

July 2013

## Problems for Pale Male: An Analysis of the U.S. Fish and Wildlife Service's Nest Destruction Policy

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### Recommended Citation

Brent Plater, Nicole Lopez-Hagan, and Laura Horton, *Problems for Pale Male: An Analysis of the U.S. Fish and Wildlife Service's Nest Destruction Policy*, 30 Pace Env'tl. L. Rev. 811 (2013)

DOI: <https://doi.org/10.58948/0738-6206.1727>

Available at: <https://digitalcommons.pace.edu/pelr/vol30/iss3/1>

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ARTICLE

**Problems for Pale Male: An Analysis of the  
U.S. Fish and Wildlife Service's Nest  
Destruction Policy**

BRENT PLATER\*

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**I. INTRODUCTION**

During the 2004 holiday season, Pale Male, New York City's celebrated and world-renowned red-tailed hawk, had his nest deliberately destroyed. The nest was approximately 400-pounds and was built over several years. Almost immediately, this act of

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All authors would like to thank the editors of Pace Environmental Law Review for their assistance with this article.

destruction was met with popular uproar among his many fans throughout the world. Newspapers ran stories as far away as Saudi Arabia and India, and over ten articles appeared in the New York Times. Protests and vigils were held outside the apartment building while Pale Male and his mate, Lola, fruitlessly attempted to rebuild their nest. The pair's efforts failed because the structure that had previously supported the nest had been deliberately removed to prevent the birds from nesting again. After twenty-one days of public pressure, the building's co-op board, which originally ordered the nest destruction, bowed to public pressure and reinstalled a supporting structure for Pale Male and Lola.<sup>1</sup> The red-tailed hawks immediately began to rebuild their nest.<sup>2</sup>

Unfortunately, although the pair mated in the spring of 2005 and Lola laid a clutch of eggs, the eggs failed to hatch<sup>3</sup>—possibly because of the stress inflicted by their eviction or because the nest was too thin, causing the eggs to be damaged by its supporting structure. Over the next seven years, Pale Male and Lola continued to produce eggs that would not hatch. Although Pale Male finally was able to produce offspring with a new mate in 2011,<sup>4</sup> during those years when his eggs failed to hatch Pale Male did not recruit new members into the local population, and his birdwatching fans did not have a new set of nestlings to celebrate.

This tragic story could easily have been avoided if the United States Fish and Wildlife Service (Service) had correctly carried out its duties under the Migratory Bird Treaty Act (MBTA). The MBTA expressly prohibits the destruction of migratory birds and their nests unless the Service issues a permit to do so. Although the Fifth Avenue building co-op board applied for a permit to remove Pale Male's nest, it was told by the Service that no permit was necessary because the nest was "unoccupied," which it

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1. Jesse Greenspan, *How the Nest Was Won*, AUDUBONMAGAZINE.ORG, Mar. 2005, <http://www.audubonmagazine.org/features0503/paleMale.html>.

2. *Id.*

3. Thomas J. Lueck, *5th Ave. Address, but No Youngsters in Nest*, N.Y. TIMES, Apr. 29, 2005, [http://www.nytimes.com/2005/04/29/nyregion/29pale.html?\\_r=2&](http://www.nytimes.com/2005/04/29/nyregion/29pale.html?_r=2&).

4. Donegal Browne, *Sam Says It's a Hatch as Do the Rest of This Evenings Hawk Bench Warmers!!!*, PALEMALEIRREGULARS (May 21, 2011), [http://palemaleirregulars.blogspot.com/2011\\_05\\_15\\_archive.html](http://palemaleirregulars.blogspot.com/2011_05_15_archive.html).

defined as a nest “without birds or eggs.”<sup>5</sup> The Service made this determination even though Pale Male and Lola were residing in the nest year-round.

This odd result is the product of a Service policy that, counter-productively, encourages the destruction of nests, even if a property owner is willing to move it rather than destroy it, by making it easier to destroy nests than to live with them.<sup>6</sup> Under this policy, anyone may destroy a nest so long as no egg or fledgling is within it at the moment of destruction, regardless of whether an adult bird is using the nest for shelter, roosting, or returns to the same nest every spring.<sup>7</sup> Because of this, functioning bird nests can be destroyed without oversight from expert biologists and without legal consequence.

The faulty logic the Service uses to justify its new destructive policy is found in the Migratory Bird Permit Memorandum (Policy Memo) issued on April 15, 2003.<sup>8</sup> In this memorandum, the Service speciously argues that so long as a bird nest is destroyed without “possession,” there is no violation of the MBTA and therefore no permit or authorization from the Service to destroy the nest is required.<sup>9</sup> The Policy Memo contains spurious logic, creates absurd results, is inconsistent with other Service regulations,<sup>10</sup> and is contrary to the purpose and spirit of the MBTA: to conserve birds and nests as the invaluable natural

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5. Letter from David A. Dobias, Chief, Migratory Bird Permit Office, U.S. Fish & Wildlife Serv., to Noreen McKenna, Assistant Sec’y, 927 Fifth Avenue Corp. (Apr. 30, 2004) (on file with author).

6. E-mail from Tami Tate-Hall, Former Permits Officer, U.S. Fish & Wildlife Serv., Region 1, to Kamile McKeever, Permits Adm’r, U.S. Fish & Wildlife Serv., Region 2 (Jan. 13, 2005) (on file with author). These e-mail exchanges between U.S. Fish & Wildlife Service employees and officers, cited throughout this article, were procured by the author through a Freedom of Information Act request and are on file with the author.

7. *Id.*

8. Memorandum from Steve Williams, Dir., U.S. Fish & Wildlife Serv. on the Migratory Bird Permit Policy (Apr. 15, 2003) [hereinafter Policy Memo], available at <http://www.fws.gov/policy/m0208.pdf>.

9. *Id.*

10. It is also inconsistent with state law. For example, Pale Male’s nest should not have been destroyed by 927 Fifth Avenue Corporation without first obtaining a permit from the New York State Department of Environmental Conservation, as required by New York Environmental Conservation Law § 11-0505(5). See N.Y. ENVTL. CONSERV. LAW § 11-0505(5) (McKinney 2013).

resources they are. What happened to Pale Male years ago is still a possibility today because the Service's policy remains the same. This article addresses these issues and urges the Service to comply with the MBTA by demanding that individuals receive permits to destroy any bird nest before the destruction occurs.

## II. BIRDS ARE ESSENTIAL TO THE HEALTH AND WELL-BEING OF PEOPLE, SUSTAINABLE ECOSYSTEMS, AND PRODUCTIVE AGRICULTURE, AND THEREFORE DESERVE COMPREHENSIVE LEGAL PROTECTION

Migratory birds have received legal protection in statutes and treaties for approximately ninety years. According to the North American Bird Conservation Initiative—co-chaired by the then-director of the Service—we should be concerned about bird populations for three reasons.<sup>11</sup> First, “birdwatching is the fastest-growing form of outdoor recreation in the United States . . . .”<sup>12</sup> Second, “healthy bird populations are indicators of healthy ecosystems, which are needed by both wildlife and people.”<sup>13</sup> Finally, “birds are important in their own right, as significant components of our biological heritage and in performing numerous ecological roles,” such as pollination and controlling pest and insect populations, which “bring us enormous economic benefits.”<sup>14</sup> Thus we need to protect this resource for the benefit of both human beings and other wildlife.

### A. Birds Have Great Cultural Value

The American public has a strong affinity for birds, wildlife, and outdoor recreational activities. Millions of people participate in wildlife-watching. The average number of days spent wildlife watching by the “avid” wildlife watcher increased from 231 in

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11. U.S. N. AM. BIRD CONSERVATION INITIATIVE (NABCI) COMM., NORTH AMERICAN BIRD CONSERVATION INITIATIVE: BRINGING IT ALL TOGETHER 7 (Sept. 2000), *available at* <http://www.nabci-us.org/aboutnabci/fwsbroch.pdf>.

12. *Id.* at 6.

13. *Id.*

14. *Id.*

1991 to 339 in 2006.<sup>15</sup> Birds are highly visible, diverse, and relatively easy animals to observe. As such, they attract the largest following of wildlife-watchers at 47.7 million in 2006: 94% of all wildlife observers and 21% of the total U.S. population over the age of sixteen.<sup>16</sup>

Birds have inspired human societies for centuries. As symbols of freedom, agility, strength, determination, and spirit, they have played a prominent cultural role as totemic and folkloric figures. Birds serve as namesakes of places and sports teams, and national symbols on flags and currency.<sup>17</sup> For instance, the Congressional Research Service has said that as the nation's symbol, the Bald Eagle, represents "American ideals of freedom."<sup>18</sup> Furthermore, "bald eagle imagery is ubiquitous in American culture, attesting to the widespread symbolic importance the bald eagle holds in American society."<sup>19</sup> In religion, birds are icons and omens; scavenger species are central to many funeral practices. Birds are also important in art. Their feathers have been used for adornment and ornamentation. Finally, birds are a prominent source of inspiration, for works of fine art, literature, and music.

Strong public reactions have been elicited by actions perceived as harming birds. The bald eagle became a symbol for conservation organizations and the environmental movement due to the story of its population fluctuations resulting from shooting,

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15. U.S. FISH & WILDLIFE SERV., WILDLIFE WATCHING TRENDS 1991-2006: A REFERENCE REPORT ADDENDUM TO THE NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION REPORT 2006-3 67 (2006), *available at* <http://digitalmedia.fws.gov/cdm/ref/collection/document/id/150>.

16. *Id.* at 44.

17. HUMBERTO BERLANGA ET AL., SAVING OUR SHARED BIRDS: PARTNERS IN FLIGHT TRI-NATIONAL VISION FOR LANDBIRD CONSERVATION 6 (2010), *available at* [http://www.savingoursharedbirds.org/final\\_reports\\_pdfs/PIF2010\\_English\\_Final.pdf](http://www.savingoursharedbirds.org/final_reports_pdfs/PIF2010_English_Final.pdf).

