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"Dropping" The Migratory Bird Treaty Act: The Negative Effects of the MBTA on Property Rights and Human Health

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“DROPPING” THE MIGRATORY BIRD TREATY ACT: THE NEGATIVE EFFECTS OF THE MBTA ON PROPERTY RIGHTS AND HUMAN HEALTH

By Sabita Maharaj[†]

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I. INTRODUCTION

It is 8:00 p.m. on an autumn night and a cold front is moving through the region.¹ Brisk northwesterly winds signal a change in the season.² High above our neighborhoods, the wings of hundreds of thousands of songbirds strain under the force of flight.³ Airborne and on the move, these nomads soon must land, hopefully where there is food and shelter.⁴ The annual migrations of birds are a high stakes,

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1. *What is Migration?*, N. J. AUDUBON, <http://www.njaudubon.org/sectionoases/whatismigration.aspx> (last visited Feb. 16, 2013).

2. *Id.*

3. *Id.*

4. *Id.*

life and death drama that has been played out for thousands of years and for countless millions of birds.⁵ The birds know what to do

Tanglewood Trail is a quiet, historical neighborhood that started as a ranch owned by Cass Overton Edwards in 1868.⁶ The eastern part of the Tanglewood area is bordered by a branch of the Trinity River, where children used to play.⁷ There is also a winding walking trail through the neighborhood. Prestigious names are given to the roads in this neighborhood, such as Bellaire Drive and Marquette Court.⁸ New home development in the neighborhood must be comprised of brick or stone with an attached two-car garage, and most homes are one story to keep the ranch-style feel of the neighborhood.⁹ The original Edwards family still lives in Tanglewood Trail.¹⁰

The yards are large and tree covered, and the proximity to the food source in the Trinity River provides an ideal setting for migratory birds. This neighborhood is the type of environment egrets are in search for to nest in from March through October. However, what the birds are searching for is on property that residents own. Residents' yards become overrun with egrets, and some residents purposefully leave town to avoid living through the nesting season.¹¹ Egrets nesting for months in the trees above homes results in dead fish, chicks, and feces dropped on streets and in yards. The residents of Tanglewood Trail cannot enjoy the walking trail during these months and children cannot safely play outside.

Federal law essentially handcuffs residents from protecting their health and their children's health and severely restricts what they can do to protect their property from MBTA-protected birds. The usefulness of these laws is no longer justifiable. While it is necessary for human enjoyment and the balance of the ecosystem to protect animals, protection should not come at the expense of human health and property use and enjoyment.

5. *Id.*

6. Wini Klein, TANGLEWOOD NEIGHBORHOOD ASS'N, <http://www.tanglewood-neighbors.org/TNA/Home.html> (last visited Feb. 16, 2013).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Susy Solis, *Egrets Return to North Texas, Landing in Fort Worth*, CBS DALLAS/FORT WORTH (June 9, 2012, 11:00 AM), <http://dfw.cbslocal.com/2012/06/09/egrets-return-to-north-texas-landing-in-fort-worth/>; Elizabeth Campbell, *Neighborhood Overrun by Protected Birds that Create Mess and Stench*, STAR-TELEGRAM.COM (Aug. 6, 2012), <http://www.star-telegram.com/2012/08/05/4156530/neighborhood-overrun-by-protected.html>.

A. *Migration*

Migration has been occurring annually since the beginning of the Ice Age of the Quaternary period, roughly two million years ago.¹² It has been an endless trek for these creatures, flying across oceans to find the right place at the right time of year to mate, find food, and just survive. Humans, as we are recognized today, began to evolve about 200,000 years ago.¹³ By that calculation, a first-in-time theory of property acquisition would give the birds priority over land. But, traditionally, humans are classified higher on a hierarchy, while animals are reduced to property, and the value of animals is based on their usefulness to humans.¹⁴

The Snowy Egret and Great Egret (“egrets”) are classified as Neotropical Migratory Birds. These birds spend northern-hemisphere winters in Central America, the Caribbean, and the northern parts of South America.¹⁵ As the cold season begins in these parts of the globe, the food supply begins to shorten and the egrets must travel in order to stay alive and keep their species population up through reproduction. As the change of season forces the egrets to fly north in search of food and nesting areas, a conflict arises between their nesting habits and human life. Global climate change can affect the path of migration because of food supply fluctuations and temperature changes.¹⁶ The basis of the birds’ migration path can be traced to climate change in the Arctic.¹⁷ The recent warming trends¹⁸ and melting of ice and permafrost affects the composition of water in lakes and rivers, which in turn affects what fish species can survive in certain areas and can alter the food supply of the migratory birds that feed on

12. *Ice Ages*, NATURAL HISTORY NOTEBOOKS, <http://nature.ca/notebooks/english/iceage.htm> (last updated Oct. 12, 2012).

13. Dov Fox, *The Second Generation of Racial Profiling*, 38 AM. J. CRIM. L. 49, 62 (2010); Dennis O’Neil, *Early Modern Homo sapiens*, EVOLUTION OF MODERN HUMANS, http://anthro.palomar.edu/homo2/mod_homo_4.htm (last visited Feb. 16, 2013); *What Does it Mean to be Human?*, SMITHSONIAN NAT’L MUSEUM OF NATURAL HISTORY, <http://humanorigins.si.edu/evidence/human-fossils/species/homo-sapiens> (last visited Feb. 16, 2013).

14. Elizabeth L. DeCoux, *Pretenders to the Throne: A First Amendment Analysis of the Property Status of Animals*, 18 FORDHAM ENVTL. L. REV. 185, 188–89 (2007).

15. Floyd E. Hayes, *Definitions for Migrant Birds: What is a Neotropical Migrant?*, 122 THE AUK 521 (1995); *Neotropical Migratory Bird Basics*, SMITHSONIAN NATIONAL ZOOLOGICAL PARK, http://nationalzoo.si.edu/scbi/migratorybirds/fact_sheets/default.cfm?fxst=9 (last visited Feb. 16, 2013).

16. Joseph Dunsay, *How Climate Change Affects Migrating Birds*, <http://www.environmentalgraffiti.com/news-migrating-birds-and-climate-change> (last visited Feb. 16, 2013).

17. Randall S. Abate, *Climate Change, The United States, And The Impacts of Arctic Melting: A Case Study In The Need For Enforceable International Environmental Human Rights*, 43A STAN. J. INT’L L. 3, 33 (2007).

18. *Id.* at 30 (stating that the temperature has warmed in the Arctic region about twice as much as the rest of the world. Near future (next fifty years) warming estimates are between 3–5 degrees and even up to 7 degrees.).

those fish.¹⁹ So, naturally, migratory birds will have to adjust their flight path; and places that have not previously experienced stopovers by migratory birds are experiencing it now, and will into the future.

The new path that migratory birds choose and their choice of stop-over locations are unpredictable and unforeseeable, which can lead to a greater chance of conflict between humans and bird species. This is currently an issue in North Texas.

