat loss. Recognizing the ramifications on gun and ammunition sales, Winchester pledged financial support and industry influence to conserve populations of huntable species. Conservation leaders such as William T. Hornady, director of the New York Zoologi-



BAD FORM The craze for feathered hats at the turn of the 20th century fueled a slaughter of egrets and other birds that alarmed many Americans.

PHOTOS: LIBRARY OF CONGRESS

cal Park, and George Bird Grinnell, of the newly formed Boone and Crockett Club, joined the movement. They, Audubon members, and others helped pass the Weeks-McLean Migratory Bird Act, which, by banning spring bird shooting, effectively eliminated the plume trade. It was signed by President Taft in 1913.

Market hunters, hatmakers, and states’ rights advocates sought to weaken the legislation, which even supporters acknowledged was built on shaky constitutional ground. To strengthen the bill, Senator Elihu Root, former secretary of state under President Theodore Roosevelt, suggested turning it into a treaty with Canada. In 1916, motivated by fears that several species might follow the passenger pigeon, Carolina parakeet, and Labrador duck into extinction, the United States entered into the Migratory Bird Treaty with Great Britain, representing Canada, to protect birds from wanton killing.

SUPREME COURT RULES

Opponents of federal bird protection weren’t giving up, however. Missouri’s attorney general arranged to have himself arrested by a federal enforcement officer



GONE FOR GOOD Three migratory bird species that became extinct around the turn of the 20th century. From left to right: passenger pigeon, Carolina parakeet, and Labrador duck. Congress passed the 1918 Migratory Bird Treaty Act to ensure that such losses never happened again.

for intentionally shooting ducks out of season. The ensuing standoff reached the U.S. Supreme Court. The justices ruled in favor of the warden, in effect granting the federal government supremacy over states in conserving migratory birds. “We see nothing in the Constitution that compels the government to sit by while a food supply is being cut off and the protectors of our forests and crops are destroyed,” wrote Associate Justice Oliver Wendell Holmes. “It is not sufficient to rely upon the states...We are of the opinion that the treaty and statute must be upheld.”

In 1918, Congress enacted the Migratory Bird Treaty Act (MBTA) to codify the treaty. The act makes it illegal for anyone “to take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to Federal regulations.” The MBTA accomplished a number of conservation firsts, including banning the sale of game birds, outlawing night shooting, and protecting all species used in the plume trade. It also established exceptions for the regulated hunting of game birds. By the early 1920s, both hunters and birders reported significant increases in migratory populations.

The MBTA has since been broadened—through treaties with Mexico (1936), Japan (1972), and the Soviet Union (now Russia, 1976)—and with amendments that protect

Missoula writer PJ DelHomme is an editor at Bugle.

eagles, owls, hawks, and other raptors. The act is credited with saving egrets, wood ducks, sandhill cranes, and other species from extinction. It continues to protect more than 1,000 species in the United States. Until recently (see “Interior Department

state’s north-central and northwestern regions combine to produce more waterfowl than any state except Alaska, North Dakota, and South Dakota. Ken McDonald, head of the Montana Fish, Wildlife & Parks Wildlife Division, says federal agencies have long

“ The MBTA helps ensure that these birds are protected at a national and international scale, so that one state or one country doesn’t jeopardize a resource that doesn’t know political boundaries.”

grounds the MBTA,” page 27), every U.S. administration since the 1970s has held that the act strictly prohibits the unregulated killing of birds. Since enactment, according to the National Audubon Society, the MBTA has saved millions, if not billions, of birds.

The National Geographic Society, National Audubon, Cornell Laboratory of Ornithology, and dozens of other conservation and scientific organizations declared 2018 the Year of the Bird to highlight the 100-year-old act.

MONTANA BENEFITS

The MBTA has been a lifesaver for Montana birds, say state wildlife officials. Abundant wetlands and grasslands in the



CONTINENTAL TRAVELERS Montana is in both the Central and Pacific Flyways. Many “Montana” bird species winter in Central America or nest in Canada or Alaska.



PAINTINGS BY JOHN JAMES AUDUBON; FLYWAY MAP: USEFWS; NORTHERN PINTAIL: GARY KRAMER

TAKEOFF Migratory waterfowl such as northern pintails have benefited greatly from the treaty act. The law regulates harvest and penalizes poaching and other illegal killing.