18. KRISTINA ALEXANDER, CONG. RESEARCH SERV., RL 34174, WHAT HAPPENS TO THE BALD EAGLE NOW THAT IT IS NOT PROTECTED UNDER THE ENDANGERED SPECIES ACT? 4 (2010).

19. DIV. OF MIGRATORY BIRD MGMT., U.S. FISH & WILDLIFE SERV., FINAL ENVIRONMENTAL ASSESSMENT: DEFINITION OF "DISTURB" AS APPLIED UNDER THE BALD AND GOLDEN EAGLE PROTECTION ACT 9 (2007) [hereinafter DEFINITION OF "DISTURB"], *available at* <http://www.swbemc.org/pdf/DisturbEAFinal.pdf>.

deforestation, and pesticides.<sup>20</sup> This sentiment continues as iconic state birds like the Baltimore oriole, black-capped chickadee, purple finch, brown thrasher, and American goldfinch populations decline in their honorary states.<sup>21</sup>

## B. Birds Have Great Ecological Value

Birds are also a valuable part of America's natural heritage. There are more than 900 species and fifty-eight taxonomic families (twice as many as mammals) that collectively occupy every major habitat in North America alone.<sup>22</sup> Their unique adaptations include a raptor's binocular vision, keen hearing, razor talons and hooked beaks for catching prey, the long bills, legs, and toes of waders for foraging on mudflats and wetlands, and earth-tone plumage to camouflage adults incubating their eggs on the ground.<sup>23</sup> The study of birds has added greatly to our knowledge of the natural sciences, famously inspiring Darwin's theories of evolution and contributing to our understanding of such concepts as territory, migration, and imprinting.<sup>24</sup> The diversity of the avian species is matched by a corresponding diversity of ecological functions, the most diverse range of any

20. *Id.*; see also Press Release, Nat'l Audubon Soc'y, Bald Eagle Back From the Brink (June 26, 2007), available at <http://www.audubon.org/newsroom/press-releases/2007/bald-eagle-back-brink>.

21. Les Line, *Silent Spring: A Sequel?*, NAT'L WILDLIFE FED'N (Dec. 1, 2002), <http://www.nwf.org/News-andMagazines/NationalWildlife/Birds/Archives/2003/Silent-Spring-A-Sequel.aspx>.

22. BERLANGA ET AL., *supra* note 17, at 8; see also Cagan H. Sekercioglu, *Increasing Awareness of Avian Ecological Function*, 21 TRENDS IN ECOLOGY & EVOLUTION 464 (2006), available at [http://www.stanford.edu/~cagan/Sekercioglu\\_TREE2006.pdf](http://www.stanford.edu/~cagan/Sekercioglu_TREE2006.pdf).

23. DIV. OF MIGRATORY BIRD MGMT., U.S. FISH & WILDLIFE SERV., *Colonial-Nesting Waterbirds: A Glorious and Gregarious Group* (Jan. 2002), <http://www.fws.gov/birds/Waterbird-Fact-Sheet.pdf>; DIV. OF MIGRATORY BIRD MGMT., U.S. FISH & WILDLIFE SERV., *Shorebirds: Waders of Shores, Wetlands and Grasslands* (Jan. 2002), <http://www.fws.gov/birds/Shorebird-Fact-Sheet.pdf>; DIV. OF MIGRATORY BIRD MGMT., U.S. FISH & WILDLIFE SERV., *Raptors: Diurnal and Nocturnal Birds of Prey* (Jan. 2002), <http://www.fws.gov/birds/Raptor-Fact-Sheet.pdf>.

24. U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD TREATY ACT: AN INTERNATIONAL RESPONSIBILITY (Oct. 2004), available at [http://training.fws.gov/branchsites/CSP/Resources/mig\\_birds%5CCCD%5CFact%20Sheets%20and%20Articles%5CMBTA%20Fact%20Sheet.pdf](http://training.fws.gov/branchsites/CSP/Resources/mig_birds%5CCCD%5CFact%20Sheets%20and%20Articles%5CMBTA%20Fact%20Sheet.pdf).

group of vertebrates.<sup>25</sup> With the mobility to connect even far-distant habitats, the movements and feeding of birds “can alter vegetation structure . . . , invertebrate densities, and the mixing of sediments . . . .”<sup>26</sup> Thus, birds (especially migrants) become crucial to maintaining ecosystem function, memory, and resilience.<sup>27</sup>

Birds serve as important transporters of genetic information through seed dispersal and pollination.<sup>28</sup> More than 900 bird species, particularly hummingbirds, sunbirds, and honeyeaters, pollinate around 500 vascular plant genera.<sup>29</sup> Birds provide higher quality pollination due to their higher energy needs, which cause birds to visit more flowers regularly, increasing gene flow.<sup>30</sup> Many rare plant species with sparsely distributed and isolated populations are particularly dependent on birds, and are in danger of becoming extinct should bird populations decline.<sup>31</sup>

Birds also transport important external nutrients and minerals between environments. Seabird guano can transfer  $10^4$ – $10^5$  tons of phosphorous to land, while waterfowl can input 40% of the nitrogen and 75% of the phosphorous entering wetlands.<sup>32</sup> Deserts like the Gulf of California islands are dependent on birds to introduce nutrients from the surrounding high-productivity environments.<sup>33</sup> The reduction of seabirds in the Aleutian Islands has resulted in a decrease of nutrient deposition and declines in soil phosphorous, marine-derived nitrogen, and plant nitrogen content, triggering an ecosystem transformation from grassland to maritime tundra.<sup>34</sup>

Birds can also modify their environment, physically transforming materials from one state to another. For instance,

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25. Sekercioglu, *supra* note 22, at 464.

26. U.S. ENVTL. PROT. AGENCY, BIRDS AS INDICATORS OF PRAIRIE WETLANDS INTEGRITY (1995) [hereinafter BIRDS AS INDICATORS], *available at* [http://water.epa.gov/type/wetlands/assessment/pph2\\_6.cfm](http://water.epa.gov/type/wetlands/assessment/pph2_6.cfm).

27. *Id.*

28. *See* Sekercioglu, *supra* note 22, at 464.

29. *Id.* at 466.

30. *Id.*

31. *Id.* at 466.

32. *Id.* at 467.

33. *Id.* at 467.

34. Sekercioglu, *supra* note 22, at 466.



the largest avian nests, built by colonial social weavers, can bring down trees. Cavity and burrow diggers, including woodpeckers can provide food resources to nectarivorous birds through the construction of nests.<sup>35</sup> Their nests are also essential to frugivorous and predaceous birds, as well as other wildlife.<sup>36</sup> Through such tasks as nest-building, birds can affect the composition and evolution of the plant community and entire ecosystems.

Predatory and insectivorous birds have a more direct effect on invertebrate and vertebrate populations.<sup>37</sup> These birds are able to respond to increases and decreases in prey populations much more quickly than nonflying predators.<sup>38</sup> Not only do the birds reduce pest populations directly, but they also affect prey behavior.<sup>39</sup> They limit populations by reducing foraging and provide indirect defense for nests of other birds, for example.<sup>40</sup> They stabilize predator-prey dynamics, leading to higher species richness through competitive coexistence.<sup>41</sup> For example, nesting wood warblers in the boreal forests of eastern North America promote tree growth by consuming up to 84% of eastern spruce budworm larvae and pupae, which defoliate millions of acres of timberland every year.<sup>42</sup>

Scavenger birds can provide sanitary services.<sup>43</sup> Through waste disposal and recycling, they facilitate decomposition and the continued flow of energy and nutrients through the food web.<sup>44</sup> Leaf litter gleaning is a unique ecological function performed by certain species of birds.<sup>45</sup> "Vultures are the only known obligate vertebrate scavengers," highly specialized to rapidly dispose of the bodies of large animals.<sup>46</sup> The decline of

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35. *Id.* at 469; BERLANGA ET AL., *supra* note 17, at 6.

36. Sekercioglu, *supra* note 22, at 469.

37. *Id.* at 465.

38. *Id.* at 468.

39. *Id.*

40. *Id.*

41. *Id.*

42. Line, *supra* note 21.

43. Sekercioglu, *supra* note 22, at 467.

44. *Id.* at 468.

45. *Id.* at 464.

46. *Id.* at 468.

vultures in India has had serious public and wildlife health consequences, leading to an increase in rotting carcasses and other mammalian scavengers including feral dogs and rats, which are disease vectors.<sup>47</sup>

A quarter or more of frugivorous, omnivorous, and tropical forest insectivorous bird species, and one third of herbivorous, piscivorous, and scavenger species are extinction-prone.<sup>48</sup> This can have serious consequences for all other plant and animal species, including humans, which depend upon the ecological services that birds provide.<sup>49</sup> Because birds have a strong influence on natural ecosystems through their interactions with other species, the Council on Environmental Cooperation recognized that “migratory birds are a particularly important component of North American biodiversity” in its 1996 Annual Report.<sup>50</sup> Stanford ecologist Cagan H. Sekercioglu also warns that “there is a pressing need to compare avian ecological functions,” in particular, “to those of other taxa, to understand how these functions translate to ecosystem services and to estimate the ecological implications of bird declines,” which “can rapidly diminish certain ecosystem processes before we can study the underlying mechanism.”<sup>51</sup>

BirdLife International and the European Bird Census Council state that “[b]iodiversity is a vital indicator of the wellbeing of our planet.”<sup>52</sup> The more diversity there is, the more likely that there is one species that can fulfill a function efficiently. On the other hand, the more specialized and

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47. *Id.*

48. Cagan H. Sekercioglu, Gretchen C. Daily & Paul R. Ehrlich, *Ecosystem Consequences of Bird Declines*, 101 PNAS 18042, 18043 (2004), available at <http://www.pnas.org/content/101/52/18042.full.pdf>.

49. *Id.* at 18044.

