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The Troublesome Course to Protecting Birds

by Jay Strangis

“Men do not fail; they give up trying.”
– Elihu Root
American statesman and Nobel Peace
Prize recipient

This year marks the 100th anniversary of the Migratory Bird Treaty Act and its protections for North America’s feathered denizens. It’s a story that can be tracked across the continent, from Florida to Minnesota to California, where overharvest for feathers, food and sport was a common and acceptable practice.

Some might say that the 1916 treaty came too late for some species, and this is certainly true for birds like the Passenger Pigeon. However, given the resistance applied to earlier avian conservation efforts, it’s a marvel that the protection came at all, or at least as early as it did.

Today we view fights in Congress, powerful special interest groups, constitutional challenges and division among the citizenry as unique to our time. Yet our own history as citizens and conservationists became rooted in such battles long ago. Way back then, just after the turn of the previous century, the public drew sides on the very issue of protecting migratory birds, and for some 20 years the polarization continued. There is little doubt that, despite the hurdles, what became the Migratory Bird Treaty allowed us to sustain and even expand bird populations we still have today.

Much of the conversation at the time focused on game birds because of the huge financial trade in waterfowl and shorebirds, supported by an industry of market hunters harvesting birds, brokers buying and distributing the birds, and restaurants and meat

markets portioning the birds at premium prices. Hunting was allowed in fall and spring seasons, and with the improvement of modern shotguns the toll was becoming more and more apparent. The feather trade, hardest on birds like egrets and herons, fed the millinery industry in which feathers and capes were often shipped to Paris where fashion houses styled them into garb and sold them back to the U.S.

According to a personal account quoted here and written by Thomas Gilbert Pearson* (1873–1943), Congress had little interest in the welfare of wild birds prior to the 1900s. The Lacey Act (1900), introduced by Iowa Assemblyman John F. Lacey, was the first law to protect birds, but it attracted little public attention. It aimed to stop the shipping of illegally taken game or game parts and importation of live “pest birds” like House Sparrows and European Starlings. However, if game were taken legally, it could still be shipped.

George Shiras III, a representative from Pennsylvania as well as a hunter and naturalist, introduced a bill to protect the migratory game Birds of the United States in 1904. At this time an estimated five million sportsmen resided in the U.S. and a number of states had no game wardens. Intended by Shiras for discussion among game commissioners, the bill never got a hearing on Capitol Hill.

When Shiras retired soon after, Representative John W. Weeks (R-Mass.) and Senator George P. McLean (R-Conn.) aimed to expand on Shiras’s concept and introduced the Migratory Bird Bill to prohibit spring hunting, stop the marketing of migratory birds,

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end the importation of wild bird feathers, and establish hunting seasons. Although kind words were spoken on the bill's behalf, it did not advance in Congress.

It wasn't until the newly organized American Game Protective and Propagation Association came into its own in 1912 that the Weeks-McLean Bill got a hearing. State and federal game officials and representatives of 23 associations and societies all tendered their opinions to the committee. "This was the first large gathering of people ever assembled in the halls of Congress to work for the passage of a bird protective bill."

The bill had offered protection for migratory game birds but soon added non-game birds as well. What followed were extensive campaigns both for and against the bill both in and out of Congress. At issue was the federal government's authority over the fortunes of migratory birds, something that until that time had been exercised solely by the states. The bill had not even become law yet and already was being challenged as unconstitutional.

Interestingly, Elihu Root, the brilliant New York senator, lawyer and statesman, reasoned that if the principle of protecting migratory birds were embodied in a *treaty*, it would not be subject to the scrutiny of the courts. Six weeks before the bill became law, Root introduced a resolution to secure a treaty between the United States, Canada "and countries to the south." However, it would be some time before Root's treaty took hold.

Meanwhile, a major opponent of the Weeks-McLean Bill was Rep. Frank W. Mondell of Wyoming. Rep. Mondell delivered a fiery speech before the House in early 1913. Among his comments: "It (the bill) takes from the states control over everything that flies, save some birds of the grouse family, bats and butterflies." He continued, "...a farmer shooting a crow in his cornfield could be hauled before

a Federal grand jury, indicted, fined and imprisoned...a barefooted boy in any state of the union snaring a lark or reedbird, taking a shot with his airgun at the smallest and most insignificant of the feathered tribe, could be indicted, tried, condemned and immured in a federal penitentiary..." And more, "Pass this bill and every barrier standing against the assertion of Federal police control in every line and with regard to every act and activity of the American people is broken."