B. *Conflict*

For certain neighborhoods in the Fort Worth and Carrollton suburbs in North Texas, this was the first year the egrets stopped over in this area. Egrets land in North Texas beginning in March and stay the entire summer to nest. Egrets are protected by the Migratory Bird Treaty Act (“MBTA” or “Act”).²⁰ From March through October the egrets nest in the trees of residents’ yards. One resident of Tanglewood Trail neighborhood in Fort Worth claimed to have eighty-five nests in his yard.²¹ The strict protection that the MBTA provides for migratory birds essentially handcuffs humans in what actions we can take to protect our livelihood, our health, and ourselves. Because of the restrictions the MBTA purposefully and inadvertently places on human life in order to protect migratory birds, this Article proposes three solutions: repeal, alter, or replace the Act.

II. BACKGROUND OF THE MIGRATORY BIRD TREATY ACT

A. *Origin and Purpose of the Act*

The Migratory Bird Treaty Act started out in 1916 as a treaty between the United States and Great Britain to protect many species of birds that traveled annually between the United States and Canada from being killed by humans.²² The basis of protecting the birds from death was that they destroyed insects that were harmful to crops and were a good source of food to humans.²³ The treaty passed legislation in 1918 to become the Migratory Bird Treaty Act.²⁴ It then was held constitutional in 1920 by the Supreme Court in *Missouri v. Holland*.²⁵ The Act states in pertinent part that it:

19. *Id.* at 33.

20. *Code Compliance*, PLANNING & DEV. DEP’T CITY OF FORT WORTH TEX., fortworthtexas.gov/codecompliance/info (last visited Feb. 16, 2013).

21. Solis, *supra* note 11 (quoting Richard Steed counting up to eighty-five egret nests in his yard).

22. *Missouri v. Holland*, 252 U.S. 416, 431 (1920); Hye-Jong Linda Lee, Note, *The Pragmatic Bird Treaty Act: Protecting “Property,”* 31 B.C. ENVTL. AFF. L. REV. 649 (2004).

23. *Holland*, 252 U.S. at 431; Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 9–10 (1996).

24. Finet, *supra* note 23, at 7.

25. *Holland*, 252 U.S. at 435.

shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest or egg of any such bird²⁶

The Act has only been minimally amended since its inception in 1918,²⁷ yet times have changed drastically. The goal of the Act was to curb hunting of migratory birds because it led to a rapid population decline.²⁸ As stated above, migratory birds were beneficial for humans because of their ability to kill detrimental insects and because the birds themselves were a source of food. An additional cause of their population decline was due to the feather trade that flourished between 1870 and 1920.²⁹ Women’s fashions during that time incorporated feathers in hats and feathers were worn as status symbols. Harper’s Bazaar magazine described the 1897 winter season hat trend as “piled high with feathers, birds, fruit, flowers, furs, even mice and small reptiles. Birds were by far the most popular accessory: [w]omen sported egret plumes, owl heads, sparrow wings, and whole humming-birds; a single hat could feature all that, plus four or five warblers.”³⁰ At the height of the feather trade, hunting birds to sell feathers became a lucrative business.³¹ In 1903, the price offered to hunters for egret plumes was \$32 per ounce.³² About four herons or egrets were needed to measure about an ounce of plumes.³³ The feather trade left many orphaned chicks to fend for their own livelihood, which added to the population decline of migratory birds.³⁴ The Act was meant to put an end to the commercial bird trade because it caused a sharp decrease in bird populations.³⁵

The protection that the Act gives to migratory birds is grounded in the notion that birds are a resource.³⁶ At the turn of the twentieth century, songbirds were used as food for humans and incorporated in

26. 16 U.S.C. § 703 (2006).

27. Act of June 1, 1974, Pub. L. No. 93-300, 88 Stat. 190.

28. *Feather Trade: Hunting and Collecting*, FEATHER TRADE, <http://americanhistory.si.edu/feather/fthc.htm> (last visited Feb. 16, 2013).

29. *Id.*

30. Jennifer Price, *Hats Off to Audubon*, HERITAGE (Dec. 2004), <http://archive.audubonmagazine.org/features0412/hats.html>.

31. Merle Patchett, *Murderous Millinery*, FASHIONING FEATHERS, <http://fashioningfeathers.com/murderous-millinery/> (last visited Feb. 16, 2013).

32. *Id.*

33. *Id.*

34. *Id.*

35. *A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds*, LAWS & TREATIES PROTECTING MIGRATORY BIRDS, <http://www.fws.gov/migratorybirds/RegulationsPolicies/treatlaw.html#mbta> (last updated Apr. 11, 2011).

36. Lee, *supra* note 22, at 651.

soups and pies.³⁷ Even hunters that killed solely for sport felt the need to protect migratory birds, probably from the standpoint of keeping the sport alive.³⁸ A need for legislative protection arose from the disparity between an increase in unregulated killings and the needed benefits of live migratory birds to humans. A similarly situated creature is the currently controversial Dunes Sagebrush Lizard (“DSL”); at issue is what level of protection it needs without resulting in negative effects on human life and economy.³⁹ Right now, the lack of scientific information to determine whether the DSL needs to prosper implies that one factor in deciding to legally protect the DSL is whether the research could end in a beneficial result for humans.⁴⁰ Proponents of classifying the DSL as an endangered species to protect it are motivated by the prospect of studying it before it disappears.⁴¹ Since these societal goals and mores occurred at the time of the MBTA’s inception as well, it is with this mindset to determine whether the Act is still relevant and useful to humans in the twenty-first century.

B. *Violations Under the Act*

It is not settled whether the Migratory Bird Treaty Act is mainly aimed at deterring pleasure killings and killings for commercial gain by hunters or whether the Act is meant to punish anyone whose acts may result in the killing of a migratory bird.

The word “take” is used in multiple Acts that protect animals such as: the Endangered Species Act (“ESA”), the Bald and Gold Eagles Protection Act (“BGEPA”), and the Migratory Bird Treaty Act (“MBTA”).⁴² Each Act’s definition of “take” varies.⁴³ The discrepancies between what constitutes a “taking” is a source of confusion for

37. *Id.*

38. *Id.* at 652.

39. Charles Sartain, *The Lizard that (Almost) Shut Down the Permian Basin*, ENERGY AND THE LAW, (June 20, 2012), <http://www.energyandthelaw.com/2012/06/20/the-lizard-that-almost-shut-down-the-permian-basin/> (stating that if the Dune Sagebrush Lizard is listed as an endangered species, its habitat, the shinnery oak, will need protection, meaning the exploration and oil production from the Permian Basin in West Texas and New Mexico will halt which negatively affects the economies of those areas that depend on the oil business.).

40. Jemma Denney, *The Texas Conservation Plan, The Good, The Bad and The Lizard*, ECOSYSTEM MARKETPLACE, (June 18, 2012), http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=9100§ion=news_articles&eod.

41. *Id.*

42. 16 U.S.C. § 1538 (2006); 16 U.S.C. § 668 (2006); 16 U.S.C. § 703(a) (2006).

43. 16 U.S.C. § 1532(19) (The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct); 16 U.S.C. § 718(j)(5) (The term “take” means to pursue, hunt, shoot, capture, collect, or kill; or to attempt to pursue, hunt, shoot, capture, collect, or kill); 16 U.S.C. § 668(c) (“take” includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb).

courts and for everyday people using their land in ways they see fit, such as using pesticide on a field, clearing trees of unwanted nests, or providing their children a healthy place to play outside.