50. COMM’N FOR ENVTL. COOPERATION, ANNUAL REPORT 13 (1996), available at [http://www.cec.org/Storage/93/9085\\_ar96\\_en.pdf](http://www.cec.org/Storage/93/9085_ar96_en.pdf).

51. Cagan H. Sekercioglu, *Increasing Awareness of Avian Ecological Function*, 21 TRENDS IN ECOLOGY & EVOLUTION 464, 464, 469 (2006), available at [http://www.stanford.edu/~cagan/Sekercioglu\\_TREE2006.pdf](http://www.stanford.edu/~cagan/Sekercioglu_TREE2006.pdf); Sekercioglu, *supra* note 22, at 464.

52. BIRDLIFE INT’L & EUROPEAN BIRD CENSUS COUNCIL, BIRDS AS BIODIVERSITY INDICATORS FOR SUSTAINABILITY: A PAN-EUROPEAN STRATEGY 1 (2003) [hereinafter BIRDS AS BIODIVERSITY INDICATORS], available at [http://www.birdlife.org/action/science/indicators/pdfs/eur\\_biodiversity\\_indicators.pdf](http://www.birdlife.org/action/science/indicators/pdfs/eur_biodiversity_indicators.pdf).

evolutionarily unique a species is, the more likely it is to go extinct. The reduction or extinction of one population can cause significant changes throughout an ecosystem, eventually disrupting processes and services that are important to human society.<sup>53</sup> It is important to maintain structurally diverse habitats, in order to host the widest variety of species possible and ensure the sustainability of entire ecosystems.<sup>54</sup>

Furthermore, declines in bird species are indications of changes elsewhere in their environment.<sup>55</sup> Because birds have such a diverse and unique array of critical ecological roles, bird populations are dependent upon the health of larger ecosystems.<sup>56</sup> Birds are often used as indicator species, for parameters too difficult, inconvenient, and/or expensive to measure directly.<sup>57</sup> Birds can indicate changing biodiversity, species richness, and occurrence of rare and threatened species.<sup>58</sup> Birds are used to monitor the condition of ecosystems and habitats, including forests, rainforests, grasslands, rangelands, riparian ecosystems, terrestrial wetlands, marine ecosystems, and even urban areas.<sup>59</sup> They can indicate presence of contaminants such as pesticides, heavy metals, and polychlorinated biphenyls in the environment.<sup>60</sup> Additionally, birds have been monitored in order to assess the impact of stressors, including disturbances and processes like urban

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53. Cf. Sekercioglu, *supra* note 22; *see also* Sekercioglu, Daily & Ehrlich, *supra* note 48.

54. TAMMY VERCAUTEREN & SCOTT W. GILLIHAN, ROCKY MOUNTAIN BIRD OBSERVATORY, INTEGRATING BIRD CONSERVATION INTO RANGE MANAGEMENT 9 (2004), *available at* [http://www.rmbo.org/dataentry/postingArticle/dataBox/RMBO\\_SARE\\_manual\\_Jun\\_06.pdf](http://www.rmbo.org/dataentry/postingArticle/dataBox/RMBO_SARE_manual_Jun_06.pdf).

55. *See* BIRDLIFE INT'L, *Wild Bird Indices: Tracking Trends in the Condition of Habitats*, [http://www.birdlife.org/action/science/indicators/common\\_birds.html](http://www.birdlife.org/action/science/indicators/common_birds.html) (last visited Apr. 6, 2012).

56. *Id.*; BIRDS AS BIODIVERSITY INDICATORS, *supra* note 52; N. AM. BIRD CONSERVATION INITIATIVE, U.S. COMM., THE STATE OF THE BIRDS: UNITED STATES OF AMERICA 3 (2009), *available at* [http://www.stateofthebirds.org/2009/pdf\\_files/State\\_of\\_the\\_Birds\\_2009.pdf](http://www.stateofthebirds.org/2009/pdf_files/State_of_the_Birds_2009.pdf).

57. Scott A. Chambers, *Birds as Environmental Indicators: Review of Literature*, in PARKS VICTORIA TECHNICAL SERIES NO. 55, 15 (2008), *available at* [http://parkweb.vic.gov.au/\\_\\_data/assets/pdf\\_file/0018/314523/19\\_2346.pdf](http://parkweb.vic.gov.au/__data/assets/pdf_file/0018/314523/19_2346.pdf).

58. *Id.* at 11.

59. *Id.*

60. *Id.*

expansion, logging, hydrological regimes, eutrophication, replacement of endemic ecosystems with plantations, grazing, and hunting, as well as the success of threat-response activities like restoration programs.<sup>61</sup> Thus, bird indicators provide essential information to management agencies for prioritizing and planning, “directing future policies towards improving the health of the . . . environment and in helping . . . to meet . . . international obligations in protecting freshwater ecosystems,” and allow progress toward established targets for sustainability to be quantified and tracked.<sup>62</sup>

Measures promoting conservation of migratory birds can also promote sustainability on a global level.<sup>63</sup> Birds can provide insight into the characteristics indicating the health of the environment as a whole, and can be used to devise measures to maintain the general quality of the ecosystems and habitats where birds occur.<sup>64</sup> In sum, as explained by Waterbird Conservation for the Americas, the conservation of bird species “can help protect the broader landscape.”<sup>65</sup>

### C. Birds Have Great Economic Value

A 2009 report from the Service shows that birding activities can be a tremendous benefit to the U.S. economy.<sup>66</sup> Bird

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61. *Id.*; BIRDLIFE INT’L, *Monitoring and Indicators*, <http://www.birdlife.org/action/science/indicators/index.html> (last visited Apr. 6, 2012); BIRDS AS INDICATORS, *supra* note 26; N. Prairie Wildlife Research Ctr., *Birds as Indicators of Riparian Vegetation Condition in the Western U.S.*, U.S. GEOLOGICAL SURVEY, <http://www.npwrc.usgs.gov/resource/birds/ripveg/index.htm> (last visited Apr. 10, 2013); DAVID KIRK, CANADIAN ENVTL. ASSESSMENT AGENCY, A DECISION SUPPORT TOOL TO AID IN EVALUATING SIGNIFICANCE OF ADVERSE EFFECTS ON BIRDS 4 (2001), *available at* <http://dsp-psd.pwgsc.gc.ca/Collection/En105-63-2001E.pdf>.

62. David Noble, *The Importance of Indicators*, 9 BIRD POPULATIONS 236, 237 (2008), *available at* [http://birdpop.net/pubs/files/noble/2009/571\\_Noble2009.pdf](http://birdpop.net/pubs/files/noble/2009/571_Noble2009.pdf).

63. *See* JAMES A. KUSHLAN ET AL., WATERBIRD CONSERVATION FOR THE AMERICAS: NORTH AMERICAN WATERBIRD CONSERVATION PLAN 5, *available at* [http://www.waterbirdconservation.org/pdfs/plan\\_files/complete.pdf](http://www.waterbirdconservation.org/pdfs/plan_files/complete.pdf).

64. Chambers, *supra* note 57, at 5.

65. KUSHLAN ET AL., *supra* note 63, at 5.

66. *See* ERIN CARVER, U.S. FISH & WILDLIFE SERV., BIRDING IN THE UNITED STATES: A DEMOGRAPHIC AND ECONOMIC ANALYSIS, ADDENDUM TO THE 2006 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 11 (2009), *available at* [http://library.fws.gov/Pubs/birding\\_natsurvey06.pdf](http://library.fws.gov/Pubs/birding_natsurvey06.pdf).

watching, feeding, and photography, generates billions of dollars in direct expenditures and industry output, hundreds of thousands of jobs, and billions more dollars in state, federal, and local tax revenues across the United States.<sup>67</sup> While many birders may engage in these activities in their own backyards, there has been an increase in the number of people birdwatching away from home.<sup>68</sup> Bird tourism can be an important source of income for local economies. Ecotourism has led to the growth of bird festivals and specialized tour packages in Mexico and other countries, and locations in the United States also serve as birding hotspots.<sup>69</sup> In 2006, 73% of the birders in Wyoming and more than 45% in Hawaii, Vermont, New Mexico, and Montana all came from outside those states.<sup>70</sup> Central Park is famous for its birdwatching, as evidenced by Pale Male's large fan base from all over the country.<sup>71</sup> In addition, Texas has both diverse habitats and bird species, and the Matagorda County-Mad Island Marsh region often leads the nation with the highest tallies for the most species in the Christmas Bird Count.<sup>72</sup>

Furthermore, as early as the late 18th century a government study estimated that 90% of migratory birds directly benefit farmers.<sup>73</sup> Birds pollinate 3.5% to 5.4% of more than 1,500 crop species.<sup>74</sup> The nutrients in bird guano, which can be deposited thousands of kilometers away from the source, are important for crop fertilization.<sup>75</sup> Additionally, the net economic value of birds as a form of pest control for agriculture and other affected industries is significant; it is estimated at \$5.4 billion in Canada's

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67. *Id.* at 13.

68. *Id.* at 10.

69. BERLANGA ET AL., *supra* note 17, at 6.

70. CARVER, *supra* note 66, at 9.

71. See Sarah McCarn Elliott, *Not Just a Walk in the Park: New York's Central Park Christmas Bird Count*, 63 AM. BIRDS 24, 25 (2010), available at [http://web4.audubon.org/bird/cbc/pdf/AB\\_109\\_Central\\_Park.pdf](http://web4.audubon.org/bird/cbc/pdf/AB_109_Central_Park.pdf).

72. See Gary Clark, *Christmas Bird Count - A Volunteer Science Project*, CHRON.COM, Dec. 7, 2012, <http://www.chron.com/life/gardening/article/Christmas-Bird-Count-a-volunteer-science-project-4100002.php>.

73. Greg C. Bruno, *Birds May Prove Beneficial Ally to Organic Farmers*, GAINESVILLE SUN, July 5, 2003, <http://www.gainesville.com/article/20030705/LOCAL/207050311>.