Still, the bill passed on March 4, 1913 and was signed by President Taft. The sum of \$50,000 was designated to the secretary of agriculture to develop seasons, regulations, and enforcement.



Cape May Warbler by Earl Orf

Before taking effect, the regulations were published for three months to give the public time to respond.

During those three months, public hearings were held across the country. "Strong objections were voiced in many places. What had the government to do with birds, when the laws of every state declared that the birds of a state belonged to the people of the state in which they were found...? Someone was against every hunting restriction proposed."

A 15-man commission was made up of "...men prominent in protection of game in various sections of the country..." to advise in framing regulations. The law went into effect in October of 1913.

Because the number of game wardens employed under the Migratory Game Law was extremely small, there

were few arrests, and the constitutionality of the law continued to be questioned in legal briefs and published opinions. One game warden who received an appointment without pay, Col. Joseph Acklen of Tennessee, was a lawyer and active friend of the new law. Col. Acklen felt that a test case should be carried to the Supreme Court to settle the matter once and for all.

The game warden learned of a young man, Harvey C. Schauer, who had shot a couple of coots in January after the season had closed. When advised by Col. Acklen that he had broken the law, the boy offered to go before the nearest judge and plead guilty, but this didn't fit Col. Acklen's plan. "He insisted that Schauer must plead not guilty, in order that, whichever side won, the case might be carried to the Supreme Court." As a sworn game warden, Col. Acklen would see that the boy was prosecuted, and as President of a duck club, Col. Acklen would also provide the necessary funds for the boy's defense! In May of 1914 the trial took place, with the presiding judge promptly declaring the Migratory Game Law unconstitutional. He dismissed the boy. The government then appealed the case and it eventually found its way to the Supreme Court.

E. Marvin Underwood was assigned to represent the government's case to the high court. "He said that some of the Supreme Court Justices undoubtedly were hostile to the law... decidedly unfriendly."

Five months passed before the Supreme Court reported on the Arkansas case. But they didn't rule. One of the justices died in the course of the case and the other justices were evenly divided, so the court referred the case back to the Department of Justice.

Meanwhile the "friends" of the Migratory Bird Law were not anxious for a re-hearing of the case. They feared the potential result. But there was another reason for their hesitation: Progress was being made on the

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“treaty” proposal.

A month after Senator Root’s treaty resolution had been introduced with little result, Senator McLean had presented an identical resolution on which the President had taken action. Great Britain, then representing Canada, had indicated its willingness to participate in a conference on the matter.

The work of preparing the treaty had fallen on the US. Biological Survey and the Commission of Canada. The treaty’s supporters saw this as a golden opportunity to end spring waterfowl hunting—a bone of contention both for and against—in state legislatures across the country. Game conservationists supported a ban on shooting after Feb. 1, but in strong opposition were “...numerous gunners who wanted to shoot ducks in spring as long as any could be found, and they had the active support of cold-storage operators and hotel men, who in these days constituted a formidable opposition and often defeated conservation measures.”

By June of 1915, Canada had lent its approval and sent the treaty to the British ambassador in Washington. However, overwhelmed with war matters, he forgot about the treaty until the following spring. The Arkansas test case regarding constitutionality would soon have to be argued again, and treaty supporters feared that if it was heard before the treaty was ratified, Congress might never give its approval to a treaty.

The treaty was secured from the British ambassador in March of 1916. By this time, political pressure had mounted to amend the treaty to include the shooting of ducks in spring. Its supporters had a dilemma—rush the treaty through to overtake the constitutional test, or delay the treaty to prepare for concessions to the states in the “Middle West” who had the perceived political will to kill the treaty in a Senate vote.

“Much of the demand for a spring-

shooting clause was coming from Illinois and Missouri, but other Western states also were shouting for the same change.” A telegraph from the Iowa Game Protection Association, consisting of “sixteen hundred hunters of southern Iowa,” said, “We stand pat for a Middle Zone to include Iowa open season on ducks, geese and so forth, October 1 to March 31.” The state of Indiana’s conservation commissioner advertised for “petitions from sportsmen asking for spring shooting,” saying he would send these to Washington.

The Association of Audubon Societies stood firm on the spring shooting ban, but “the Middle West continued its bombardment.” Legislators called on the Secretary of Agriculture to assure their constituents they would have their wishes.

It seemed as if concessions were inevitable. Senator McLean wrote: “If it is a case of treaty this season, or an agreement to let the treaty conform to what the Secretary of Agriculture is bound to grant anyway, it may be wise to concede.”