The District Court for the Eastern District of California said that the purpose of the MBTA is to protect migratory birds from indiscriminate slaughter, like what occurred in the early 1900's.⁴⁴ The court also said that Congress's main focus was on hunters when it implemented the Act and that criminal penalties should be assessed for each bird killed.⁴⁵ But this same court goes on to say that just because proscribing hunting was Congress's main focus, it does not mean that hunting was the only type of bird killings it was meant to ban.⁴⁶ The words of the Act itself do not include “poison,” yet this court said that the use of pesticide in a field that resulted in the poisoning and killing of migratory birds is within the proscriptions of the MBTA.⁴⁷ The court relied on the fact the BGEPA, enacted in 1940, was modeled after the MBTA and specifically includes the word “poison;” therefore, poisoning is inferred by legislative intent and included into the list of activities that violate the MBTA.⁴⁸

The MBTA was amended in 1986 to add a scienter requirement for felony charges, but violation of the Act is a strict liability offense for misdemeanor charges.⁴⁹ Congress specifically noted that nothing in the 1986 amendment is meant to alter the strict liability standard for misdemeanors.⁵⁰ Since 1986, individuals have been found guilty under the strict liability standard for being the recipient of feathers that were sent through the mail and for possession of ducks and geese in excess of the limit.⁵¹ Given the nature of strict liability, these actions do not require a showing of specific intent or knowledge to be held violations of the Act.⁵² The penalty for such misdemeanor charge can be a fine up to \$15,000 or six months imprisonment.⁵³ A misdemeanor is a criminal charge, yet generally strict liability is limited to civil cases because criminal law is based upon a theory of punishing vicious will.⁵⁴ Since the misdemeanor penalty is strict liability and a person can be charged multiple times for each bird affected by a “taking,” day-to-day activities can put one in jeopardy of a very high fine or a damaging criminal charge on his or her record.

44. *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 530 (E.D. Cal. 1978).

45. *Id.* at 529.

46. *Id.* at 532.

47. *Id.*

48. *Id.*

49. 16 U.S.C. § 707(b) (2006) (adding whoever, in violation of this subchapter, shall knowingly . . .); *United States v. Morgan*, 311 F.3d 611, 615 (5th Cir. 2002).

50. *Morgan*, 311 F.3d. at 615.

51. *Id.*

52. *Id.*

53. § 707(a).

54. *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 493 (E.D.N.Y. 1993).

Certain circuit courts have held that the MBTA should not be read to prohibit “takings” or deaths of migratory birds that result from logging activities.⁵⁵ In the 1991 case, *Seattle Audubon Society v. Evans* (*Seattle II*), the Ninth Circuit said that destroying a migratory bird’s habitat is not equivalent to a “taking.”⁵⁶ This court said that the Act’s definition of what actions are unlawful is descriptive of the acts by hunters and poachers.⁵⁷ Although, one could conclude that destroying a migratory bird’s habitat could indirectly and unintentionally end in a bird killing, resulting in a violation of the Act under strict liability standards through habitat destruction.

The District Court of Illinois came to a similar holding in *Mahler v. U.S. Forest Service*. The Forest Service had a plan to clear-cut forty-six acres of a forest in which migratory birds could be nesting.⁵⁸ This court relied on *Seattle II*’s definition of “take” in that it is descriptive of those acts associated with hunters and poachers.⁵⁹ The court stated that the Congressional purpose and language of MBTA was intended to forestall hunting of migratory birds and the sale of bird parts and that the court would not extend protection to habitat destruction.⁶⁰

Conversely, in *United States v. Moon Lake Electric Ass’n, Inc.*, the District Court of Colorado disagreed with the Ninth Circuit’s decision of excluding habitat destruction from the definition of “taking.”⁶¹ This court compared the MBTA definition to the definition of “take” in the Endangered Species Act (“ESA”), which includes harm.⁶² Under the ESA, harm includes an act that substantially modifies habitat in a way that impairs breeding, feeding, and shelter.⁶³ The District Court of Colorado used this analysis to hold that the Ninth Circuit’s definition ignores the strict liability component of the Act and that the Act was not limited in its aim to solely poachers and hunters.⁶⁴

An additional case that agrees with *Moon Lake*’s holding that the Act extends beyond solely poaching and hunting activities and applies to federal agencies is *Center for Biological Diversity v. Pirie*. In *Pirie*, a United States District Court held that the Navy would have to halt training activities on land where migratory birds nested and acquire a

55. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559 (S.D. Ind. 1996).

56. *Seattle Audubon Soc’y*, 952 F.2d at 302.

57. *Id.*

58. *Mahler*, 927 F. Supp. at 1561–73.

59. *Id.* at 1574.

60. *Id.*

61. *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1075 (D. Colo. 1999).

62. *Id.* at 1076.

63. *Id.*

64. *Id.* at 1077 (stating that a distinction between direct and indirect takings is illogical).

permit, or be in violation of the MBTA.⁶⁵ The court granted an injunction prohibiting any further Navy activities until the Navy acquired a permit from the Fish and Wildlife Services.⁶⁶

In 2001, President Clinton issued Executive Order 13186, which applies to federal agency actions that may have a negative effect on migratory bird populations.⁶⁷ The Executive Order recognizes protecting migratory birds’ habitat from significant destruction.⁶⁸ The Executive Order defines “take” as including intentional and unintentional takings and further extends “take” to the habitats upon which migratory birds depend.⁶⁹ The two major U.S. Forest Service Cases (*Seattle II* and *Mahler*) may have been analyzed according to a different standard if the 2001 Executive Order was implemented at the time they were litigated.

C. *Continued Necessity of the Act?*

Whether aimed against only hunters and poachers or aimed against all actors that may affect migratory birds, the overriding goal of the MBTA was to prevent the population of migratory birds from a vast and rapid decline.⁷⁰ The migratory birds that have led to conflict with North Texas residents are the Snowy Egret and the Great Egret. Both species are currently classified as “Green” on the Audubon Watchlist.⁷¹ A “Green” classification means they have a low vulnerability to extinction based upon four classification factors established by the National Audubon Society.⁷² The Great Egret global population is up to 1.2 million,⁷³ and the Snowy Egret population is unknown but has continuously increased over the past forty years and is now stable.⁷⁴ The International Union for Conservation of Nature and Natural Resources (“IUCN”) classifies plant and animal species according to level of risk of global extinction.⁷⁵ Both egret species are listed under Least Concern.⁷⁶ A species is listed as Least Concern when it has a

65. *Center for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 121–23 (D.D.C. 2002); Catherine M. Vogel, *Military Readiness and Environmental Security—Can They Co-exist?*, 39 REAL PROP. PROB. & TR. J. 315, 326 (2004).

66. *Center for Biological Diversity*, 201 F. Supp. 2d at 122.

67. Vogel, *supra* note 65, at 326–27.

68. *Id.* at 327.

69. *Id.*; Exec. Order No. 13,186, 66 Fed. Reg. 3,853 (Jan. 10, 2001).

