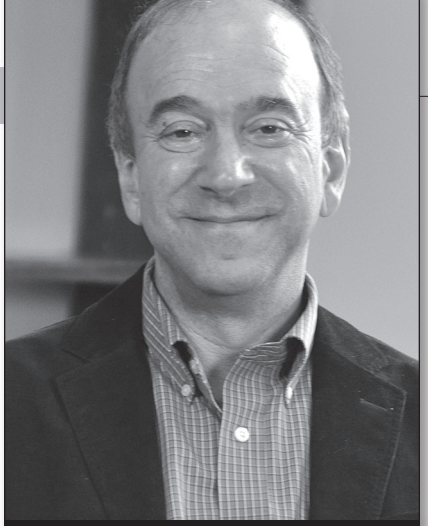
Will 2018 Be the Year of the Bird? If So, Not Necessarily a Good One



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The National Geographic Society has declared 2018 the Year of the Bird, in honor of the 100th anniversary of the Migratory Bird Treaty Act. Even so, as underscored by two recent Ninth Circuit rulings and a major Interior Department policy reversal, the MBTA's precise meaning and reach remain very much a live issue as the act begins its second century.

In *Turtle Island Restoration Network v. Department of Commerce,* the Ninth Circuit in late December agreed with environmental plaintiffs that the Fish and Wildlife Service violated the MBTA by issuing a permit authorizing a swordfish fishery to incidentally kill migratory birds by using "longlines," which accidentally ensnare birds with their hundreds of baited hooks. Under FWS regulations, the interior secretary can permit a taking of a migratory bird for "special purpose activities" that benefit "the migratory bird resource," "research," "individual birds," or another "compelling justification." The court rejected the government's contention that this "special purpose" exception could be fairly read to extend to "basic commercial activities like fishing" that did not further the MBTA's conservation objective.

Environmental plaintiffs, however, fared less well in a second Ninth Circuit MBTA decision, handed down in early January. At issue in *Friends of Animals v. Fish and Wildlife Service* was whether the MBTA allows the government to permit the take of one species of bird principally to benefit another species. The FWS had permitted the removal of some barred owls because their spread into old growth forest threatened the survival of the endangered northern spotted owl in those same forests. Upholding the permit, the court found no support for the plaintiffs' theory that the language of the MBTA, its implementing regulations, or the international accords underlying its enactment supported a "same species" limitation.

The most significant development affecting the scope of MBTA enforcement in the courts, however, does not arise from a judicial decision in the first instance. It derives instead from yet another major policy reversal by Interior under the Trump administration. Unless overturned by the courts, the department's new position would dramatically cut back on the reach of the MBTA's prohibition on the taking of migratory birds.

For about fifty years, Interior has taken the position that the act bars both direct and incidental takes of migratory birds. The former refers to affirmative, physically injurious actions directed immediately and intentionally against a particular bird. The latter refers to action, lacking such immediacy and intent, such as the longline swordfishing at issue in the Ninth Circuit's *Turtle Island* case, that nonetheless injures the species. There are far more incidental takes than direct takes, and the government's ability to protect migratory birds is dramatically reduced if the act's bar is limited to direct takings.

The government's power is dramatically reduced if the species act is limited to direct takings

Especially because the MBTA imposes criminal penalties for its violation, the government's contention that the ban extends to incidental takes has long been understandably controversial. And there is a longstanding conflict in the federal circuits on the validity of the government's view. The Second and Tenth circuits have upheld applications to incidental takes, with some limiting constructions to avoid injustices, and the Fifth, Eighth, and Ninth circuits have questioned that broader reading.

In late December, Interior's solicitor issued a formal opinion embracing the act's narrower view. The opinion withdrew the prior solicitor opinion that had reached the diametrically opposed, broader reading in early January 2017, just a few days before the end of the Obama administration. The solicitor newly reasoned that "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."

Looming, moreover, in the background are the possible implications for Interior's new position for the Endangered Species Act. In 1995, the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon,* upheld Interior's view that the ESA's prohibition on the take of endangered species extends to incidental takes, including habitat modification. Justice Antonin Scalia dissented, arguing that the term "take" was limited to "affirmative acts . . . directed immediately and intentionally against a particular animal." The solicitor opinion reversing the longstanding expansive view of the MBTA's take prohibition cites favorably six times to Scalia's *Sweet Home* dissent. If the ESA take provision is next on the solicitor's hit-list, such a reversal would seriously threaten that act's protections.

In short, 2018 may be the Year of the Bird — but it is far from clear that it will be a good year for birds and endangered species.