74. Sekercioglu, *supra* note 22, at 467.

75. *Id.*

boreal forest alone.<sup>76</sup> Some landbirds eat as many as 300 insects per day, and can collectively consume 100,000 metric tons of invertebrates daily, equivalent in weight to 20,000 elephants, thus controlling insects by the millions annually and reducing plant damage and increasing yields.<sup>77</sup> A single pair of savannah sparrows raising their young can help to control pests in the western rangelands through their consumption of up to 149,000 grasshoppers in a breeding season.<sup>78</sup>

In addition, birds reduce the costs of conservation efforts.<sup>79</sup> Avian seed dispersal reduces the cost of restoring degraded lands to economic and ecological use.<sup>80</sup> Restoration is facilitated by greater vegetation complexity.<sup>81</sup> By providing a few appropriate plants that are attractive to avian seed dispersers, these will subsequently introduce many other new individual plants and plant species, so that “static landscape designs [are] replaced with dynamic successional processes that introduce a continuous stream of new elements.”<sup>82</sup> Consequently, the cost and effort of planting entire plant communities is reduced.<sup>83</sup>

### III. MANY BIRD SPECIES FACE POPULATION DECLINES, JEOPARDIZING THE SPECIES THEMSELVES AND THE BENEFITS THEY PROVIDE

Despite the popularity of birds and interest in their protection, 1.3% of bird species have gone extinct, and the number of individual birds worldwide is estimated to have undergone a 20% to 25% reduction since the year 1,500.<sup>84</sup> The

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76. BERLANGA ET AL., *supra* note 17, at 6.

77. *Id.*

78. Line, *supra* note 21.

79. See Sekercioglu, Daily & Ehrlich, *supra* note 48, at 18045.

80. *Id.*

81. George R. Robinson & Steven N. Handel, *Forest Restoration on a Closed Landfill: Rapid Addition of New Species by Bird Dispersal*, 7 CONSERVATION BIOLOGY 271, 275 (1993).

82. *Id.* at 276.

83. See T.S. Fredericksen et al., *Comparative Regeneration Ecology of Three Leguminous Timber Species in a Bolivian Tropical Dry Forest*, 20 NEW FORESTS 45 (2000).

84. Sekercioglu, Daily & Ehrlich, *supra* note 48, at 18042.

Red List Index for the world's birds shows that the status of many species continues to deteriorate.<sup>85</sup> One quarter of all European and North American bird species have declined over the last three decades, while 21% are extinction prone.<sup>86</sup> In the United States, the Service considers 10% to 15% of all species at each geographic scale at which birds of concern are identified (Bird Conservation Region, U.S. Fish and Wildlife Service Region, and National) as requiring conservation attention.<sup>87</sup> Of the 131 species on the Service's Birds of Conservation Concern 2002 National list, 103 were retained in the 2008 list while the twenty-eight species deleted from the list were overrun by the forty-four new species added, resulting in a net gain of sixteen species.<sup>88</sup> The Audubon Society's 2007 WatchList further identifies 178 continental species and thirty-nine species in Hawaii, or one quarter of all U.S. birds, as those in need of action.<sup>89</sup> More specifically, Partners in Flight, an international collaborative conservation group of organizations and government agencies, reports that 148, or 17%, of all native landbird species face threats, have declining populations, and are in danger of disappearing unless immediate conservation action is taken.<sup>90</sup>

Habitat loss is the main factor involved in the decline of bird populations.<sup>91</sup> Human dominated areas are associated with loss of biodiversity, including the diversity of bird species. The

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85. *The Red List Index: Measuring Trends in the Extinction Risk of Species*, BIRDLIFE INT'L, <http://www.birdlife.org/action/science/indicators/rli.html> (last visited Apr. 6, 2012).

86. Sekercioglu, Daily & Ehrlich, *supra* note 48, at 18044, 18042.

87. U.S. FISH & WILDLIFE SERV., BIRDS OF CONSERVATION CONCERN 2008 10 (2008) [hereinafter BIRDS OF CONSERVATION CONCERN], *available at* <http://digitalmedia.fws.gov/cdm/ref/collection/document/id/1404>.

88. *Id.* at 11.

89. Jeffrey Hunter, *More Than One-Quarter of United States Birds Need Urgent Conservation Action: WatchList 2007 Identifies Species at Greatest Risk*, AM. HIKING SOC'Y (Nov. 28, 2007), <http://americanhiking.chattablogs.com/archives/063761.html>.

90. *What is Partners in Flight (PIF)?*, PARTNERS IN FLIGHT – U.S., <http://www.partnersinflight.org/description.cfm> (last visited Apr. 11, 2013); BERLANGA ET AL., *supra* note 17, at 2.

91. BIRDS OF CONSERVATION CONCERN, *supra* note 87, at 12; *Bird Conservation Database: Web-based Access to Bird Research and Management Information on DoD Lands*, DEP'T OF DEF. PARTNERS IN FLIGHT (June 2005), [http://www.dodpif.org/downloads/factsheet06\\_Database\\_hi.pdf](http://www.dodpif.org/downloads/factsheet06_Database_hi.pdf).

association of human settlement with the decline of many bird species indicates the destructive impact unregulated development can have on ecosystems and a failure of our society to provide enough consideration to wildlife populations in the development process. Pale Male was one of the first Red-tailed Hawks to nest on a building.<sup>92</sup> Such adaptation is increasingly necessary as human society continues to envelop and annex essential bird habitat.

**A. Many Bird Species of Conservation Concern Are Left Unprotected by the Endangered Species Act**

Species that are in danger of extinction can obtain protection under the Endangered Species Act (ESA). The ESA has been the driving force behind many successful species conservation and recovery efforts.<sup>93</sup> The Service has reported that over 500, or 41%, of listed species have improved or stabilized their population levels.<sup>94</sup> Nineteen species have been recently delisted or are likely to be delisted over the next twenty-five years because a primary threat has been mitigated, they were found to be more prevalent than previously thought, or they are expected to respond quickly to recovery efforts.<sup>95</sup> From 1967 to 2006, for example, Bald Eagle sightings went up nine-fold and increased an average of 6% per year, due to strong federal and state

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92. Frank DiGiacomo, *Ruffled Feathers on Fifth Avenue*, VANITY FAIR (July 2005), <http://www.vanityfair.com/culture/features/2005/07/palemale200507>; Greenspan, *supra* note 1.

93. See GREGORY S. BUTCHER ET AL., AM. BIRDS, THE 2007 WATCHLIST FOR UNITED STATES BIRDS 19 (2007), *available at* [birds.audubon.org/sites/default/files/documents/watchlist2007technicalreport.pdf](http://birds.audubon.org/sites/default/files/documents/watchlist2007technicalreport.pdf); Hunter, *supra* note 89; N. AM. BIRD CONSERVATION INITIATIVE, *supra* note 56, at 28.

94. ROBERT J. NOECKER, CONG. RESEARCH SERV., 98-32 ENR, ENDANGERED SPECIES LIST REVISIONS: A SUMMARY OF DELISTING AND DOWNLISTING 2 (1998), *available at* [http://digital.library.unt.edu/ark:/67531/metacrs531/m1/1/high\\_res\\_d/9832enr\\_1998Jan05.pdf](http://digital.library.unt.edu/ark:/67531/metacrs531/m1/1/high_res_d/9832enr_1998Jan05.pdf); Martin Miller, *Three Decades of Recovery*, 28 ENDANGERED SPECIES BULLETIN 4, 5 (2003), *available at* <http://www.fws.gov/endangered/esa-library/pdf/04-05.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, ENDANGERED SPECIES: MANY FACTORS AFFECT THE LENGTH OF TIME TO RECOVER SELECT SPECIES 6 (2006).

95. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 94, at 7.



protection and the banning of DDT, resulting in the delisting of the Bald Eagle in 2007.<sup>96</sup>

However, the ESA does not protect all known declining species. This is particularly evident in bird conservation, where less than seventy of the 1,007 species protected by the MBTA are listed as endangered or threatened, even though several reports indicate that many other bird species are declining.<sup>97</sup> For example, the State of the Birds report has suggested that in addition to the sixty-seven ESA listed bird species, 184 bird species require conservation action.<sup>98</sup> Greg Butcher, Audubon Bird Conservation Director and co-author of the WatchList, has stated “[i]t’s astounding that several are so close to the edge but haven’t even received Endangered Species Act protection—this list is a reminder that we need to act and act now.”<sup>99</sup>

The Service’s “Service Manual”<sup>100</sup> also recognizes that conservation concern extends to many species that are not protected by the ESA. There, the Service defines “species of concern” to include not only species listed as endangered and threatened, but also “priority migratory bird species documented in comprehensive bird conservation plans (North American Waterbird Conservation Plan, United States Shorebird Conservation Plan, Partners in Flight Bird Conservation Plans),” “MBTA-listed game birds below desired population sizes,” and “species listed in the periodic report, Birds of Conservation Concern, published by our Service Division of Migratory Bird Management.”<sup>101</sup> In turn, the 2008 Birds of Conservation Concern National report created a list of 147 migratory and non-

96. Press Release, Nat’l Audubon Soc’y, *supra* note 20.

97. See *Migratory Bird Management Information: List of Protected Birds (10.13): Questions and Answers*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/43603%20QA%201013%20rule.pdf> (last visited Apr. 17, 2012); N. AM. BIRD CONSERVATION INITIATIVE, *supra* note 56, at 4.

98. N. AM. BIRD CONSERVATION INITIATIVE, *supra* note 56, at 4.

99. Hunter, *supra* note 89.

100. DIV. OF POLICY & DIRECTIVES MGMT., U.S. FISH & WILDLIFE SERV., *Service Manual Chapters*, <http://www.fws.gov/policy/manuals/> (last visited Apr. 17, 2012).