70. Finet, *supra* note 23, at 8.

71. *Green*, NAT’L AUDUBON SOC’Y BIRDS, <http://birds.audubon.org/category/watchlist-status/green?page=4> (last visited Feb. 16, 2013).

72. *See Watchlist Methodology and Criteria*, NAT’L AUDUBON SOC’Y BIRDS, <http://birds.audubon.org/watchlist-methodology-and-criteria> (last visited Feb. 16, 2013).

73. *Green*, *supra* note 71.

74. *Snowy Egret*, BIRDLIFE SPECIES FACTSHEET, <http://www.birdlife.org/datazone/speciesfactsheet.php?id=3711> (last visited Feb. 16, 2013).

75. *See THE IUCN RED LIST OF THREATENED SPECIES*, <http://www.iucnredlist.org> (last visited Feb. 16, 2013).

76. *THE IUCN RED LIST OF THREATENED SPECIES*, <http://www.iucnredlist.org> (then search “great egret” or “snowy egret”) (last visited Feb. 16, 2013).

history of extinction risk but is currently too widespread and populous to qualify for a high-risk classification such as Endangered, Threatened, or even Vulnerable.⁷⁷ Additionally, neither species is listed on the Fish & Wildlife Services' Endangered Species List. The above lists and statistics show that the egret population has rebounded since the early twentieth century when the MBTA was first implemented to protect birds from unrestrained killings. The MBTA successfully served its purpose and achieved the goal of preventing extinction.

However, the MBTA is probably not the sole reason the egret population has rebounded. Culture and fashions have changed since 1870, and society's general appreciation for the important part animal species play in a stable ecosystem has also changed. People for the Ethical Treatment of Animals ("PETA") was founded in 1980 and has become a strong force in educating the public about the importance of animals and bringing awareness to the clothing trade.⁷⁸ Many people, regardless of their economic status, choose not to wear clothing made from animals. A decline in the demand for feathers naturally occurred between the late nineteenth century when women, especially, wore birds and feathers for fashion and as a status symbol, and today when many celebrities endorse PETA or a vegan lifestyle.⁷⁹ Change in hairstyle trends added to the initial decline of using feathers in hats.⁸⁰ It is also evident from viewing fashion magazines and runways that feathers are not used as a regular textile anymore.

A combination of factors enabled the egret population to rebound and become stable: the decrease of the use of feathers in fashion, the increase in the public's education regarding animals and their importance to an effective ecosystem, and the strict liability of the MBTA. However, the lingering effects of the MBTA create an infringement on the use of private property by landowners. The protection of egrets has led to them also becoming a nuisance and health concern for humans. Since the MBTA was implemented with the goal of restoring the egret population for the purpose of human utility, it follows that the Act be limited when its effects become hazardous to humans.

77. *2001 Categories and Criteria*, THE IUCN RED LIST OF THREATENED SPECIES, http://www.iucnredlist.org/static/categories_criteria_3_1#categories (last visited Feb. 16, 2013).

78. *See generally All About PETA*, PETA.ORG, <http://www.peta.org/about/learn-about-peta/default.aspx> (last visited Feb. 16, 2013).

79. *See generally Celebrities*, PETA.ORG, <http://www.peta.org/tv/celebrities.aspx> (last visited Feb. 16, 2013).

80. *See* Patchett, *Murderous Millinery*, *supra* note 31 (stating that as early as 1913, the bob, and other short hairstyles were introduced, ones that are not conducive to wearing extravagant hats. So, the trend began to switch to wearing plain slouch hats).

III. NUISANCE TO HEALTH, ECONOMY, AND ENJOYMENT OF PROPERTY

Nuisances can be public or private, or both public and private. A public nuisance is an unreasonable interference with a right common to the general public.⁸¹ A private nuisance is an unreasonable interference with the use and enjoyment of one’s property.⁸² Both types are at issue here. Circumstances that affect the level of unreasonableness of a public nuisance include: whether the conduct significantly interferes with public health, safety, peace, comfort, or convenience; whether the conduct is of continuing nature or has produced a long-lasting effect; and whether the conduct is proscribed by statute or ordinance.⁸³ The Migratory Bird Treaty Act (“MBTA”), by proscribing landowners from taking many actions to protect their land from the nesting of migratory birds, is in effect facilitating a public and private nuisance.

Hérons or egrets nest in colonies; these areas are called heronries.⁸⁴ Migratory birds that create heronries in the trees around people’s homes create a threat to the health of visitors and residents of that neighborhood. Tanglewood Trail neighborhood in Fort Worth, Texas is a prime example of this. For roughly eight months of the year, egrets (which are protected by the MBTA) make their nests in the trees of residents’ yards. Because of the duration that the egrets nest in this area, the threat to the public’s health is not minor.

Bird droppings cover the yards, mailboxes, cars, sidewalks, streets, and sometimes people of Tanglewood Trail.⁸⁵ The large amount of bird droppings that accumulate, and the flies and odors that result from the bird droppings, can cause human health hazards, especially to people that already suffer from breathing difficulties like asthma.⁸⁶ Histoplasmosis is a fungus that causes lung infection.⁸⁷ The fungus lives in environments usually associated with large amounts of bird or bat droppings.⁸⁸ The symptoms of Histoplasmosis are similar to pneu-

81. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

82. JESSE DUKEMINIER ET AL., PROPERTY 755–56 (Aspen Publishers, 7th ed. 2010).

83. *Id.* at 755.

84. RAY C. TELFAIR II, BRUCE C. THOMPSON & LINDA TSCHIRHART, TEXAS PARKS AND WILDLIFE, NUISANCE HERONRIES IN TEXAS 5 (2d ed.), http://www.tpwd.state.tx.us/publications/pwdpubs/media/pwd_bk_w7000_0134.pdf.

85. Melissa Cutler, *Egrets Take Over Fort Worth Neighborhood*, MYFOXDFW.COM (Aug. 7, 2012, 2:58 PM), <http://www.myfoxdfw.com/story/19218379/egrets-take-over-fort-worth-neighborhood>; Campbell, *supra* note 11.

86. Joel Thomas, *Fort Worth Homeowners Regret Egrets*, CBS DALL./FORT WORTH (Nov. 2, 2012, 6:51 PM), <http://dfw.cbslocal.com/2012/11/02/fort-worth-homeowners-regret-egrets/>.

87. *Histoplasmosis*, CDC, www.cdc.gov/fungal/histoplasmosis (last visited Feb. 23, 2012).

