

January 10, 2018

The Honorable Ryan Zinke

Secretary of the Interior

1849 C St., NW

Washington, D.C. 20240

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.

The Solicitor's opinion takes 41 pages to turn the MBTA's straightforward language — "it shall be unlawful to hunt, take, capture, kill ... *by any means whatever* ... at any time or *in any manner*, any migratory bird" (emphasis added) — into a conclusion that the killing of migratory birds violates the act only when "the actor [is] engaged in an activity *the object of which was to render an animal subject to human control*" (emphasis added).

This is a new, contrived legal standard that creates a huge loophole in the MBTA, allowing companies to engage in activities that routinely kill migratory birds so long as they were not intending that their operations would "render an animal subject to human control." Indeed, as your solicitor's opinion necessarily acknowledged, several district and circuit courts have soundly rejected the narrow reading of the law that your Department is now embracing.

We recognize that, at the margin, reasonable people can disagree about the extent to which prosecutions under the MBTA are appropriate for activities that are not intended to kill birds, but which are reasonably likely, and indeed, quite likely to kill them. That is why, over the course of our collective careers, significant progress has been made in defining the limits of this law through refined interpretations, court decisions, and common sense. Over the years, career professionals and political leadership in the U.S. Fish and Wildlife Service (FWS), the Department of the Interior, and Department of Justice have adapted to ensure that the enforcement of this law fairly balances the goal of economic progress with the impact of that progress on bird populations.

Birds are, quite literally, the proverbial "canary in the coal mine." How birds fare in the world indicates how all wildlife and habitat, and by extension human populations, will fare. It is not just poetry that led Rachel Carson to title her seminal work, *Silent Spring*. All the past administrations for which we have

worked have struck a balance and worked diligently and in good faith with industries that had significant impacts on birds, such as oil and gas, coal, electric utilities, commercial fishing, communications, transportation, national defense, and others to reasonably address unintended take. It can be done. In fact, it has been done.

Successes in applying this law to minimize the incidental killing of birds are numerous. For example, we worked with oil producers to ensure that exposed crude oil waste pits were covered with nets to keep birds from landing in them. We worked to improve the techniques of commercial fishing to reduce the drowning of seabirds in fishing lines and nets. Additionally, government has used the law to work with wind energy companies to improve the siting of turbines to avoid and minimize the killing of birds. It has never been the goal to entirely eliminate the unintentional killing of birds, but when we find techniques and technologies that can be used at reasonable cost to protect bird populations, we had a responsibility to do so. Although the proximate reason for the passage of the MBTA may have been to protect migratory birds from unregulated market hunting (we note the absence of oil waste pits and wind farms at the time of bill passage), the ultimate reason was the protection of migratory birds.

The MBTA can and has been successfully used to reduce gross negligence by companies that simply do not recognize the value of birds to society or the practical means to minimize harm. Your new interpretation needlessly undermines a history of great progress, undermines the effectiveness of the migratory bird treaties, and diminishes U.S. leadership.

In a world where connections to nature are becoming ever more tenuous, birds are the wildlife that Americans encounter daily. Whether we are conservationists, birdwatchers, hunters, or just citizens who enjoy the natural world, conserving birds is a common interest. In addition, we must consider how our treaty partners in Canada, Mexico, Japan and Russia will view this new interpretation. Only a few years ago, the U.S. exchanged formal diplomatic notes with Canada reaffirming our countries' common interpretation that incidental killing of birds was prohibited by the treaty.

Just as Theodore Roosevelt declared and demonstrated, we, as Federal officials, endeavored to strike a balance between development and conservation. We recognized that strict liability must be tempered with common sense notions of reasonable foreseeability and readily available alternatives. We are anxious to explore this balance and provide you with an approach that we can all support, and one that will continue the proud record of U.S. leadership in conserving birds.

We await your response.

Sincerely,

Lynn Scarlett, Deputy Secretary of the Interior; President George W. Bush

David J. Hayes, Deputy Secretary of the Interior, Presidents William Clinton and Barack Obama

Nathaniel Reed, Assistant Sec. of the Interior for Fish & Wildlife & Parks, President Richard Nixon

Donald Barry, Assistant Sec. of the Interior for Fish & Wildlife & Parks, President William Clinton

Lyle Laverty, Assistant Sec. of the Interior for Fish & Wildlife & Parks, President George W. Bush

Lynn Greenwalt, USFWS Director, Presidents Richard Nixon, Gerald Ford, and Jimmy Carter

John Turner, U.S. Fish and Wildlife Service Director, President George H. W. Bush

Jamie Rappaport Clark, U.S. Fish and Wildlife Service Director, President William Clinton
Steve Williams, U.S. Fish and Wildlife Service Director, President George W. Bush
Daniel M. Ashe, U.S. Fish and Wildlife Service Director, President Barack Obama
John Rogers, U.S. Fish and Wildlife Service, Chief, Migratory Bird Management (1972-84)
Rollin Sparrowe, U.S. Fish and Wildlife Service, Chief, Migratory Bird Management ([1984-89](#))
Tom Dwyer, U.S. Fish and Wildlife Service, Chief, Migratory Bird Management (1989-93)
Paul Schmidt, USFWS, Chief, Migratory Bird Mgmt(1993-99), Assist. Dir. Migratory Birds(2003-11)
Jon Andrew, U.S. Fish and Wildlife Service, Chief, Migratory Bird Management (1999-2002)
Robert Blohm, U.S. Fish and Wildlife Service, Chief, Migratory Bird Management (2006-11)
Brad Bortner, U.S. Fish and Wildlife Service, Chief, Migratory Bird Management (2011-17)

CC:

The Honorable Rob Bishop, Chairman, House Committee on Natural Resources
The Honorable Raúl Grijalva, Ranking Member, House Committee on Natural Resources
The Honorable John Barrasso, Chairman, Senate Committee on Environment and Public Works
The Honorable Tom Carper, Ranking Member, Senate Committee on Environment and Public Works
The Honorable Lisa Murkowski, Chairwoman, Senate Committee on Energy and Natural Resources
The Honorable Maria Cantwell, Ranking Member, Senate Committee on Energy and Natural Resources
The Honorable Ed Royce, Chairman, House Committee on Foreign Affairs
The Honorable Eliot Engel, Ranking Member, House Committee on Foreign Affairs
The Honorable Bob Corker, Chairman, Senate Committee on Foreign Relations
The Honorable Ben Cardin, Ranking Member, Senate Committee on Foreign Relations
The Honorable Rodney Frelinghuysen, Chairman, House Committee on Appropriations
The Honorable Nita Lowey, Ranking Member, House Committee on Appropriations
The Honorable Thad Cochran, Chairman, Senate Committee on Appropriations
The Honorable Patrick Leahy, Ranking Member, Senate Committee on Appropriations
Mr. David Bernhardt, Deputy Secretary of the U.S. Department of the Interior
Ms. Aurelia Skipwith, Deputy Assistant Secretary, Fish & Wildlife & Parks, U.S. Dept. of the Interior
Mr. Greg Sheehan, Director of the U.S. Fish and Wildlife Service (Acting)