101. U.S. FISH & WILDLIFE SERV., *Service Responsibilities to Protect Migratory Birds*, <http://www.fws.gov/policy/720fw2.pdf> (last visited Apr. 11, 2013).

migratory bird species considered to be the highest priorities for national conservation, none of which were ESA listed.<sup>102</sup>

The reason so many bird authorities have determined that non-ESA listed species must be conserved now is that conservation is most effective when implemented early so recovery activities have an opportunity to be successful.<sup>103</sup> For example, species protected during the earliest phases of population decline are more likely to recover than species protected closer to an extinction event.<sup>104</sup> This suggests that early conservation efforts provide large conservation dividends.<sup>105</sup>

In many instances birds fail to receive ESA protection simply because their declines have not been thoroughly documented, rather than because they are not declining.<sup>106</sup> As these species become even rarer, it becomes more difficult to obtain enough data to conclusively determine their status. Indeed, population data is lacking for a third of all bird species.<sup>107</sup> Waterbird Conservation for the Americas claimed there was insufficient information to determine the status of 15% of colonial waterbird species, while non-colonial waterbirds had yet to be assessed quantitatively.<sup>108</sup>

**B. Birds with Larger Populations May Also Require Conservation Protection When Trends Show Rapid Declines or it is Vulnerable to Catastrophic Events**

Furthermore, bird species that are not at risk of immediate extinction might still be a priority for conservation action.<sup>109</sup> While rare species are increasing in certain locations, some common birds species, with more than 500,000 individuals and a range greater than one million square kilometers, are undergoing

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102. BIRDS OF CONSERVATION CONCERN, *supra* note 87, at iii, 10.

103. BERLANGA ET AL., *supra* note, at 17.

104. N. AM. BIRD CONSERVATION INITIATIVE, *supra* note 56, at 28-29.

105. *Id.* at 29.

106. DIV. OF MIGRATORY BIRD MGMT., U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS 1 (Jan. 2002), *available at* <http://www.fws.gov/birds/mortality-fact-sheet.pdf>.

107. *See id.*

108. KUSHLAN ET AL., *supra* note 63, at 16.

109. *See* KIRK, *supra* note 61, at 18.

sharp declines.<sup>110</sup> The Audubon Society reports that 119 of America's most common birds, or half of those for which population trends are known, have declined significantly over the last forty years, losing at least 20% of their population.<sup>111</sup> Partners in Flight has further identified forty-two common bird species whose populations have declined 50% or more over the last forty years.<sup>112</sup> The Common Murre is one of the most numerous seabirds in the northern hemisphere, but it has declined more than 76%.<sup>113</sup> The Rusty Blackbird remains numerous, estimated at hundreds of thousands and up to one or two million, but Breeding Bird Survey data indicates a decline in Rusty Blackbird populations of 95% over the last forty years in the boreal zone.<sup>114</sup>

Moreover, even a regional population that is large and increasing may require active conservation management if that population is vulnerable to catastrophic threats.<sup>115</sup> In all of these cases, active, ongoing protection of the bird species or population will be necessary to ensure that the species does not decline.<sup>116</sup>

### C. Bird Species Often Face Regional Threats, and Therefore Regional Conservation Actions are Necessary to Address These Threats

Birds are subject to regional variation in population status. Many of the bird species listed as rare on the Audubon WatchList show up on Service Region and Bird Conservation Region lists,

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110. Testimony of G. Thomas Bancroft, Ph.D., Chief Scientist, Nat'l Audubon Soc'y, Before the Comm. on Natural Res., Subcomm. on Fisheries, Wildlife & Oceans, *Going, Going, Gone? An Assessment of the Global Decline in Bird Populations*, 1 (July 10, 2008), available at [http://www.audubonmagazine.org/sites/default/files/documents/tombancroft-cbid-statement\\_july10th2008.doc](http://www.audubonmagazine.org/sites/default/files/documents/tombancroft-cbid-statement_july10th2008.doc);

BIRDS OF CONSERVATION CONCERN, *supra* note 87, at 12.

111. Testimony of G. Thomas Bancroft, *supra* note 110, at 1.

112. BERLANGA ET AL., *supra* note 17, at 2.

113. N. AM. BIRD CONSERVATION INITIATIVE, *supra* note 56, at 22.

114. Russ Greenburg, *The Mysterious Decline of the Rusty Blackbird*, in THE ALL-BIRD BULLETIN: BIRD CONSERVATION NEWS AND INFORMATION 17 (2010), available at <http://www.nabci-us.org/bulletin/bulletinspring10.pdf>.

115. See KIRK, *supra* note 61, at 2.

116. *Id.* at 19.

but not on the National list.<sup>117</sup> This indicates that birds that are not in danger of global or even national extinction could still be vulnerable to local or regional extinctions.<sup>118</sup>

Examples of this phenomenon abound. The Rusty Blackbird disappeared from regions where it was formerly common and retracted from the southern edge of its distribution.<sup>119</sup> In the State of Florida, Ospreys and Burrowing Owls are species of special concern, and thus afforded special protections.<sup>120</sup> Ospreys and Bank Swallows, though not of conservation concern nationally, could be of regional or local concern.<sup>121</sup> A bird species that is declining locally may be important to the local or regional ecosystem, so that their elimination from the area, quite apart from their larger status, could have a significant local impact.

Therefore, bird conservation requires active management by wildlife agencies, management that is tailored to specific situations that meet the needs of bird populations where they are found. Although the ESA provides powerful protections for species the law protects, proactive conservation through other legal avenues can be more cost effective and ultimately make conservation more successful.<sup>122</sup> This is especially necessary at a time when human impacts upon the environment are at an all-

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117. BUTCHER ET AL., *supra* note 93, at 21.

118. N. PRARIE WILDLIFE RESEARCH CTR., U.S. GEOLOGICAL SURVEY, *Nesting Ecology and Nesting Habitat Requirements of Ohio's Grassland-nesting Birds: A Literature Review*, <http://www.npwrc.usgs.gov/resource/birds/ohionest/summary.htm> (last visited Apr. 6, 2012) [hereinafter *Nesting Ecology*].

119. Greenburg, *supra* note 114, at 17.

120. FLA. FISH & WILDLIFE CONSERVATION COMM'N, OSPREY NEST REMOVAL POLICIES 1 (revised Sept. 30, 2004), *available at* <http://www.ospreys.com/downloads/files/Osprey%20nest%20removal%20policy.pdf>; FLA. FISH & WILDLIFE CONSERVATION COMM'N, BURROWING OWL NEST PROTECTION GUIDELINES AND PROCEDURES IN URBAN AREAS (revised Sept. 29, 2004), *available at* [http://fwcg.myfwc.com/docs/Burrowingowl\\_protectionguidlines.pdf](http://fwcg.myfwc.com/docs/Burrowingowl_protectionguidlines.pdf).

121. E-mail from Chuck Hunter, Chief, Div. of Planning & Res. Mgmt., U.S. Fish & Wildlife Serv., Region 4, to Cyndi Perry, Chief, Branch of Bird Conservation, U.S. Fish & Wildlife Serv., and Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv. (Dec. 27, 2001) (on file with author).

122. N. Am. Comm'n for Env'tl. Cooperation – Secretariat, *Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, submitted by Alliance for the Wild Rockies et al. 25 (Dec. 15, 2000), *available at* [http://www.cec.org/Storage/71/6466\\_ACFA30.pdf](http://www.cec.org/Storage/71/6466_ACFA30.pdf).

time high, and even birds that are abundant now may become increasingly stressed as climate change impacts intensify.<sup>123</sup>

#### **IV. THE HISTORY AND MEANING OF THE MIGRATORY BIRD TREATY ACT INDICATES THAT THE SERVICE'S NEST POLICY IS INCONSISTENT WITH THE INTENT OF CONGRESS TO PRESERVE NORTH AMERICAN BIRDS**

Congress enacted the Migratory Bird Treaty Act (MBTA) to ensure that “any migratory bird, any part, nest, or egg of any such bird, or any product” would be protected from harm, as stated in section 703 of the Act.<sup>124</sup> Yet since passage of the MBTA, bird populations have continued to decline. In order to reverse this trend and protect birds as Congress intended, the Service must ensure that all of its actions and policies—including its policy on nest destruction—is consistent with the MBTA’s clear purpose: to protect migratory birds, along with their eggs and nests, from unregulated harm.

##### **A. Treaties Implemented by the MTBA Recognize the Importance of Preserving Bird Habitats and Are Not Limited to Direct Death or Injury from Trade**

The MBTA was passed in 1918 to implement a United States treaty with Great Britain on behalf of Canada. Updated several times thereafter, it now implements conventions entered into, not only with Canada (amended in 1999), but also with Mexico (1936), the U.S.S.R. (1976), and Japan (1972). The first treaty was signed in the midst of the mass destruction of egrets, herons, cuckoos, and owls by market hunting for the millinery trade in the late 1800s and early 1900s. Sarah McCarn Elliott describes the conflict:

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123. BIRDS OF CONSERVATION CONCERN, *supra* note 87, at 1; N. AM. BIRD CONSERVATION INITIATIVE, U.S. COMM., THE STATE OF THE BIRDS: 2010 REPORT ON CLIMATE CHANGE 25 (2010), *available at* [http://www.stateofthebirds.org/2010/pdf\\_files/State%20of%20the%20Birds\\_FINAL.pdf](http://www.stateofthebirds.org/2010/pdf_files/State%20of%20the%20Birds_FINAL.pdf).

124. 16 U.S.C. § 703 (2006).

Not everyone approved of the craze [for feathered hats]. Newspaper stories with grizzly pictures caught the public's attention, and some Americans denounced the slaughter, publishing in journals and forming protest groups. Eventually laws were passed, and the feather trade diminished. The feather war lasted nearly a quarter century, focusing public attention onto birds and their defenders, supporters who became a part of the Audubon movement.<sup>125</sup>

Although unsustainable commercial trade was the catalyst for the migratory bird treaties, the treaties are not limited to regulating the direct killing or death of birds, and over time the treaties have placed an increasing emphasis on protecting bird habitats from destruction. For example, the treaties entered into by the United States with Japan and the U.S.S.R. include language regarding the conservation of bird habitats, while the 1995 Protocol with Canada provides that "each government will use its authority to protect and conserve habitats essential to migratory bird populations (including protection from pollution and from alien or exotic species)."<sup>126</sup>

The treaties also recognize the intrinsic value of birds, and promote the entire array of values they provide and functions they serve. The 1916 treaty between United States and Great Britain was implemented in part because birds

are of great value as a source of food or in destroying insects which are injurious to forests and forage plants [and] agricultural crops . . . but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds. . . .<sup>127</sup>

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125. Elliott, *supra* note 71, at 24.

