

SYMPOSIUM

THE MIGRATORY BIRD TREATY ACT: RESHAPING A POWERFUL CONSERVATION TOOL

Our “fine, feathered friends” in the sky, whether floating on thermals, diving on prey, or merely silhouetted in repose, inspire near-universal awe and fascination. Perhaps it is for this wonder that birds have been so central to the development of environmental protection laws. Indeed, the Migratory Bird Treaty Act, signed in 1916 by the United States and Britain (Canada), was only the second piece of legislation in the United States to protect environmental features.

Though even the most casual nature enthusiast would agree that these flighted creatures are incredible to us grounded humans, there is more at play than simply wonder. Of course, with insight from conservation biology, it is apparent that species of flora and fauna are important in their own right, regardless of their particular gifts, because of each of their roles in the greater ecology. Moreover, the protection of birds provides the practical effect of protecting the large areas that birds call home, which some may argue provide more effective protection for resources within those areas than the legislation actually designed to protect those resources.

For all their gifts, birds are not blessed with the ability to recognize political boundaries. Thus, while a migratory species may have legal and physical protections within one segment of its range, it may have none in another. To give practical effect to protections for such wide-ranging birds, therefore, political treaties between two or more nations are necessary. Professor Mitsuhiro A. Takahashi discusses the effectiveness of such international treaties in his article, *Migratory Bird Treaties' Issues and Potentials: Are they Valuable Tools or Just Curios in the Box?* Professor Takahashi examines, among other treaties, the Bonn Convention of 1902, the MBTA of 1916, and the Treaty between Japan and the United States (1972) for their practical effect on conservation of migratory bird species. He also describes the interrelation between treaties and other laws targeting preservation through various means of regulation. For instance, the Endangered Species Act prioritizes certain species as they near extinction while other laws limit or prohibit certain sorts of trade; yet other legal

protections create hybrid models that allocate liabilities between the public, the government, and market actors. Clearly, the confluence of birds and geopolitics lies at the heart of conservation legislation; birds, as much as any species, remind us that the many peoples of the world are far more connected, and have far more in common, than our shifting and uneasy political alliances and economic agreements may recognize.

Furthermore, in a world of finite resources, there may be greater interests than avian wonder at bar. “[H]ow much must be sacrificed for each handful of bird deaths prevented?” asks Professor Kalyani Robbins in her article, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*. Specifically, what liability can we impose on commercial actors for inadvertent taking and reduction in range, when we as a nation, or even globe, depend on that commercial activity for jobs and production? Professor Robbins’s answer suggests that the strict liability provisions of the MBTA should be imposed on those individuals most likely to perpetrate the harm, rather than the public at large (an interpretation of the Act which a recent Tenth Circuit decision makes that essentially writes strict liability out of the law, diluting its protection). This allocation of remedies and penalties will in turn motivate best practices that will balance the needs of infrastructure and development with the ecological benefits of conservation.

These and many other issues came up at *The Migratory Bird Treaty Act: Reshaping a Powerful Conservation Tool* Conference, held at Lewis & Clark Law School, October 20–21, 2011, at which more than thirty-five speakers came from around the world to discuss the practices and politics of migratory bird conservation. National and international experts from government, industry, and environmental organizations discussed the Migratory Bird Treaty Act and similar and related statutes, exploring how to make protections more effective. Some of these discussions led to the creation of these articles, which are included here in this year’s *Environmental Law* symposium.

Nolan Shutler
Symposium Editor