The Secretary of Agriculture called on treaty drafters stating plainly that “...the people of the dissatisfied Western region must be placated.” Drafters were fully aware that the 52 legislators who had requested spring shooting had the power to eliminate all appropriation for the Biological Survey, the architect of the treaty. The treaty was revised to include “the shooting of ‘ducks, geese and swans’ as late in spring as March 10.”

As it turned out, the spring dates really didn’t matter all that much, since the treaty has allowed seasons to be set within a federal framework determined by the Department of Agriculture, since transferred to the U.S. Fish & Wildlife Service.

Both Canada and the U.S. ratified the Migratory Bird Treaty on December 7, 1916, and the next day it was proclaimed by the President of the United States. The Migratory Bird Act in the case against Schauer was ruled unconstitutional, but with the treaty,

the long campaign to protect migratory birds had succeeded. It had taken 13 years and five months from the time George Shiras III had first proposed the concept.

But the story doesn’t end there. In July of 1916 President Woodrow Wilson put the treaty into effect by a reenactment of the provisions of The Migratory Bird Act that had previously been held unconstitutional. In 1920 the State of Missouri brought a lawsuit to prevent a game warden under the authority of the Treaty Act from enforcing the act in Missouri, contending that the law was an unconstitutional interference with the state’s 10th Amendment rights and an invasion of the state’s sovereign rights.

The court ruled against Missouri, holding that Congress has the power to give effect to a treaty, even if that legislation standing alone would be an unconstitutional interference.

And so, as the Migratory Bird-Treaty Act celebrates 100 years of management and protection, its results are obvious—from sustaining and increasing bird numbers to promoting dramatic efforts to re-establish diminished species like Whooping Cranes, Trumpeter Swans, eagles and California Condors—conservation continues. The main limiting factor today appears to be the habitat itself.

Jay Strangis is a bird lover, naturalist and writer with a passion for conservation. He lives in Minnesota near the junction of the Crow Wing and Mississippi rivers.

**Author’s note: Thanks and credit to Barry D. Smith for sharing a copy of T. Gilbert Pearson’s hand-typed account entitled “Our Bird Treaty with Canada” from which this account was extracted. Thomas Gilbert Pearson was an American conservationist and one of the first faculty members of the University of North Carolina at Greensboro. He was one of the founding members of the National Association of Audubon Societies (to become the National Audubon Society).*

MOU Calendar



July / August 2016

AUDUBON CHAPTER OF MINNEAPOLIS

July 26: Enbridge Pipeline Challenge Presentation

Details: Starts at 7:30pm at Breckenridge Chapter House (8816 West River Road in Brooklyn Park 55444). Presenter is Lee Lewis, volunteer chair of the St Croix River Association pipeline safety task force. Free.

August 23: General Meeting (topic to be determined)

Details: Starts at 7:30pm at Breckenridge Chapter House (8816 West River Road in Brooklyn Park 55444). Updates on topic will be revealed at audubonchapterofminneapolis.org. Free.

CARPENTERST.CROIXVALLEYNATURECENTER

July 9 and August 13: Bird Hike

Details: Program takes place from 8am-9am at Carpenter's Wisconsin Campus (300 East Cove Road, Hudson, WI). Led by the St. Croix Valley Bird Club. Field guides and binoculars are available for use. Cost is \$6/person. Reservations are required; call 651-437-4359 to reserve a spot.

July 22 and August 26:

Public Bird Banding Demonstration

Details: Program takes place from 8:30am-12pm at the Minnesota Campus (12805 St. Croix Trail S, Hastings, MN). Learn and watch bird banders capture wild birds. Free. Attendees can come and go as they please. MINNESOTA ORNITHOLOGISTS' UNION (MOU)

August 24-September 5: Minnesota State Fair Booth

Details: The MOU asks its members to consider volunteering for the MOU booth at the state fairgrounds in St. Paul. Shifts are available each day from 8:30/9am-1pm, 1pm-5pm, and 5pm-9pm. For more information or to sign up for (a) shift(s), please contact Kate Kelnberger at kkelnberger@boreal.org or 218-388-9908.

MINNESOTARIVERVALLEYAUDUBONCHAPTER

August 20: Henderson Hummingbird Hurrah

Details: This free and family-friendly event runs from 9am-4:30pm between Bender Park (200 N. Third St., Henderson, MN) and Minnesota New Country School. Activities include hummingbird banding, guest speakers, garden tours, educational booths, children's activities, food, and raffle prizes.