126. Protocol Amending the 1916 Convention for the Protection of Migratory Birds, U.S.-Can., at 4, Dec. 5, 1995, S. TREATY DOC. No. 104-28 (1996), *available at* [http://www.fws.gov/le/pdf/Canada\\_Mig\\_Bird\\_Treaty.pdf](http://www.fws.gov/le/pdf/Canada_Mig_Bird_Treaty.pdf); Exec. Order No. 13186, Responsibilities of Federal Agencies To Protect Migratory Birds, 66 Fed. Reg. 3853, 3853 (Jan. 10, 2001), *available at* [http://www.doe.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/Req-EO13186migratorybirds.pdf](http://www.doe.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-EO13186migratorybirds.pdf); Take of Migratory Birds by Department of Defense, 69 Fed. Reg. 31,074, 31,075 (June 2, 2004); 16 U.S.C. §§ 703-12 (2012).

127. Submission to the Comm'n on Env'tl. Cooperation Pursuant to Article 14 of the North American Agreement on Environment Cooperation, *submitted by*

The 1972 treaty between the United States and Japan states that “birds constitute a natural resource of great value for recreational, aesthetic, scientific, and economic purposes, and that this value can be increased with proper management . . . .”<sup>128</sup> In 1978, the United States and the U.S.S.R. entered into an agreement that finds “that migratory birds are a natural resource of great scientific, economic, aesthetic, cultural, educational, recreational and ecological value and that this value can be increased under proper management.”<sup>129</sup>

As such, these treaties support regulating all activities that harm birds, not just commercial trade. This expanding scope of regulation is matched in the treaties with an expanding notion of the value of birds, their habitats, and the ecosystem upon which they depend.

#### **B. Judicial Opinions Consistently Hold that the MBTA Protections Apply Broadly and Irrespective of Intent**

Courts have often found that the plain language of the MBTA provides strong support for broad protection of birds, protection that is not contingent on the manner in which birds are harmed or the intent of the person taking the action. The Supreme Court has described the prohibitions in the MBTA as “‘comprehensive,’ ‘exhaustive,’ ‘carefully enumerated,’ ‘expansive,’ and ‘sweepingly framed.’”<sup>130</sup> The court in *United States v. Moon Lake Electric Association, Inc.* expressly rejected the plaintiffs’ claims that the

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Alliance for the Wild Rockies et al. 5-6 (Nov. 17, 1999) [hereinafter Submission to Comm’n on Envtl. Cooperation], *available at* [http://www.cec.org/Storage/83/7888\\_99-2-SUB-E.pdf](http://www.cec.org/Storage/83/7888_99-2-SUB-E.pdf) (quoting Convention for the Protection of Migratory Birds in the United States and Canada, U.S.-Gr. Brit, preamble, para. 3, Aug. 16, 1916, 39 Stat. 1702); *see also* Take of Migratory Birds by Department of Defense, 69 Fed. Reg. 31,074, 31,075 (June 2, 2004).

128. Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and their Environment, U.S.-Japan, Mar. 4, 1974, 25 U.S.T. 3329, *available at* [http://www.biodic.go.jp/english/biolaw/wata\\_am.html](http://www.biodic.go.jp/english/biolaw/wata_am.html).

129. Convention Concerning the Conservation of Migratory Birds and their Environment, U.S.-U.S.S.R., Nov. 19, 1976, *available at* <http://www.fws.gov/le/pdf/MigBirdTreatyRussia.pdf>.

130. *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1075 (D. Colo. 1999) (quoting *Andrus v. Allard*, 444 U.S. 51, 56, 57, 59-60 (1979)).

MBTA applies only to poaching and hunting activities.<sup>131</sup> The *Moon Lake* court concluded:

Because Congress expressed its will in ‘reasonably plain terms,’ I regard the plain language of the MBTA as conclusive. . . . Even if I were to construe the nature of physical conduct prohibited by the MBTA as ambiguous, my review of the legislative history leads me to believe that it is capable of supporting broad interpretations.<sup>132</sup>

Courts at all levels have emphasized the gravity of violating the MBTA in decisions that have held violators strictly liable for breaking the law—even if they accidentally killed or injured a protected bird. The Center for International Environmental Law’s “Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environment Cooperation” states that “[the Service’s] prosecution and federal court decisions in these cases clearly illustrate that Section 703’s prohibitions apply to all killings and takings ‘by any means or in any manner,’ including all direct and unintentional killings and takings of migratory birds.”<sup>133</sup>

Specifically, several courts have concluded that intent is immaterial and migratory bird deaths resulting from otherwise lawful activities even where there was no intent to kill birds (i.e., incidental takes) violate the MBTA.<sup>134</sup> For example, in *United States v. FMC Corporation*, the Second Circuit held that a pesticide manufacturing company was strictly liable for the accidental poisoning of several birds that had visited the company’s wastewater pond and consumed lethal chemicals.<sup>135</sup> In response to arguments that the company had no intention to harm the birds and had attempted to protect them, the court

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131. *Id.* at 1070.

132. *Id.* at 1079 (citation omitted).

133. Submission to Comm’n on Envtl. Cooperation, *supra* note 127, at 14.

134. PAMELA BALDWIN, CONG. RESEARCH SERV., RL 31415, THE ENDANGERED SPECIES ACT (ESA), MIGRATORY BIRD TREATY ACT (MTBA), AND DEPARTMENT OF DEFENSE (DOD) READINESS ACTIVITIES: CURRENT LAW AND LEGISLATIVE PROPOSALS 5-6, 8 (2003), available at <http://www.nationalaglawcenter.org/assets/crs/RL31415.pdf>.

135. *United States v. FMC Corp.*, 572 F.2d 902, 902 (2d Cir. 1978).



succinctly stated “[w]hen one enters into a business or activity for his own benefit, and that benefit results in harm to others, the party should bear the responsibility for that harm.”<sup>136</sup> Another pesticide case, *United States v. Corbin Farm Services*, similarly held that the unintentional poisoning of birds through misapplication of pesticides by aerial spraying is a violation of the MBTA.<sup>137</sup> The *Corbin* court referred to “the broad wording of the Act, and the evident purpose behind the treaty and the Act,” to come to its conclusion that a defendant’s knowledge of his or her crime is irrelevant to determine liability.<sup>138</sup> *United States v. Stuarco Oil Company*, *United States v. Union Texas Petroleum*, and *United States v. Equity Corporation* all held oil companies strictly liable for bird deaths caused by faulty oil sumps, concluding that maintenance of hazardous conditions without protective measures to keep birds away is a violation of the MBTA.<sup>139</sup> Absence of tolerance for harm to migratory birds was demonstrated when the court in *United States v. Moon Lake Electric Association, Inc.*<sup>140</sup> held that electrocution of birds by power lines where the electric company could have inexpensively modified the lines was also a strict liability violation. Finally, the Navy argued in *Center for Biological Diversity v. Pirie* that it did not intend to kill birds in its live fire military training activities, but the *Pirie* court noted that the Navy knew it was killing birds even if that was not the Navy’s purpose, and the MBTA applies to intentional and unintentional takings.<sup>141</sup> Actions resulting in killing a protected bird are always a misdemeanor violation of the MBTA regardless of whether felony violations require that a defendant knowingly take a migratory bird.

The U.S. Court of Appeals for the District of Columbia Circuit held in *Humane Society of the United States v. Glickman*

136. *Id.* at 907.

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

138. *Id.* at 534 (quoting *United States v. Schultze*, 28 F. Supp. 234, 236 (W.D. Ky. 1939)).

139. *Id.* at 527, 532 (citing *United States v. Stuarco Oil Co.*, 73-CR-129 (D. Colo. 1973); *United States v. Union Tex. Petroleum*, 73-CR-127 (D. Colo. 1973); *United States v. Equity Corp.*, 75-CR-51 (D. Utah 1975)).

140. *Moon Lake Elec. Ass’n*, 45 F. Supp. 2d at 1070.

141. BALDWIN, *supra* note 134, at 5 (citing *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002)).

that the MBTA applies to the federal government, and federal agencies are also subject to the take prohibitions of the MBTA, so that federal agency's taking and killing of migratory birds without a permit was in violation of the MBTA.<sup>142</sup>

Thus, all levels of government have weighed in on the MBTA, have recognized its importance, and have affirmed its intended purpose: to protect "any migratory bird, any part, nest, or egg of any such bird, or any product . . ." from harm.<sup>143</sup>

**V. THE SERVICE'S NEST POLICY IS  
INCONSISTENT WITH THE MBTA,  
REGULATIONS IMPLEMENTING THE MBTA,  
AND THE TREATIES THE MBTA IMPLEMENTS**

On April 15, 2003, the Service issued the Migratory Bird Permit Memorandum (Policy Memo), which introduced a new policy position on the destruction of migratory bird nests.<sup>144</sup> In this memorandum, the Service argues that when an "inactive" bird nest—one without birds or eggs—is destroyed, there is no violation of law and no permit to destroy the nest is required so long as the nest is destroyed without "possession."<sup>145</sup> The Policy Memo justified this assessment by suggesting that only "possession" of nests is prohibited under the MBTA, and that "destruction" does not entail "possession."<sup>146</sup> However, the Memo's arguments break down under scrutiny, and its conclusions are ultimately unsupported by logic or law.

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142. *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000).

143. 16 U.S.C. § 703 (2012).

