

The Migratory Bird Treaty Act

California to protect birds as Trump Administration abandons them

State is first to affirm that “incidental” killing is illegal

November 29, 2018

Sacramento, Calif. – California legal and wildlife officials today released a legal advisory affirming the state’s ability and intent to protect migratory birds from commercial and industrial activity even as the federal government refuses to do so. The move by California Attorney General Xavier Becerra and Director Chuck Bonham of the California Fish and Wildlife Department comes as the Trump Administration has signaled its intention to abandon enforcement of key provisions of the Migratory Bird Treaty Act (MBTA).

“California is home to hundreds of magnificent bird species, such as the Sandhill Crane and Burrowing Owl, that will benefit from this affirmative statement that they will be protected,” said Sarah Rose, executive director of Audubon California. “These birds are an important part of California’s natural legacy, just like our beaches, mountains, and deserts.”



This action is the culmination of work by Audubon California and our many advocates throughout 2018 to raise the profile of this issue to state policymakers and compel them to take steps to protect our birds. In 2018, Audubon California sponsored legislation to reinforce protections for migratory birds in existing state law. That effort dramatically raised awareness throughout the Capitol about the plight of migratory birds and the threat created by the Trump Administration’s actions. Audubon California eventually withdrew this legislation because we felt we could make more progress working with the administration – and that effort resulted in last week’s announcement.

The MBTA is one of the nation’s oldest environmental laws, and has been the foundation of protections for migratory birds in North America for more than a century. In a legal opinion issued December 2017, however, the Trump administration abruptly reversed decades of government policy and practice—by both Democratic and Republican administrations—on the implementation and enforcement of the MBTA.

“This move by the State of California is an example for other states seeking avenues to protect migratory birds until the federal government again lives up to its historic and legal obligations,” said Sarah Greenberger, senior vice president for conservation policy at National Audubon Society.

The Act's prohibition on the killing or "taking" of migratory birds has long been understood to extend to so-called incidental take from industrial activities—meaning unintentional but predictable and avoidable killing. Under the Trump administration's revised interpretation, the

MBTA's protections will apply only to activities that purposefully kill birds. Any "incidental" take—no matter how inevitable or devastating the impact on birds—is now immune from enforcement under the law. The Administration intends to change the regulations that guide how the law is enforced to reflect its radical legal opinion, which will make it more permanent and binding.

The California legal advisory specifically notes the state's ability to enforce the so-called "incidental take" that the federal government is seeking to allow. "California's protections for migratory birds, including a prohibition against incidental take, remain clear and unchanged," the advisory reads.

"California law contains a number of provisions prohibiting the "take" of migratory birds," the advisory reads, and then includes an extensive listing of California law that allows officials to protect migratory birds in the absence of federal involvement.

The federal abandonment of incidental take enforcement is alarming not only because the Act has been used to prosecute violations, but also to compel industries to proactively take steps to minimize the impacts of their operations on birds. The Administration's new legal interpretation opens the door for industries like mining and oil drilling to kill migratory birds without attempt to avoid or mitigate such impacts.

California in September joined seven other states in a lawsuit challenging the Administration's decision not to enforce key elements of the Migratory Bird Treaty Act. In May of this year, Audubon led a coalition of environmental groups to file a similar suit challenging the Administration's move.