Organization of Professional Aviculturists

January 28, 2019

Attn: Docket No. FWS-HQ-MB-2018-0047
Eric L. Kershner,
Chief of the Branch of Conservation, Permits, and Regulations,
U.S. Fish and Wildlife Service;
5275 Leesburg Pike,
Falls Church, VA 22041-3803

Re: Proposal to amend the list of species covered by the Migratory Bird Treaty Act
Docket No.: FWS-HQ-MB-2018-0047

To whom it may concern:

This comment is on behalf of the Organization of Professional Aviculturists (OPA) regarding the proposal to revise the List of Migratory Birds protected by the Migratory Bird Treaty Act (MBTA) by both adding and removing species. Comments from the public on this matter were requested in the Federal Register, 83 FR 61288, on November 28, 2018.

The Organization of Professional Aviculturists (OPA) is a trade and conservation organization that believes that the protection and maintenance of avian species is best achieved by balancing the synergistic needs and demands of *in situ* protection, *ex situ* conservation, and

a properly managed trade. The OPA's purpose is to ensure that the trade in avian species is managed in a way that acknowledges the ability of professional, organized, and knowledgeable aviculturists to enhance the conservation of avian species in their country of origin and in *ex situ* populations while satisfying the desires of the world human population for companion animals. It is our belief that well managed, captive bred populations kept in conformation with established animal husbandry practices provides a critical repository for conservation. Our members are dedicated to protecting avian species in the wild, while also to learning how to best raise, care for, and manage these species in hope that our actions will provide a genetic repository for endangered species, an intellectual repository of husbandry practices, and a steady stream of specimens that will reduce the profitability of the illegal trade in avian species.

1) The proposed action of the Service implicates the Just Compensation Clause of the Fifth Amendment, as a result, the action is not in compliance with Executive Order 12630 as it has significant takings implications.

The proposed rulemaking is not in compliance with Executive Order 12630 as there is a high likelihood that the proposed action will result in a taking of private property. The Service is required by Executive Order 12630 to review their actions carefully to prevent unnecessary takings, which it has blatantly failed to do. The OPA has direct knowledge that at least three of the proposed species are currently kept in significant numbers in U.S. aviculture, specifically, European Turtle-

Dove, *Streptopelia turtur*, Red-legged Honeycreeper, *Cyanerpes cyaneus*, and Bananaquit, *Coereba flaveola*. Attached to this comment are current and former listings on the several web pages listing the above mentioned for sale. As well as published avicultural articles discussing importation and captive breeding of said species. (Appx. at pg. 1-51).

The OPA believes it likely that other proposed additions to the covered species list are also kept in U.S. aviculture. A FOIA request submitted by the OPA shows that 18 specimens of Pink-footed Goose, *Anser brachyrhynchus,* have been imported to the United States under a T source code, commercial purposes, since 2008. (Appx. at pg. 52-54). That information is also attached. Upon publication of this comment, the OPA promptly filed forty-four FOIA request for import data relating to the proposed species.

However, due in part to the current lapses federal government funding, the Service has failed to timely comply with those requests, thus, the OPA is unable to provide the Service with data as to the number of the specimens of proposed species that were imported to the U.S. For sake of brevity, the OPA has not attached the record of those FOIA requests, but Michael Jenkins, Management Analyst, USFWS, Office of Law Enforcement can attest to their filing. Regardless, the requested data is controlled by the Service, this data must be examined and considered, under Executive Order 12630, before any of the proposed species are added to the covered list.

There is also exists the possibility that specimens entered the United States prior to the creation of reporting requirements. The OPA

has actual knowledge of European Turtle Doves are being kept in U.S. aviculture, but the import records provided by the Service for the last ten years did not return any information. The OPA subsequently submitted a FOIA request for all the Service's records relating to import of European Turtle Doves, but again, due in part to the lapse of federal funding, no response has been received. However, it is a realistic possibility that founder specimens entered legally prior to the commencement of record keeping and have flourished in captivity. (Appx. at pg. 10-18). The OPA requests that the Service contact the American Dove Association for more information on captive European Turtle Dove populations.[1]

Any move to list a species that is currently kept in U.S. aviculture on the Migratory Bird Treaty Act (MBTA) will substantially limit the value and use of those privately held specimens. A listing would immediately make possession illegal under the Act; this is a complete deprivation of an individual's private property right in their specimens. Further, an intentional violation of the Act is a felony under the statute. 16 U.S.C. § 707.