STILL VULNERABLE The decimation of shorebirds, waders, and other species for the hat trade inspired the MBTA a century ago. The long-legged water-loving birds—such as egrets, herons, and Wilson’s phalaropes (shown here at Freezout Lake)—still need protection, especially from oil spills, oil waste pits, power lines, and wind turbines.

PHOTO BY CRAIG & LIZ LARCOM





SAFETY NET Montana birds covered by the Migratory Bird Treaty Act include, clockwise from top left, the yellow-rumped warbler, rough-legged hawk, western meadowlark, and redpoll. Many species—including Montana’s state bird, the western meadowlark—travel across North America. Because the act protects on a continental scale, it ensures that no one state, province, or country can put at risk species that traverse political boundaries.

CLOCKWISE FROM TOP: LEFT: WES UNCAPHER; ED COYLE; BOB MARTINKA; JEFF VAN TINE

TOP TO BOTTOM: JAY L. CROSS; COURTNEY SPRADLIN; LOG CABIN DEMOCRAT

used the MBTA to protect waterfowl and prosecute poachers. “Montana ducks and geese have definitely benefited,” he says. So have other migratory birds. For instance, the MBTA inspired the Montana Electric Co-op Association to develop a bird protection plan to reduce deaths of hawks and songbirds at power lines and electric facilities.

McDonald notes that many “Montana” birds spend only part of the year in the state, often nesting in Canada or Alaska or wintering in Central America. “The MBTA helps ensure that these birds are protected at a national and international scale, so that one state or one country doesn’t jeopardize

a resource that doesn’t know political boundaries,” he says.

Not only does the MBTA protect Montana waterfowl, raptors, and songbirds, it benefits the many residents and visitors who hunt ducks and geese and enjoy watching birds. According to the U.S. Fish & Wildlife Service, Montana is home to more wildlife watchers per capita than any other state. “The people who came together to save birds 100 years ago recognized how important migratory birds are to the world we live in,” McDonald says. “We owe them our gratitude—and a commitment to keep working to protect birds.”



Birders watch migratory snow geese at Freezout Lake Wildlife Management Area.

Interior Department grounds the MBTA

On its 100-year anniversary, the Migratory Bird Treaty Act (MBTA) had its wings clipped.

In December 2017, the Department of the Interior solicitor’s office abruptly issued a legal opinion stating that any incidental take of migratory birds was not a violation of the act. An “incidental take” is a death caused by otherwise lawful activities. “The change means that only intentional killing—like illegally hunting or trapping migratory birds—will be enforced,” says Martha Williams, Montana Fish, Wildlife & Parks director, previously a Department of Interior attorney. “To our great disappointment, it now appears that the often-preventable deaths of birds killed by power lines, communications towers, oil pits, oil spills, and wind farms will no longer violate the law.”

In April 2018, the Department of the Interior issued a legal memorandum to the U.S. Fish & Wildlife Service to provide additional information on the December opinion. The memo said the MBTA can no longer be used to prosecute companies or others if the “underlying purpose of that activity is not to take birds.” For instance, if migratory birds die after landing in an uncovered oil drilling waste pit or are killed by wind turbines, that would no longer be a prosecutable offense.

The April memo reads, “The department has pursued MBTA claims against companies responsible for oil spills that incidentally killed or injured migratory birds. That avenue is no longer available.” To limit incidental take, many oil, electric, and other companies work conservation groups and wildlife agencies to protect birds, often using methods such as placing nets over oil ponds or installing markers on power lines. Without the threat of penalties, companies may be less inclined to spend the time and money required to do what’s right for wildlife. “This shift in policy is troubling,” Williams says. “Some energy companies are very proactive about protecting birds, and this change will serve as a huge disincentive for them to continue being proactive.”

According to the National Audubon Society, power lines kill up to 64 million birds per year nationwide, and 500,000 to 1 million birds perish in oil waste pits.

In May, National Audubon, the National Wildlife Federation, and several other organizations sued the Interior Department over the new opinion. In addition, 17 former Interior officials, including U.S. Fish & Wildlife directors under presidents Richard Nixon, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama repudiated the reinterpretation. The signatories called on Department of the Interior Secretary Ryan Zinke to “suspend this ill-conceived opinion, and convene a bipartisan group of experts to recommend a consensus and sensible path forward.”

—Tom Dickson, Editor



Under a recent interpretation of the Migratory Bird Treaty Act, bird injuries and deaths caused by oil spills will no longer violate the law.