88. *Id.*

monia and can become serious if not treated properly and quickly.⁸⁹ When these fungal spores become airborne, they are breathed in by residents and visitors of the neighborhood and are a nuisance risk to people's health.⁹⁰ Daily activities such as mowing the lawn and street sweeping add to the risk of inhalation because these activities disturb the soil and stir up the fungus into the air.⁹¹ So, people's effort to clean up the neighborhood backfires and results in making the fungal spores airborne and more likely to be inhaled. Histoplasmosis is not only contracted from breathing in contaminated air spores but also through contact with contaminated soil.⁹² This is a problem for families that live in neighborhoods subjected to heronries. Children typically play outside in the yard during the summer months and are especially subject to coming in contact with the unsanitary accumulation of bird feces. One resident of Tanglewood Trail keeps her three-month old son indoors because she is concerned of how all the bird excrement will affect his health, and so the family does not get to enjoy the backyard as much as they used to due to the egret nests.⁹³

Other health hazards that result from heronries are broken eggs, feathers, and the remains of decomposing chicks.⁹⁴ In Fort Worth, the solid waste department will pick up dead birds Monday through Saturday as long as they are bagged.⁹⁵ Bagging dead birds is the residents' responsibility.⁹⁶ This can lead to a health hazard because people may not be trained on the appropriate way to bag a dead bird and how to clean up in order to keep the process sanitary. Dead fish are also associated with heronries and can fall from nests and land in yards.⁹⁷ These fish and bird remains draw in parasites and hoards of flies,⁹⁸ which are carriers of disease. Other diseases associated with

89. *Id.*

90. Janet St. James, *Fort Worth Residents Aim to Tell Egret Invasion "Bye Bye Birdie,"* WFAA.COM (Nov. 8, 2012, 6:51 PM), <http://www.wfaa.com/news/local/tarrant/Bye-Bye-Birdie-177537181.html>.

91. Solis, *supra* note 11 (stating that a street sweeper being used by workers to put in a new water line churns up a billowing, stinky cloud that makes it difficult to breathe as the machine passes by the homes).

92. IND. DEP'T. OF NATURAL RES., GREAT BLUE HERONS 2, http://www.in.gov/dnr/fishwild/files/fw-Nuisance_Info_Great_Blue_Heron.pdf.

93. Fox News, *Invasion of Egrets Makes Life "Unbearable" in Texas*, FOX NEWS VIDEO (Aug. 8, 2012), <http://video.foxnews.com/v/1776408959001/invasion-of-egrets-makes-life-unbearable-in-texas/>.

94. TELFAIR II ET AL., *supra* note 84, at 1 (stating young birds are susceptible to starvation or may fall from nests and die in a person's yard).

95. *Animal Care and Control*, CITY OF FORT WORTH, TEX., <http://fortworthtexas.gov/migratorybirds/> (last visited Feb. 16, 2013).

96. *Id.*

97. John Metcalfe, *Texas City Losing Battle of the Egrets*, WJLA.COM (Aug. 11, 2011, 5:00 AM), <http://www.wjla.com/blogs/weather/2011/08/texas-city-losing-the-battle-of-the-egrets-video—12398.html>.

98. Fox News, *supra* note 93.

heronries are psittacosis, encephalitis, and arbovirus.⁹⁹ Psittacosis is a zoonotic infectious disease caused by bacterium and is contracted from parrots, macaws, and many other species of birds.¹⁰⁰ This disease has flu-like symptoms and can also develop into pneumonia and become deadly if not treated promptly.¹⁰¹

A similar situation between wild animals and their affect on human health has arisen in the Great Plains of the United States. The Black Tail Prairie Dog (“BTPD”) is not yet a protected species but is listed as a “continual candidate” for Endangered Species Act protection.¹⁰² There is a conflict between the benefit of the species and the negative impact it has on human health. The BTPD burrows in farmland-type environments and feeds on plant species that livestock typically do not eat.¹⁰³ The BTPD is an important species in the prairie environment because insects are dependent on the burrows that BTPDs create, and the BTPD itself is a food source for other animals.¹⁰⁴ However, BTPDs are transmitters of zoonotic diseases, including the bubonic plague.¹⁰⁵ And, as human and animal habitats begin to collide, more and more cases of human plague have surfaced.¹⁰⁶ The human health hazard associated with the overpopulation of the BTPD is a concern that factors into whether this species should be protected. This example reaffirms the position that if a species transmits disease, or if disease results from the exorbitant amount of excrement that a species leaves behind, the species should not be protected at the expense of human health.

Residents and visitors to the neighborhood have had to change their lifestyle during the months that the birds are nesting.¹⁰⁷ People that used to enjoy the walking trail through Tanglewood Trail now speed through and are subject to the stench and sight of bird excre-

99. *Journal—Chamberlain Drive Rookery Death Toll*, DFW URBAN WILDLIFE, (July 18, 2011), www.dfwurbanwildlife.com/2011/07/18/journal/july-18-2011-chamberlain-drive-rookery-death-toll/.

100. *Psittacosis*, CDC BACTERIAL, MYCOTIC DISEASES, http://www.cdc.gov/ncidod/dbmd/diseaseinfo/psittacosis_t.htm (last visited Jan. 13, 2009).

101. *Id.*

102. Christopher Pepper et al., *Threatened or Endangered? Keystone Species or Public Health Threat? The Black-Tailed Prairie Dog, The Endangered Species Act, and the Imminent Threat of Bubonic Plague*, 24 J. LAND RESOURCES & ENVTL. L. 355, 356; Christy Painter et al., *Black—Tailed Prairie Dog Conservation Assessment and Management Strategy 5* (last visited Nov. 12, 2009), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5167327.pdf (listed as a candidate species in 2000).

103. *Black Tailed Prairie Dog*, PRAIRIE DOG COALITION, <http://www.prairiedogcoalition.org/pd-black-tailed-prairie-dog.php> (last visited Feb. 16, 2013).

104. *Id.*

105. Pepper et al., *Threatened or Endangered? Keystone Species or Public Health Threat? The Black-Tailed Prairie Dog, The Endangered Species Act, and the Imminent Threat of Bubonic Plague*, *supra* note 102, at 366–67.

106. *Id.* at 377–78.

107. *See* Cutler, *supra* note 85.

ment.¹⁰⁸ One resident, Richard Steed, has to enter his home from the back door because of the bird nests above his front door, and the current options available to him are to either do nothing or take action and risk a criminal sanction because of the restrictions that the MBTA imposes.¹⁰⁹ He has counted eighty-five nests in his yard.¹¹⁰ He resorts to taking more business trips in the summer in order to escape the nasty conditions.¹¹¹ Residents also cover their personal property with plastic sheets to protect their things from being destroyed by caustic bird excrement.¹¹² The large amount of excrement kills the grass and flowerbeds in residents' yards and can destroy the paint on vehicles.¹¹³ The odor alone causes residents to feel as though they are living in a zoo.¹¹⁴

This heronry was an unexpected occurrence because it was the first time the egrets decided to land in this neighborhood, but it is probably not the last time and the neighborhood will probably lose much of its marketability. The well-known property case *Spur Industries, Inc. v. Del E. Webb Development Co.* involved a similar situation in which a neighborhood was located in the vicinity of a feedlot.¹¹⁵ The odor and flies from the feedlot were unhealthy to the residents and the feedlot was held a nuisance.¹¹⁶ This court said that a public nuisance is one that affects a considerable number of people, such as an entire community or neighborhood.¹¹⁷ The homes in the neighborhood became nearly impossible to sell because of the odors from the feedlot.¹¹⁸ One real estate agent who works in Tanglewood Trail has already noted that it is definitely an extra burden on the homeowner to clean the home and curtilage to prepare it for sale.¹¹⁹ One can easily infer that a home shown during the months when the egrets are nesting will not appeal much to a buyer especially if the buyer is informed about the restrictions on protecting their property that the MBTA imposes.