This would undoubtedly be a taking which would trigger the obligations imposed by the Just Compensation Clause of the Fifth Amendment. Yet, the Service has completely failed to consider the possibility, as required by Executive Order 12630. The entirety of the proposed comment should, therefore, be withdrawn and should not re-proposed, unless the Service fully and adequately considers the Takings

[1] http://www.americandoveassociation.com

implications of its actions, provides adequate notice to those individuals whose property rights might be affected, and announces the Service's plan to deal with any takings caused by its administrative actions.

2) The Service has provided the public with no meaningful opportunity to comment due to incorrect citations.

Several of the citations provide in the proposed rule are incorrect and have denied the public a meaningful opportunity to comment as required by the Administrative Procedures Act, 5 U.S.C. §§ 553(b)-(c), which provides that an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated. And, "the opportunity for comment must be a meaningful opportunity. *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). One requirement of meaningfulness is that, "an agency must also remain sufficiently open-minded. F*ed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004).

The proposed comment has failed to comply with these requirements by denying the public access to its sources. Several of the proposed species to be added to the covered list do not have accurate citations. The European Turtle Dove, *Streptopelia turtur*, for example, has a citation to (AOU 2007), which is a reference to American Ornithologists' Union. 2007. *Forty-eighth supplement to the American Ornithologists' Union Check-list of North American Birds*. Auk 124:1109-1115. However, the European Turtle Dove is not mentioned in that publication.

Likewise, the Cackling Goose, *Branta hutchinsii* has a citation to in one part of the proposed rule to (AOU 2003) and to (AOU 2004) in another. In the list of cited works attached to the comment, the Cackling Goose reference is found under the title, auk2004, which is the *Forty-Fifth Supplement To The American Ornithologists' Union Check-List Of North American Birds*, which summarizes decisions made by the AOU's Committee on Classification and Nomenclature between 1 January 2003 and 31 December 2003, but was published in July 2004. Discovering the Service's error took significant effort on the part of the OPA.

Another inaccurate citation is Abbott's Booby, *Papasula abbotti,* which has a citation to (Pratt et al. 2009),[2] which is the correct citation for the referenced work provided in the Service's work cited document. However, the in the list of cited works attached to the comment by the Service there is a document by Pratt et al., but from 2010, which makes no reference to Abbott's Booby.

The OPA does not know if this is a complete list of inaccurate citations as the organization does not have the time and/or manpower to double-check the entirety of the Service's work. However, there is clearly a significant error rate in the citations provided by the Service. These errors undermine the ability of the public to comment on the Service's action. While professional biologists and ornithologists would likely be

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[2] Pratt, D., M. L. P. Retter, D. Chapman, W. M. Ord, and P. Pisano. 2009. *An Abbott's Booby Papasula abbotti on Rota, Mariana Islands: First historical record for the Pacific Ocean*. The Bulletin of the British Ornithologists' Club 129:87-91.

able to track down the correct citations, aviculturists without science backgrounds would struggle to do the same.

Aviculturalists are a significant stakeholder in this proposed action because they are the individuals most likely to have private control over proposed species and thus, the individuals most likely to be impacted by a listing. That is not to disparage the importance of academic stakeholders, but to remind the Service that they are not the sole stakeholder. Additionally, the high number of inaccuracies are likely to discourage academics from commenting on the proposed rule. Because while commenters involved in academia may be able to track down the correct citations, the additional effort necessary is likely to discourage academic participation due to the increase in time and effort on their part. The Service is reminded that the burden is on it to provide the public with a meaningful opportunity to comment.