Northern Saw-whet Owl by Liz Stanley



MINNESOTA RIVER VALLEY NATIONAL WILD-LIFE REFUGE

For calendar of events, visit fws.gov/refuge/Minnesota_Valley/Events.html.

ST. PAUL AUDUBON SOCIETY

For calendar of events, visit <http://saintpaulaudubon.org/events/calendar>.

THREE RIVERS PARK DISTRICT

For calendar of events, visit threeriversparks.org/events.

WARGO NATURE CENTER

Preregistration is required for both programs. Register online at anokacountyparks.com or call the nature center at 651-429-8007.

August 25: Birding for Beginners

Details: Program runs from 8am-10am. Meet at the Rice Creek Chain of Lakes Park Preserve's Heritage Lab, which is on the east side of County Road 14 (opposite side of road from Wargo Nature Center). Binoculars and field guide provided. Ages 12+. Cost is \$5/person plus tax.

August 30: Birding by Boat

Details: Program runs from 9am-12pm. Meet at the nature center, which is on the west side of County Road 14. No boating experience necessary and binoculars are available to use. Cost for ages 18 and up is \$10/person (plus tax) and the cost is free for ages 17 and under.

2016 Savaloja Grant Recipients

by Steve Wilson, Chair of Savaloja Committee

What do a Twin Cities area elementary school, wildlife management area, and big day birdathon have in common with a northern MN rare owl survey, Western Great Lakes Common Terns, and Spanish-language bird presentations? All are beneficiaries of 2016 Minnesota Ornithologists' Union (MOU) Savaloja grants. The grants are named for Terry Savaloja, a respected Minnesota birder and TS Roberts Award recipient who died in 1992. Savaloja grants support projects that increase our understanding of birds, promote preservation of birds and their natural habitats, or increase public interest in birds. At their spring meeting, the MOU Board awarded just shy of \$10,000 in Savaloja grants to the following recipients:

Edgerton Elementary School in Maplewood received \$4405 to bring a program that uses birds as an integrating theme between different disciplines to their school (previous Savaloja grants originated the same program for 2nd + 3rd graders at neighboring Harambee Elementary). Savaloja Committee member Ann Kessen captured the sense of the committee when she observed, "This is a well-developed plan for incorporating bird study into primary school curriculum and has a proven track record of success. Appreciation for birds, and the natural world in general, needs to start early in life. Additionally, this project, like the Harambee School project before it, serves a large number of folks who are under-represented in the birding community." One reason this project is so exciting is the potential for this approach to be replicated in schools across the state.

Friends of Mississippi River received \$2000 to help underwrite the cost of a natural resources management plan for the new 400-acre Hampton Woods Wildlife Manage-

ment Area in Dakota County. The plan will ensure this site will be managed to provide habitat for forest-dwelling birds in an area sorely lacking in this type of natural community.

Wood Lake Nature Center in Richfield will receive \$400 towards the costs of a live owl show and bird banding demonstration at their Third Annual Big Day Birdathon. These programs help spark interest in birds among participating families from a diversity of communities.

fluencing the population's productivity.

Project Minnesota/León received \$640 to hire an interpreter for eight Spanish/English bird presentations given at churches, schools and wildlife refuges in the Twin Cities area by Francisco Jose Muñoz, author of the new bi-lingual field guide *Birds of Nicaragua*. The programs should reach local Spanish speakers, and increase appreciation for the linkages between some of our migrants and a small country in Central America.



Great Blue Heron
by Richard Phillips

Hawk Ridge Bird Observatory of Duluth was granted \$1000 to create an online registration system for enrolling participants in the Western Great Lakes Owl Monitoring Survey. This means a more user-friendly experience for surveyors, less time spent on administration and more time spent on learning about the uncommon owl species that are now the subject of the survey.

University of Minnesota graduate student Annie Bracey received \$1376 for a study of colony productivity and survival in Western Great Lakes Region Common Terns. A species in decline, this well-designed study should help identify factors that are negatively in-

Besides the MOU's board, two groups deserve recognition in making these grants possible. Savaloja Committee members Ann Kessen, Steve and Jo Blanich, Pam Perry, Mike North, and Chuck Neil sifted through the received proposals and collectively teamed up to produce thoughtful, incisive recommendations for the board. Ultimately though, it's MOU members — through your memberships and especially donations — who are responsible for our ability to support these projects. Please consider increasing your membership level when the time comes to renew, or simply send a contribution earmarked for Savaloja grants to MOU now.