144. Policy Memo, *supra* note 8.

145. *Id.*

146. The nest policy is derived from the so-called "Moholt Memo." Memorandum from Wesley K. Moholt, Assistant Special Agent in Charge, to All Special Agents & Animal Damage Control State Supervisors, Region 1 (Oct. 5, 1984) [hereinafter Moholt Memo] (on file with author). The Moholt Memo was written by Wesley Moholt; at the time, he was the Assistant Special Agent in Charge to all special agents and animal damage control state supervisors in Region 1. *Id.* Differentiating between birds and nests for the first time, the Moholt's reasoning led the Service to later determine through the Policy Memo that only some of the MBTA's proscribed acts apply to nests and that destruction of a nest was not prohibited because it was not collected or possessed. *Id.*

The sections below will show that the Service's nest policy incorrectly interprets the statutory language of the MTBA by unlawfully distinguishing "nest" from "bird"; that destruction of a nest necessarily includes possessing it; and that the distinction between active and inactive nests is nonsensical given how birds actually behave. Because of these flaws, the Service's nest policy is inconsistent with the broader policy advocated in the MTBA itself: the protection of migratory birds with the resources the Service has at its disposal.

**A. The MBTA and Its Implementing Regulations Do Not Distinguish Nests from Birds, and Therefore the Policy Memo Is Inconsistent with the Plain Language of the MBTA**

The basis for the 2003 Policy Memo is that "nest destruction itself is not a prohibited act" under the MBTA.<sup>147</sup> However, the MBTA and its implementing regulations provide bird nests with all the protections provided to birds themselves. Because nests, like birds themselves, are protected from acts of destruction, the reasoning in the Policy Memo is inconsistent with the MBTA and the Service's implementing regulations.

The MBTA prohibitions apply to "any migratory bird, any part, nest, or egg of any such bird, or any [bird] product . . ."<sup>148</sup> Thus, the MBTA protects birds as well as their nests from all of the actions the statute prohibits.

The Service itself acknowledged that nests are to receive all the protections that birds receive when it promulgated a definition of the term "migratory bird" that included the word nest:

Migratory bird means any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in §

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147. E-mail from Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv., to Cyndi Perry, Chief, Branch of Bird Conservation, U.S. Fish & Wildlife Serv. (Sept. 30, 2003) (on file with author); E-mail from Susan Lawrence, Assistant Dir. of Migratory Birds & State Programs, U.S. Fish & Wildlife Serv., Region 9, to Chuck Hunter, Chief, Div. of Planning & Res. Mgmt., U.S. Fish & Wildlife Serv., Region 4 (July 24, 2003) (on file with author).

148. 16 U.S.C. § 703(a) (2006).

10.13, or which is a mutation or a hybrid of any such species, including any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.<sup>149</sup>

The Service came to this conclusion after operating the statute for several years under a more narrow definition of the term. For example, the Service's original regulatory definition of "migratory birds," promulgated in 1973, stated only that "[m]igratory birds means all birds, whether or not raised in captivity, included in the terms of conventions between the United States and any foreign country for the protection of migratory birds and the Migratory Bird Treaty Act, 16 U.S.C. 703-711."<sup>150</sup> But four years later the Service revised this definition to ensure that any "part, nest, or egg" of a bird is also defined as a "bird" itself under the MBTA.<sup>151</sup> In its notice of rulemaking crafting this updated definition, the Service pointed out three times that the migratory bird definition is now expanded to cover nests, eggs, and bird products, stating that "[b]y including parts, nests, eggs, and products, section 10.12 merely restates the coverage of the Act (16 U.S.C. 703)."<sup>152</sup>

This understanding is incorporated into descriptions of the Service's responsibilities, and has been implemented by Service employees themselves.<sup>153</sup> The Service's Migratory Bird Permit Manual currently states that "[i]n addition to live birds belonging

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149. 50 C.F.R. § 10.12 (2006) (emphasis added).

150. Migratory Bird Hunting, 38 Fed. Reg. 22,015, 22,016 (Aug. 15, 1973).

151. *Id.*

152. Revised List and Definition of Migratory Birds, 42 Fed. Reg. 59,358, 59,358 (Nov. 16, 1977).

153. E-mail from Karen Laing, Wildlife Biologist, U.S. Fish & Wildlife Serv., to Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv., and Susan Lawrence, Assistant Dir. of Migratory Birds & State Programs, U.S. Fish & Wildlife Serv., Region 9 (Nov. 29, 2001) (on file with author) ("[T]he definition of 'migratory bird' . . . includes 'nest.'"); E-mail from Diane Pence, Assistant Reg'l Dir., Migratory Birds & State Programs, U.S. Fish & Wildlife Serv., to Susan Lawrence, Assistant Dir. of Migratory Birds & State Programs, U.S. Fish & Wildlife Serv., Region 9 (Dec. 29, 2004) (on file with author) ("I suggest . . . that the term 'bird' not be used [in the Policy Memo], and if it is, it should be explained that 'bird' means all of these – adults, juveniles, nests, eggs and any part of a bird.").

to species listed in 50 CFR 10.13, the MBTA requires permits for MTBA-prohibited activities involving any dead specimen, feather, part, nest, or egg of such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird, part, nest, or egg thereof.”<sup>154</sup>

For over eighty years of MBTA enforcement the Service failed to distinguish between the level of protection provided to birds and that provided to nests; the Service has consistently supported the equal treatment of nests and birds. Because the Service defines “migratory bird” to include nest, then the verbs the Service applies to migratory birds must also apply to the nouns included within its definition. Otherwise, defining “migratory bird” to include nest or egg is meaningless and is contrary to the Service’s deliberate revision of its 1973 definition of migratory bird. It is nonsensical for the Service to update “migratory bird” to include nest, eggs, and products and then refuse to extend the verbs protecting migratory birds to the nests, eggs, and products listed within its related definition. If the Service wishes to do this it must do so through notice and comment rulemaking.

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154. U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD PERMITS, 724 FW 2.6 (2003), available at <http://www.fws.gov/policy/724fw2.pdf>. Other bird protection laws provide guidance on this issue as well, such as the Bald and Golden Eagle Protection Act, in which nests are incorporated into the definition of the term “bird.” The Service has interpreted the Bald and Golden Eagle Protection Act as prohibiting nest destruction because of it. ALEXANDER, *supra* note 18, at 6. The statute reads:

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly . . . possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined . . . or imprisoned . . . or both.

16 U.S.C. § 668 (2006).

**B. The Policy Memo Is Inconsistent with the Service's Longstanding Practice of Protecting Bird Nests and Requiring Permits for their Destruction**

The Service has had a longstanding practice in various Regions of requiring permits to take nests, even when the nest is without birds or eggs. As late as 1999, Service Regions 2, 3, 5, and 6 required special purpose permits for the removal of some birds' nests regardless of whether there were eggs or fledglings within the nest.<sup>155</sup> Only three regions allowed removal of all nests without a permit.<sup>156</sup> Back in 2001, Service employees discussed Region 7's position that nest destruction is unlawful without a permit from the Service, and noted that Regions 5 and 6 also required permits for take of so-called "inactive" nests.<sup>157</sup> Another Service official also stated that Region 6 still issued permits to take empty nests at the time, indicating that "until [the nest policy is] documented as policy, many regions (including 6) don't/won't/can't follow the [unofficial policy] guidelines."<sup>158</sup>

Other agencies have understood the MBTA to prohibit the destruction of inactive nests. In 1999, the Minnesota Department of Transportation Wildlife Biologist, writing to the Assistant Engineer of the Lake County Highway Department, stated that "[s]wallows are protected by the Federal Migratory Bird Act, and the destruction of swallows or their nests . . . is a misdemeanor.

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155. See MINN. DEP'T OF TRANSP., QUESTIONS AND ANSWERS ABOUT DEPREDAATION PERMITS 1 (Mar. 17, 1999) (on file with author).

156. *Id.* (Regions 1, 4, and 7).

157. E-mail from Karen Laing, Wildlife Biologist, U.S. Fish & Wildlife Serv., to Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv. (Nov. 30, 2001) (on file with author); E-mail from Karen Laing, Wildlife Biologist, U.S. Fish & Wildlife Serv., to Stephanie Jones, Nongame Coordinator, U.S. Fish & Wildlife Serv., Region 6 (Feb. 7, 2001) (on file with author); E-mail from Steve Kendall, Wildlife Biologist, U.S. Fish & Wildlife Serv., to Diane Pence, Assistant Reg'l Dir., Migratory Birds & State Programs, U.S. Fish & Wildlife Serv. (Feb. 1, 2001) (on file with author).

158. E-mail from Stephanie Jones, Nongame Coordinator, U.S. Fish & Wildlife Serv., Region 6, to Steve Kendall, Wildlife Biologist, U.S. Fish & Wildlife Serv. (Feb. 5, 2001) (on file with author). Unofficial guidelines are those that are followed by agencies internally but that have not been published to the public.

The [Service] enforces the Act, and it has a permitting process for swallow issues.”<sup>159</sup>

In 2001, the Director of the Office of Natural Environment, writing to the Division Administrators, Federal Lands Highway Division Engineers, and Directors of Field Services, stated that “[a] permit may be required for removal of inactive nests.”<sup>160</sup> Other organizations have also interpreted the MBTA in this manner. In 1999, the Center for International Environmental Law, in a submission to the Commission on Environmental Cooperation, described the Service’s policy:

Section 703 of the MBTA prohibits any person from killing or “taking” migratory birds, including the destruction of nests, the crushing of eggs, and the killing of nestlings and fledglings, “by any means or in any manner,” unless the U.S. Fish & Wildlife Service . . . issues a valid permit.<sup>161</sup>

Not until 2003 did the Service officially state that some of the MBTA’s prohibited acts only apply to birds, and not to nests: only then did the Service establish its new nationwide policy to exclude “inactive” nests from MBTA protection. In April 2000, there was vociferous debate over drafting a nest policy memorandum, and in 2003, the Policy Memo was issued. However, the Service continued to admit, even in the midst of debate over the new policy, that law enforcement has prosecutorial discretion.<sup>162</sup> The debate among Service employees highlighted the concerns over inconsistency of reasoning in the

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159. Letter from Brad R Kovach, Wildlife Biologist, Minn. Dep’t. of Transp., to Scott Kyrola, Assistant Engineer, Lake County Highway Dep’t. (Mar. 4, 1999) (on file with author).