108. *Id.*

109. Campbell, *supra* note 11.

110. Solis, *supra* note 11.

111. Campbell, *supra* note 11.

112. Metcalfe, *supra* note 97.

113. Jason Allen, *Protected Egrets Concern Carrollton Neighborhood*, CBS DALL./FORT WORTH (May 30, 2011, 10:07 PM), <http://dfw.cbslocal.com/2011/05/30/protected-egrets-concerning-carrollton-neighborhood/>.

114. Solis, *supra* note 11 (“[T]he smell is not too nice . . . It’s probably worse than a zoo.”).

115. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972).

116. *Id.* at 705.

117. *Id.*

118. *Id.* at 704.

119. E-mail from Betsy Senter, Tanglewood Branch Manager, Coldwell Banker Residential Brokerage, to Author, (Oct. 15, 2012, 18:29 CST) (on file with Author).

IV. CURRENT LEGAL OPTIONS AVAILABLE TO PERSONS
NEGATIVELY AFFECTED BY BIRDS PROTECTED BY THE MBTA

A. *Prevention*

Prevention is the most advocated method of recourse that people can take against migratory birds when they interfere with living conditions. Preventing the formation of heronries is a method founded on the premise that nesting sites are widely available.¹²⁰ The Department of Engineering formed a Best Practice Method for prevention that avoids penalties from MBTA violations.¹²¹ The steps for Best Practice are as follows: patrol daily to see if any nests are forming, use sticky netting, noise making devices, water cannons, or an EPA-approved deterrent such as Bird-X or Bird Shield to scare away any birds that might be in the area.¹²² A Carrollton neighborhood worked together to take these steps to prevent a heronry from forming. One resident reported that neighbors walk through the neighborhood in the evenings sounding air horns.¹²³ The City of Carrollton is intending to use a propane cannon to scare away any birds.¹²⁴ Carrollton has had a rough experience with heronries in the past. In 1998, the City was fined \$70,000 for destroying a nesting area, and city officials are worried that cleaning the area throughout nesting season will lead to fines.¹²⁵

Another tactic to prevent the formation of heronries is to thin bushes and underbrush. Potential nest sites are typically densely vegetated, so cutting away some shrubs to create spaces between trees will help make the area unattractive to migratory birds.¹²⁶ The use of large orange scare balloons with owl faces on them is also a strategy. However, in Fort Worth, the scare balloons did not work and are now white from being covered with egret excrement.¹²⁷ These scare tactics must be effective to deter the birds from nesting, because once they start nesting, the Act proscribes disturbing the nests.¹²⁸ Residents have only a short amount of time to deter the birds. Once the birds scout out an area for nesting, they move in quickly.¹²⁹

120. TELFAIR II ET AL., *supra* note 84, at 6.

121. EFCOG Best Practice #56, *Managing Migratory Birds and In-use Nest*, EFCOG.ORG, http://www.efcog.org/bp/p/doc/BP56-Managing_Migratory_Birds.pdf.

122. *Id.*

123. *Texas Town Uses Cannons to Fight off Egrets*, WHDH.COM (Apr. 6, 2012, 3:55 PM), www1.whdh.com/news/articles/national/12007143854511/texas-town-uses-cannons-to-fight-off-egrets/.

124. *Id.*; see also Cathy Heidenreich, *Bye Bye Birdie-Bird Management Strategies for Small Fruit*, CORNELL U., CORNELL.EDU, <http://www.fruit.cornell.edu/berry/ipm/ipmpdfs/byebyebirdiesmallfruit.pdf> (describing the sounds a propane cannon elicits as very loud thunderclaps and the cannon can be timed to go off at certain increments).

125. Allen, *supra* note 113.

126. TELFAIR II ET AL., *supra* note 84, at 6.

127. Fox News, *supra* note 93.

128. Solis, *supra* note 11.

129. *Id.*

Deterrence is an especially unsatisfactory remedy for neighborhoods that have never experienced a migratory bird invasion. Since it is impossible to predict sites of heronries,¹³⁰ there is almost no defense against the first invasion. After breeding season ends, which is usually by October 1st, it is recommended that residents destroy nests that have been left behind so it will be less likely the birds will return the following year.¹³¹ However, this is no small or inexpensive task for Tanglewood Trail residents, such as Richard Steed, who have almost 100 nests in their yards, some of which are located high in the treetops.

B. *Permits*

Once the first egg is laid, the only option that residents have to defend their property is by filing for a permit because any habitat modification or destruction that occurs after nesting begins is subject to Migratory Bird Treaty Act penalties. Federal regulations that govern the issuance of permits for “taking” from a migratory bird are specified in Title 50 of the Code of Federal Regulations. A depredation permit can be issued to disturb a migratory bird that is wreaking havoc on a person’s property, including livestock and wildlife.¹³² For example, in *Fund for Animals v. Kempthorne*, cormorants, which are migratory birds not protected by the Endangered Species Act, experienced an immense population growth over the past decade.¹³³ The Fish and Wildlife Service received many complaints from fisherman and commercial catfish farmers because the cormorants were stealing the fish the farmers were attempting to cultivate.¹³⁴ The Second Circuit Court of Appeals held that a depredation order to “take” from cormorants to prevent pillaging of public resources was permissible.¹³⁵

Fifteen species of migratory birds can be controlled without a federal permit when causing depredation or when the population of birds is so great that they become a health hazard or nuisance.¹³⁶ Unfortunately for the residents of Tanglewood Trail and others that are negatively affected by heronries, egrets are not on the list even though they are a health hazard and nuisance.

The permitting process is not very accessible to the average person, and the process is quite tenuous and costly. To apply for a depredation permit a person must complete the information requirements

130. TELFAIR II ET AL., *supra* note 84, at 6.

131. Brett Johnson, *DFW Heronries*, TEX. PARKS & WILDLIFE, http://www.overtonpark-na.org/TPWD_Egrets.pdf.

132. DEPREDATION PERMITS, 50 C.F.R. § 21.41 (2012); DEPREDATION ORDER FOR BLACKBIRDS, COWBIRDS, GRACKLES, CROWS, AND MAGPIES, 50 C.F.R. § 21.43 (2012).

133. *Fund for Animals v. Kempthorne*, 538 F.3d 124, 128 (2d Cir. 2008).

134. *Id.* at 128.

135. *Id.* at 133.

136. 50 C.F.R. § 21.43 (2012).

listed in 50 CFR section 13.12(a) and 50 CFR section 21.41, some of which are: a description of the applicant, location of the depredation, the extent of the injury, the nature of the interests being injured, the particular species of migratory birds causing the injury, a description of the applicant’s previous efforts, and a description of the actions the applicant plans to take if the permit is issued.¹³⁷ The application also requires a fee of \$50 and the applicant should expect a delay of at least sixty days before receiving a permit, if one is issued.¹³⁸ If a permit is issued, it only lasts for a year at most and then needs to be re-issued.¹³⁹ Additionally, any birds that happen to be killed through depredation control must be collected by the applicant and turned over to a Bureau representative.¹⁴⁰ The delay and process of obtaining a permit, and the duration of only one year, is an obstacle for a person trying to protect his or her home from current damage of depredating migratory birds.