3) **The Service has provided the public with no meaningful opportunity to comment because the correct citations are conclusory summations without details relating to the fac tual determinations.**

A large number of the Service's citations are to the yearly supplements of the *American Ornithologists' Union Check-List Of North American Birds*. These documents state that they are a summarization of the decisions of the AOS/AOU's Committee on Classification and Nomenclature for the previous year. As a result, the documents provided simply state that the conclusion of the committee without providing any record of that proceeding. The public is neither aware nor able to comment on

the process the committee uses to make its determinations. A commentator, like the OPA, cannot meaningfully comment on whether the actions of the AOS/AOU support a listing under the MBTA, because it is not clear what criteria they considered when determining whether the occurrence of a bird in the United States constitutes a natural occurrence. The MBTA only covers natural occurrences without intervening human intervention intentional or unintentional. This is in violation of the Administrative Procedures Act, 5 U.S.C. §§ 553(b)-(c),

For example, the Red-legged Honeycreeper, *Cyanerpes cyaneus*, was sighted in Texas and has a reference to (AOS 2017). That supplement states, "a record of Cyanerpes cyaneus (Red-leggedHoneycreeper) in the United States is recognized." It also provides a reference to Gustafon et al. 2015.[3] That citation is to Texas Bird Annual, an amateur publication of the Texas Ornithological Society, a bird watching group. (Appx at pg. 55-138). Within the 2015 publication is an article written by an amateur bird watcher who spotted and photographed a female honeycreeper in Estero Llano Grande State Park. (Appx at pg. 105).

The article discusses whether the bird might have been an accidental human release, stating "long-time birders in the area reported seeing Red-legged Honeycreepers in cages in Mexico near the border." (Appx at pg. 105). Yet, counterintuitively, the Texas Bird Records Committee voted that it was more likely that the bird was a

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[3] Gustafson, M., R. Rangel, D. Anderson, T. Kersten, and J. Yochum.2015. *Red-legged Honeycreeper at Estero Llano Grande State Park*, Weslaco. Texas Birds Annual 11:49

vagrant from hundreds of miles away than an accidental release from the other side of the border, please note Estero Llano Grande State Park is 5.5 miles from the Nuevo Progresso border crossing. (Appx at pg. 139-140). Additionally, for specialty species like the Red-legged Honeycreeper, aviculturists often keep both males and females, in part because this species is regularly bred in captivity. (Appx at pg. 35-51). It was this decision by the Texas Bird Records Committee that was then approved by the AOU/AOS. The OPA has been unable to track down the deliberations of the AOU/AOS.

The Service has thus relied on this decision of a private organization without providing the OPA any opportunity to review the underlying decision. Further, the public, with its limited resources is likely not even aware of the limited information discovered by OPA through its own efforts. It took an OPA member several hours of the research to uncover the minimal amount of facts relating to the supposed sighting of the Red-legged Honeycreeper. The OPA does not have the manpower to go through all of the forty-four proposed additions and dig through the record to determine whether an accurate determination has been made as to the origin of each recorded specimen. But as to at least the Red-legged Honeycreeper, it appears clear that the determination is flawed.

The Service should reissue this proposed rule with detailed records of the sightings of the birds, identify the groups who considered whether the bird sighting was legitimate, outline what criteria they used, and provide a complete record of all evidence that would negatively impact the likelihood of a lawful listing.

4) The Service has unlawfully delegated its decision-making authority to a private organization.

Congress delegated the implementation of the Migratory Bird Treaty Act to the Department of the Interior. 16 U.S.C. § 712. USFWS as sub-agency of the DOI has delegated authority to enforce the Act. However, the Service has further delegated its delegation to private groups not considered by Congress. The Service states in its proposed rule;

> Records must be documented, accepted, and published by the AOS committee. For the U.S. Pacific territories that fall outside the geographic scope of the AOS and for which there is no identified ornithological authority, new evidence of a species' natural occurrence will be based on the Clements checklist and then published peer-reviewed literature, in that order.

The Service is not involved and does not review the determinations of the AOS or the Clements checklist. This abdication of authority by the Service to private groups was not contemplated by Congress and bypasses the procedural safeguards of both the Constitution and Administrative Procedures Act.