Minnesota Birder Bio: Alex Franzen

Born: August 28, 1998

Currently living: A hall on the University of Minnesota St. Paul campus. My home is in Hastings, MN

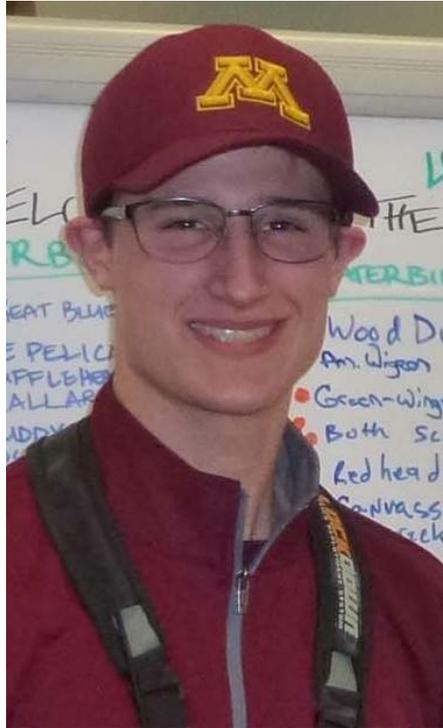
Occupation: I am currently an undergraduate student at the University of Minnesota College of Food, Agricultural, and Natural Resource Sciences. Here, I am studying for a Bachelor of Science degree in Fisheries Biology with a minor in Agronomy/Plant Genetics. I also volunteer as a Scientific and Natural Area (SNA) site steward at the Hastings Sand Coulee and with Friends of the Mississippi River.

Serious about birding since: I was the occasional serious birder until 2015 when I started birding almost every day after I was introduced to eBird.org. I started doing bird surveys in 2015 and I was inspired to try and learn the science behind birds. I then received a membership to the Minnesota Ornithologists' Union (MOU) and was introduced to the listing coloring book. It made me want to get most of the birds in my county and the neighboring counties. P.S.: I am not a county lister.

Favorite bird or bird family: I am really fond of the Tufted Titmouse. After having one in my yard this winter, I was mesmerized by the distinctive "Peter, Peter, Peter" song.

Favorite places to bird in MN: I really like to bird locally year round at the Hastings Sand Coulee, Miesville Ravine Park Reserve and Spring Lake Park Reserve-Schaars Bluff. In the winter I also like a good trip or two up to Sax-Zim Bog.

Favorite place to bird outside MN: I loved it when I birded Ding Darling NWR and Corkscrew Swamp Sanctuary in Ft. Meyers, Florida.



Birding style: I always like to have at least one other person with me. I find that it always pays to have another set of eyes and ears when birding a good spot. I am the fairly meticulous birder in that I like to take my time and count every bird possible. Occasionally I will speed things up when I want to get a photograph of a good bird or am only going for a single target bird. It is also a good idea to have an experienced birder (shout out to Kevin Smith) with because there is nothing more valuable than to learn from someone who is more passionate about birds than the average person. I don't go birding just to bird but rather get exercise for myself and the dog.

Best advice to be a better birder: I can say that after meeting a lot of very good birders at the MOU paper session this past year, the more people you know the more you will learn. These birders are some of the most accepting people I have met in my life. Several online sources, like the MOU-net listserve, Minnesota Birding Facebook page, and various blogs are also ex-

tremely helpful tools to the new birder. I see time and time again people getting discouraged and angered over making simple misidentifications. You cannot fix something if you don't know what's broken if you catch my drift. One last piece of advice is Ralph Waldo Emerson's motto of "Trust thyself". The more self-doubt one has, the more likely he or she is to change his or her originally correct identification to a different bird that is wrong.

Main attraction of birding to you: I thoroughly enjoy the aspect of taking trips with others to places that I've never been before or that I don't get a chance to go often. There is nothing better than the thrill of getting new birds at new places. I recall the time that I got the Gyrfalcon that was at Connor's Point this winter. It was the first time I had been to that part of Superior, WI. Many other birders were looking for this bird with no luck and leaving. Kevin Smith happened to join me on this trip as we had just seen the notorious Ivory Gull. We were just about ready to leave when I spotted a large raptor at the top of the elevator. I looked over to Kevin and shouted "THERE IT IS!" We were able to get good looks at it through the scope and even gave two other birders a good look at the elusive life bird they had been chasing for quite a while. That was probably my favorite birding trip to date.

Interests/hobbies when I am not birding: I am a very active fisherman, in particular trout. My family, my dog, and I also hunt for pheasant, grouse and waterfowl. In addition to wildlife, I am a diehard Minnesota Twins fan and Gopher fan. I am also active in 4H and the Dakota County Fair.