Yet, in 1989, a United States District Court said that requiring a permit before a person can defend his or her property from harm caused by wild animals is not an unreasonable restraint.¹⁴¹ In *United States v. Darst*, the defendant was charged with violating the MBTA because a great horned owl was found in a trap he had set up because the owls were killing his chickens.¹⁴² The court found him guilty and upheld the permit requirement on the basis that it is better to have a government official decide whether killing protected wildlife is necessary, rather than allowing the individual landowner to decide.¹⁴³

The Oregon Court of Appeals has also held that the permit requirement is a reasonable restraint on a person’s right to protect his property.¹⁴⁴ In *State v. Webber*, wild deer were feeding from the defendant’s hay ranch on his property.¹⁴⁵ The defendant did not obtain a permit and complying with the permit would require him to skin, dress, and dispose of a killed deer.¹⁴⁶ The court said that the premise of wildlife law is not to prevent a person from “taking” from wildlife that is damaging land the person owns or damaging livestock, agricultural, or forest crops on such land.¹⁴⁷ But, the defendant was found guilty of killing and wasting one deer because he did not have a permit

137. General Information Requirements on Applications for Permits, 50 C.F.R. § 13.12(a) (2009); 50 C.F.R. § 21.41; DEP’T OF THE INTERIOR, FED. FISH & WILDLIFE PERMIT APPLICATION FORM, <http://www.fws.gov/forms/3-200-13.pdf>.

138. DEP’T OF THE INTERIOR, *supra* note 137, at 1–4.

139. 50 C.F.R. § 21.41 (2012).

140. *Id.*

141. *United States v. Darst*, 726 F. Supp. 286, 288 (D. Kan. 1989).

142. *Id.* at 286–87.

143. *Id.* at 288.

144. *State v. Webber*, 736 P.2d 220, 221 (Or. Ct. App. 1987).

145. *Id.* at 222.

146. *Id.* at 221.

147. *Id.* at 222.

before acting in defense of his property.¹⁴⁸ Even if a permit requirement is beneficial to the public good,¹⁴⁹ the issue may arise where the property owner may continually lose more property during the delay of applying and waiting to receive a permit.

The strong blanket protections that the MBTA implements forces even the military to recognize the Act before training in an area that may be home to nesting migratory birds.¹⁵⁰ The Navy SEALs and Marines are required to adjust their training and create “work-around” options so as to not “take” from the nesting birds.¹⁵¹ Forcing our military to train in a “work-around” environment does not allow our troops to receive training most similar to actual wartime activities.¹⁵² Continual threats to the United States and the wars that our country has recently been involved in should lend importance to the standard of training our troops receive, even at the possible expense of migratory birds or their habitats.

V. POSSIBLE SOLUTIONS

A. *Repeal the Migratory Bird Treaty Act*

Because of the reasons previously stated, the Migratory Bird Treaty Act should be repealed. There are other options that would allow more freedom to property owners while maintaining an increased migratory bird population. The MBTA is not solely meeting its intended purpose of protecting migratory birds from rampant killings for the hunter’s economic gain, but the Act’s resulting effects limit what a person can do on his or her private property, even to the extent that a person cannot defend his or her property from damage that these birds cause. Since a depredation order for killing cormorants was permissible because the birds were killing the source of the farmer’s livelihood,¹⁵³ it should follow that when birds are creating human health hazards, human health should rank higher in priority of protection.

Since the Act was initially implemented to respond to the diminishing populations of migratory birds and now the population of migratory birds, especially egrets, is stable and not threatened, the Act has accomplished its goal of deterring rampant hunting and rebuilding bird populations.¹⁵⁴ Now, the remaining effects of the Act are mostly detrimental to human health and limiting on property rights. The En-

148. *Id.* at 221.

149. *United States v. Darst*, 726 F. Supp. 286, 288 (D. Kan. 1989).

150. Vogel, *supra* note 65, at 318.

151. *Id.* (defining “work-around” as “Plans that modify and sometimes restrict aspects of its training exercises.” Examples of work-arounds include limiting Marine training in the Mojave Desert in California to the daytime and restricting live and simulated fire operations).

152. *Id.* at 319.

153. *See Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008).

154. *See Green, supra* note 71.

dangered Species Act can and does protect migratory bird species if a population begins to decline.¹⁵⁵ But, because of greater education and a general cultural appreciation for species vital to the ecosystem, the chance of an early twentieth-century population slide reoccurring is minimal.

B. *Narrow the Migratory Bird Treaty Act*

Even changing the Act to solely charging criminal sanctions against hunters and poachers would give property owners more rights to protect their health and property against migratory bird invasions. This adjustment would not be a far cry from the possible intent of the 1918 Act.¹⁵⁶ Since courts have struggled with interpreting the Act to determine whether it is aimed at only hunters, or aimed at both intentional and unintentional killings, a narrower Act would be much clearer for people to abide by and give more flexibility to landowners attempting to protect their land and health. Taking a “people are generally good” approach, landowners will probably do minimal harm to wild animals in the course of protecting their property from harm.

The Act could also be narrowed by charging only civil penalties for violations committed without knowledge. Currently, a person will be strictly liable for a violation of the Act and subjected to a criminal charge of a misdemeanor.¹⁵⁷ The naïve violator will then have to carry the stigma of being labeled a “convict,” which can be a disgrace to someone’s character.¹⁵⁸ The Bald and Golden Eagle Protection Act (“BGEPA”) will only charge a violator with a criminal charge if he or she acted knowingly or with wanton disregard.¹⁵⁹ This standard relieves the naïve actor from having to suffer the stigma of “convict,” and that person will only be subjected to civil penalties. Additionally, the amount of the penalty is influenced by whether the person can show he or she acted in good faith.¹⁶⁰ Since the enactment of the BGEPA in 1962, the population of breeding pairs of bald eagles in North America has increased twenty-fold.¹⁶¹ This shows that a strict

155. Birds Protected by the Migratory Bird Treaty Act: Comparison with Other Federal Laws, U.S. FISH AND WILDLIFE SERVICE (1995), <http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/compare.pdf>.

156. See generally David G. Lombardi, *The Migratory Bird Treaty Act: Steel Shot Versus Lead Shot for Hunting Migratory Waterfowl*, 22 AKRON L. REV. 343 (1989) (stating that “the MBTA has largely been considered a hunting statute”).

157. 16 U.S.C. §707(a) (2006).

158. William A. Tilleman II, *It’s a Crime: Public Interest Laws (Fish and Game Statutes) Ignore Mens Rea Offenses Towards a New Classification Scheme*, 16 AM. J. CRIM. L. 279, 285 (1989).

159. 16 U.S.C. § 668(a).

160. § 668(b).

161. Susan Roeder Martin, *Continued Protection of the Bald Eagle After Delisting*, FLA. BAR J. 44 (Jul./Aug. 2008), available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Articles/21403E59E56EF1E98525747100638C5C>.

liability law that carries criminal charges may not be necessary for increasing and stabilizing migratory bird populations.