By acting in this way, there is a "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter v. Carter Coal Co*., 298 U.S. 238, 311, (1936). Nothing in the text of the comment suggests that the Service has done more than adopt the decisions of a private organization, in essence, it has

delegated its own delegation to private groups. The harm of "excessive delegation…is doubled in degree in the context of a transfer of authority from Congress to an agency and then from agency to private individuals. The vitality of challenges…[is] unquestionable. *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984).

Due to this unlawful agency action, the OPA requests that the Service withdraw the proposed rule as it relates to the addition of species due to decisions of the AOS/AOU or Clements checklist. If the Service chooses to re-propose those species it must provide a full agency record of its determinations and considerations to the public for comment.

5) The Service is unlawfully applying the Migratory Bird Treaty Act by misinterpreting the plain language meaning of the term "occurring."

Lastly**, t**he Service in the proposed rule has taken the position that a singular or extraordinary sighting of a species is sufficient to trigger coverage under the Migratory Bird Treaty Act. Specifically, the Service has stated that a species qualifies for protection if, "it occurs in the United States or U.S. territories as the result of natural biological or ecological processes." However, this is an *ultra vires* interpretation of the statute as it is contrary to the plain language of the text, which, therefore, makes it an unlawful agency action.

The Migratory Bird Treaty Act states in its pertinent language as follows:

> (1) In general
> This subchapter applies only to migratory bird species that are native to the United States or its territories.
>
> (2) Native to the United States defined
> (A) In general
> Subject to subparagraph (B), in this subsection the term "native to the United States or its territories" means *occurring* in the United States or its territories as the result of natural biological or ecological processes.

16 U.S.C. § 703 (emphasis added). The statutory text uses the word "occurring," which is the present participle form of the word "occur." Specifically, it is a present participle acting as an adjective to modify the noun "migratory bird species." What migratory birds species are covered by the Act? Those that are "occurring."

Further, a present participle is a verbal, that means it functions to modify or describe a noun by denoting present action. Therefore, the meaning of "occurring" differs from "occur" by including an element of present action; this is a limiting element in the plain language definition of the word "occurring." The Service, by incorrectly reading the statute as using the term "occur" has broadened the plain language meaning of the statute to include a solitary or extraordinary occurrence. This is an unlawful reading of the statute. Congress intentionally used the present participle form of occur, "occurring," the agency must give effect to the plain statutory language.

What does the plain statutory language mean when it is given proper effect? Solitary or extraordinary sightings cannot trigger coverage under the Migratory Bird Treaty Act, because although a species may have briefly or extraordinarily "occurred" in the U.S., they are not "occurring." For a species to be occurring in the U.S. there needs to be a greater degree of regularity, at a minimum, the species needs to be a regularly occurring vagrant, one who while rare, occurs with predictability. This application of the statute while textually correct, also more closely lines up with the intent of Congress. The Migratory Bird Treaty Act was originally past with the purpose of protecting native avian species and environment of the U.S. from harmful human actions, but an extraordinary vagrant is neither part of the U.S. environment in any real way, nor likely to be a target of harmful human action. Lastly, it would ensure that the appearance of the species was not the result of an unforeseeable human intervention.

Further, the OPA would remind the Service, that its interpretation of "occurring" as "occur" is not entitled to *Chevron deference* by the Court's if this issue where ever to be litigated.

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent…If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n. 9, (1984). The unambiguous statutory language prevents the Service from altering the plain language meaning of the text. And to any extent

there is any ambiguity, Congressional intent can be ascertained using the cannons of statutory construction.

Therefore, the OPA requests that the Service reissue the proposed comment excluding any of the proposed species in which the purported sighting documented a species briefly or extraordinarily and re-propose all species where it is uncertain whether the species "occurred" or "is occurring.

Thank you for your consideration,

/s/ Steve Duncan

Member of the Board of Directors
Organization of Professional Aviculturists
P.O. Box 3161
San Dimas, CA 91773