New bird I would like to see: I would love to take a trip to all of the western states in order to expand my life list.

Results for Hastings Area Birding Day

by *Cindy Thury Smith, MOU Membership Secretary*

The third annual Hastings Area Birding Day was held April 23rd at Carpenter Nature Center. Over 100 registrants were able to select from guided bird hikes around the nature center and other nearby birding areas. Hastings is located in the hub of four Important Bird Areas as designated by Audubon MN, which resulted in 110 species of birds being found and identified that day.

In addition to vendors, several speakers presented. Jonathan Moore from the National Park Service St. Croix National Scenic Riverway gave an overview of the history of the national parks. Al Singer from Dakota

County shared how they are working to preserve land for wildlife and enhance water quality.

One highlight of the day was the awarding of Bird City Minnesota status to the City of Hastings. This is the first city to receive this award from Audubon Minnesota. The award is given to cities that enact specific policies and practices to benefit birds and habitat for birds. (For more information on Bird City Minnesota, see the March/April 2016 issue of *Minnesota Birding*.)

The Youth Big Day competition drew in six teams this year. Winners in each division are awarded certificates

and youth memberships in MOU. This year the local team of Alex Franzen and Cody Boyd from Hastings recorded 95 species, winning the competition. They practiced hard in the days before the competition to learn the best places to find their targets and then got an early 6:00 a.m. start to ensure their victory.

We want to thank Cardinal Corner and The Vagary for prize donations. Carpenter Nature Center, the Hastings Parks & Recreation Department, Hastings Environmental Protectors, and all the local guides and volunteers all contributed to another successful event.



Baltimore Oriole by Andrew Longtin

New MOU Members

Cody Boyd, *Hastings, MN*
Ellen Doll, *Minneapolis, MN*
Joseph DuRoss, *St. Paul, MN*
David Fluegel, *Morris, MN*
Peg Furshong, *Montevideo, MN*
Louise Eidsmoe, *Roseville, MN*
J. Mark Gilbert, *St. Paul, MN*
Mary Halatyn, *Bloomington, MN*
Beth Honetschlager,
Marine on St. Croix, MN
Vivian Ikeri, *Maplewood, MN*
Steve & Patrice Roberts, *Ogema, MN*
Therese Scheller, *St. Paul, MN*
Carolyn Schmit, *Maplewood, MN*
Lisa Schreifels, *Sartell, MN*
Ruby Sonnek, *St. Paul, MN*
Joey Sundvall, *St. Louis Park, MN*
Larry Swanson, *Scandia, MN*
David Zanussi, *Afton, MN*
Trevor Zeyen, *Hastings, MN*



Minnesota Ornithologists' Union

University of Minnesota
Bell Museum of Natural History
10 Church Street SE
Minneapolis, MN 55455

Minnesota Ornithologists' Union
J. F. Bell Museum of Natural History
University of Minnesota
10 Church Street SE
Minneapolis, MN 55455
Email: mou@moumn.org
Web: <http://moumn.org>
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The Mission of the M.O.U.

We foster the study and conservation of birds by amateurs and professionals. We promote the conservation of birds and their natural habitats. We support these aims primarily by publishing and sharing information, by serving as a repository for records, by conducting field trips, by awarding grants for research, and by supporting programs that educate members and the public about birds.

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Birding Hotline

Northwest: 800-433-1888

MOU Contacts

Minnesota Birding: newsletter@moumn.org
President: president@moumn.org
Vice President: vicepresident@moumn.org
Membership Secretary: membership@moumn.org
Treasurer: treasurer@moumn.org
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The Loon editor: editor@moumn.org
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County _____

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|---|--------------|
| <input type="checkbox"/> Youth (under 18) | \$15.00 |
| <input type="checkbox"/> Individual | \$25.00 |
| <input type="checkbox"/> Foreign (including Canada) | U.S. \$35.00 |
| <input type="checkbox"/> Family | \$35.00 |
| <input type="checkbox"/> Supporting | \$75.00 |
| <input type="checkbox"/> Corporate | \$100.00 |
| <input type="checkbox"/> Life, single | \$500.00 |
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19885 Lillehei Avenue
Hastings MN 55033-9354

Please make a contribution to the Savaloja Grants

The Savaloja Grants supports research and other projects selected by the MOU for special attention. Your contributions help fund a better future for birds in Minnesota. You can add a contribution to your membership check.

Amount: \$ _____