C. *Implement a Candidate Conservation Agreement to Protect Migratory Birds*

The Fish and Wildlife Service (“FWS”) has implemented a different type of program to protect species that are populous enough to avoid a listing for protection under the Endangered Species Act but may be vital to our ecosystem. One example of such species is the Dunes Sagebrush Lizard. In the summer of 2012, it was being considered whether to add the Dunes Sagebrush Lizard (“DSL”) to the Endangered Species List.¹⁶² The possible result if the listing had occurred would have been a drastic halt on the oil and gas industry in the Permian Basin.¹⁶³ The DSL’s sole habitat is the shinnery oak dune habitat,¹⁶⁴ one of which is located in the Permian Basin in New Mexico and Texas.¹⁶⁵ The Permian Basin produces roughly one million barrels of oil per day and four billion cubic feet of natural gas per day.¹⁶⁶ Not only would oil and gas production be halted in the Permian Basin if the lizard was added to the Endangered Species List, but approximately 27,000 jobs would be lost.¹⁶⁷ The FWS points to the oil wells themselves, the access roads, pipelines, and seismic exploration as activities that significantly threaten the DSL’s habitat.¹⁶⁸

The possible extreme detriment to the Texas economy and to a large domestic energy source¹⁶⁹ that would result from halting production in the Permian Basin gave rise to the Texas Conservation Plan (“TCP”). This plan is a Candidate Conservation Agreement with Assurances (“CCAA”). A CCAA is a conservation tool that provides regulatory assurances to non-federal property owners who voluntarily agree to manage their lands or waters in such a way that would-be threats to proposed species are removed or significantly reduced.¹⁷⁰ For this Article’s purpose, only the inclusion of non-federal landown-

162. Sartain, *supra* note 39.

163. *Id.*

164. Species Profile for Dunes Sagebrush Lizard, U.S. FISH & WILDLIFE SERV., <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=C03J> (last updated Dec. 29, 2012).

165. Sartain, *supra* note 39.

166. Taylor Kilroy, “*Reptile Dysfunction*”: *How Can a Three-inch Lizard Threaten to Shut Down the Oil and Gas Industry in the Permian Basin?*, 7 ENVTL & ENERGY L. & POL’Y J. 87, 88 (2012).

167. Laura Peterson, et al., *Natural Resource “Conflicts” in the U.S. Southwest: A Story of Hype Over Substance*, 12 SUSTAINABLE DEV. L. & POL’Y 32, 34 (2011).

168. Kilroy, *supra* note 166, at 94.

169. Texas Conservation Plan for the Dunes Sagebrush Lizard 1, U.S. FISH & WILDLIFE SERV., (Feb. 13, 2012), http://www.fws.gov/southwest/es/Documents/R2ES/TX_CP_for_DSL_20120213.pdf (stating that the Permian Basin provides 20% of nation’s domestic energy source).

170. *Id.* at 4.

ers is germane. Non-federal landowners can voluntarily agree through a Certificate of Inclusion (“CI”) to participate in a CCAA.¹⁷¹ If the landowner chooses to participate, he or she is then only responsible for implementing and maintaining the conservation measures that he or she agreed to in the CI.¹⁷²

A non-federal participant is only required to address those threats that he or she can control pursuant to property rights.¹⁷³ Some ways property owners can do this is by creating new habitats, protecting existing populations or habitats, or removing threats to the species that are located on the property.¹⁷⁴ Once a person signs a CI pursuant to a CCAA, he or she is provided with the assurances that he or she will not become responsible for additional conservation measures and will not incur additional regulatory obligations if the covered species is later listed under the ESA.¹⁷⁵ This type of plan has worked for maintaining the population of the DSL since February 2012, while also allowing the oil industry to continue operations.¹⁷⁶ Since a CCAA has been used successfully for a variety of species,¹⁷⁷ it could be applied to migratory birds as well.

The DSL has found itself in several battles between economic interests and conservation, between private landowners and government regulation, and between voluntary and government-mandated regulation;¹⁷⁸ battles which are similar to those that have resulted from the continued implementation of the MBTA. As applied to the previously discussed conflict that has arisen in Tanglewood Trail, residents could sign a CI agreeing to take reasonable measures to conserve the egrets and the nests. A voluntary agreement would give a homeowner a feeling of control over his or her property and actual control over the property. For instance, Richard Steed could take the necessary measures to be able to access his home through his front door again, but also agree to maintain the egret nests that are in his backyard. Then those residents that have agreed to take measures to conserve the egrets and their habitat will have the protection of not being obligated to take further measures in the future if the egret population

171. *Id.* at 1.

172. *Id.* at 5.

173. *Id.*

174. *Id.*

175. *Id.*

176. Sartain, *supra* note 39.

177. See Candidate Conservation Agreement for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico, U.S. FISH & WILDLIFE SERV., (Dec. 8, 2008), http://www.fws.gov/southwest/es/Documents/R2ES/LPC-SDL_CCA-CCAA_2008.pdf (protection agreement for the Lesser Prairie-Chicken); Candidate Conservation, Endangered Species Program, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/Endangered/what-we-do/cca.html> (last visited Aug. 28, 2012) (describing different agreements that cover the Louisiana Pine Snake, Yellowcheek Darter, and Southern Idaho Ground Squirrel).

178. Kilroy, *supra* note 166, at 88–89.

does happen to decline to a threatened level. The halt on the oil industry in the Permian Basin that would have resulted from listing the DSL on the Endangered Species List resembles the handcuffing limitations that the MBTA places on people and their use of their property. So, it would seem logical and appropriate to implement an agreement that gives the property owner freedom to protect his or her property, home, and health.

VI. CONCLUSION

When the Migratory Bird Treaty Act was implemented, lawmakers probably did not foresee the negative effects on property rights and human health that could eventually transpire. Animal laws are generally regarded as providing protection to maintain the species itself and protection for the purpose of keeping a balanced ecosystem that is vital and beneficial to human life. Economic utility of a species for human benefit has also been a factor when determining the level of protection a species deserves. But when species protection begins to hinder human property rights and risk human health, it may be time to re-evaluate the necessity of the regulation.

The time to reconsider the necessity and structures of the MBTA has arrived. Egrets, which were once almost killed to extinction because of people's desire for their feathers, have had a major population rebound and have become a nuisance for property owners in North Texas. The health risks associated with a person's exposure to a magnitude of birds, in an area covered by their droppings, undermines the value of the MBTA. With continued efforts by organizations (such as PETA and Audubon Society) to educate the public on the valuable role birds play in the ecosystem, migratory birds may be able to remain at a stable population without the aid of the MBTA. Furthering that hope is the societal trend away from using animal furs and feathers in fashion.

But if, in the future, the populations of certain species of migratory birds are at risk of extinction or suffer from threatened habitat, the Endangered Species Act is still available to protect them. Or, a more specifically tailored conservation plan, such as the Texas Conservation Plan or another CCAA could be put in place. A CCAA would eliminate the potential for people who "take" from migratory birds from being charged with undeserving misdemeanors, a consequence that the MBTA imposes. Such plans have proven effective in maintaining populations and environments of other species. If applied to migratory birds, a conservation plan would ultimately allow the property owner more freedom while promoting animal conservation.