160. Letter from James Shrouds, Director, Office of Natural Env’t., to Div. Adm’r, Federal Lands Highway Div. Engineers, & Dir. of Field Services (Feb. 2, 2001), *available at* <http://www.fhwa.dot.gov/environment/migbird.htm>.

161. Submission to Comm’n on Env’tl. Cooperation, *supra* note 127, at 4 (quoting Migratory Bird Treaty Act, 16 U.S.C. § 703 (2006)).

162. Memorandum on Take of Migratory Bird Nests from Jon Andrew & Eliza Savage, Div. of Migratory Bird Mgmt., U.S. Fish & Wildlife Serv. (Nov. 28, 2001) (on file with author); E-mail from Susan Lawrence, Assistant Director of Migratory Birds and State Programs, U.S. Fish & Wildlife, Region 9, to Ben Jesup, U.S. Fish & Wildlife Service (Mar. 13, 2001) (on file with author).

Policy Memo and traditional approaches among Regions as well as its relationship to other Service documents.<sup>163</sup>

**C. The Policy Memo's Assertion that Nests Can Be Destroyed Without Possession is Nonsensical and in Direct Conflict with the Service's Definition of the Term Possession**

The Policy Memo proposes that of the prohibitions found in the MBTA, *pursuit, capture, hunting, and killing* are activities that do not apply to nests.<sup>164</sup> Of those activities that do apply to nests, the Policy Memo states "*possession, sale, purchase, barter, transport, import, and export*" all require an act of possession by the violator.<sup>165</sup> While the MBTA also prohibits "take," the regulatory definition of take is "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect,"<sup>166</sup> and the Policy Memo reasons that only *collect* applies to nests and also entails possession. Destruction is not included among the prohibitions in the MBTA or regulatory language.<sup>167</sup> Thus the Policy Memo concluded that destruction of a nest is not prohibited by the MBTA, as long as no possession occurs during the destruction.<sup>168</sup>

However, this assertion is inherently flawed because one cannot destroy a nest without possessing it. The Service defines "possession" in 50 C.F.R. § 10.12 to mean:

Detention and control, or the manual or ideal custody of anything which may be the subject of property, for one's use and

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163. E-mail from Susan Lawrence, Assistant Dir. of Migratory Birds and State Programs, U.S. Fish & Wildlife, Region 9, to Cyndi Perry, Chief, Branch of Bird Conservation, U.S. Fish & Wildlife Service (Feb. 14, 2001) (on file with author); E-mail from Robert Leedy, U.S. Fish & Wildlife Serv., to Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv. (Feb. 12, 2001) (on file with author); E-mail from Cyndi Perry, Chief, Branch of Bird Conservation, U.S. Fish & Wildlife Serv., to John Trapp, Assistant Dir. of Migratory Birds, U.S. Fish & Wildlife Serv., Region 9 (Sept. 30, 2003) (on file with author).

164. Policy Memo, *supra* note 8, at 1.

165. *Id.*

166. 50 C.F.R. § 10.12 (2012).

167. *Id.*

168. Policy Memo, *supra* note 8, at 1.



enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Possession includes the act or state of possessing and that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. Possession includes constructive possession, which means not actual but assumed to exist, where one claims to hold by virtue of some title, without having actual custody.<sup>169</sup>

In the act of destroying a nest, one necessarily assumes the "condition of facts under which one can exercise his own power over a corporeal thing at his pleasure *to the exclusion of all other persons*."<sup>170</sup> Destruction of a nest entails the exercise of physical power over the nest, and eliminates the opportunity for anyone else to experience or act upon the nest. An act of nest destruction thus falls plainly under this definition of actual possession, regardless of the fact that at the conclusion of the destruction, no property is left to possess. The regulatory definition of "possession" is expansive and clearly designed to include actions beyond simply collecting whole objects.

The faulty reasoning found in the Policy Memo has resulted in an unsound Service policy regarding nest destruction. The Service has premised its nest policy on the notion that an act of destruction does not entail an act of possession. This interpretation is contrary to the language and intent of Congress and is harmful to migratory bird conservation efforts.

#### **D. The Distinction Between Active and Inactive Nests Ignores the Multiple Ways Birds Use Nests**

The distinction made in the Service's nest policy between active and inactive nests is inconsistent with scientific research on migratory birds. A robust body of literature, as discussed in this Part, shows that birds need nests for a variety of purposes, even when there are no breeding birds and no eggs in the nest. As the Service's own officials have admitted, review of individual nest destruction requests by qualified agency representatives is

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169. 50 C.F.R. § 10.12 (2012).

170. *Id.* (emphasis added).

necessary because of the possibility that “action taken [upon inactive nests] will affect live birds.”<sup>171</sup> In the absence of a case-by-case evaluation of nest destruction activities, it is impossible for the Service to determine if a particular act of nest destruction will have no impact on bird conservation.

The Service has been aware of the need for case-by-case evaluation of nest destruction activities for decades. In 1983, the Acting Associate Director of Wildlife Resources suggested that “[t]here may be situations when the taking of unoccupied nests is so insignificant that not only would it be an administrative burden to require and issue permits, but prosecution of someone taking such nests would be of little value.”<sup>172</sup> However, he went on to say that “there are other situations when the removal of unoccupied nests would be detrimental,” thus rising to the level of take, as noted by other Service employees.<sup>173</sup> Even the Policy Memo is careful to qualify that “[d]ue to the biological and behavioral characteristics of some migratory bird species, destruction of their nests entails an elevated degree of risk of violating MBTA.”<sup>174</sup> However, the existing nest policy fails to heed these warnings, and instead allows individuals to destroy nests without consideration of the various factors that may make any particular act of nest destruction harmful to the continued existence of migratory birds.

Under the policy established by the Policy Memo, only a nest that is “occupied by eggs or nestlings, or [is] otherwise still essential to the survival of the juvenile birds,” is protected.<sup>175</sup> However, for many bird species, a nest does not only shelter one

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171. E-mail from Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv., to Bill Howe, Nongame Coordinator, U.S. Fish & Wildlife Serv. (May 17, 2002) (on file with author); see Policy Memo, *supra* note 8, at 1-2.

172. Memorandum from Acting Assoc. Dir., Wildlife Res., U.S. Fish & Wildlife Serv., to Reg'l Dir., Bos., U.S. Fish & Wildlife Serv. (Dec. 1983) (on file with author).

173. *Id.*; E-mail from Jon Andrew, U.S. Fish & Wildlife Serv., Region 9, to Susan Lawrence, Assistant Dir. of Migratory Birds and State Programs, U.S. Fish & Wildlife Serv., Region 9 (Aug. 30, 2001) (on file with author).

174. Policy Memo, *supra* note 8, at 1; Memorandum from Marilyn Lawal, Acting Assistant Reg'l Dir. of Migratory Birds, U.S. Fish & Wildlife Serv., Region 4, to Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv. (May 21, 2002).

175. See Policy Memo, *supra* note 8, at 2.

brood of young and eggs for one breeding season.<sup>176</sup> And even apparently unoccupied nests can serve vital functions beyond breeding, which can be disrupted by nest destruction. For example, some birds, including the Merlin, Aplomado Falcon, Great Horned Owl, and Barred Owl, do not build their own nests.<sup>177</sup> Instead, they depend upon the use of old nests built by other birds, especially the cavities and burrows created by many cavity and burrow nesting bird species.<sup>178</sup> Should all apparently “abandoned” nests be removed, such birds will have no homes in which to raise their young or take shelter for themselves.<sup>179</sup>

Other birds, including Winter, House, and Marsh Wrens, build multiple nests in a single season even though they only need one.<sup>180</sup> Sedge Wrens may build up to twenty nests in a season.<sup>181</sup> The extra nests are not used for breeding, but given the extra time and effort it takes to build them, it is likely that they serve a purpose beyond just being an extra, unused nest.<sup>182</sup> Researchers Leonard and Picman, for example, found that breeding nests were more successful when they were near larger clusters of dummy nests.<sup>183</sup> Although it has been speculated that these nests serve a role in courting, male Marsh Wrens continue

176. See generally Karen L. Wiebe, Walter D. Koenig & Kathy Martin, *Costs and Benefits of Nest Reuse Versus Excavation in Cavity-Nesting Birds*, 44 ANN. ZOOL. FENNICI 209 (2007), available at <http://www.sekj.org/PDF/anzf44/anzf44-209.pdf>.

177. *Merlin*, HAWK MOUNTAIN, <http://www.hawkmountain.org/raptorpedia/hawks-at-hawk-mountain/hawk-species-at-hawkmountain/merlin/page.aspx?id=503> (last visited May 13, 2013); *If You See An Alpomado Falcon*, TURNER ENDANGERED SPECIES FUND, <http://www.wildlife.state.nm.us/conservation/documents/AplomadoFalconFlyer.pdf> (last visited May 13, 2013); *Great Horned Owl*, SEATTLE AUDUBON SOC'Y, [http://www.birdweb.org/birdweb/bird/great\\_horned\\_owl](http://www.birdweb.org/birdweb/bird/great_horned_owl) (last visited May 13, 2013); *Nest Boxes*, RAPTOR TRUST, <http://theraptortrust.org/the-birds/nest-boxes/> (last visited May 13, 2013).

178. BERLANGA ET AL., *supra* note 17, at 6; Sekercioglu, *supra* note 22, at 469.

179. *Nesting Ecology*, FURBANK SCI. CTR., <http://www.fernbank.edu/Birding/nestecology.htm> (last visited May 13, 2013).

180. Marcia Davis, *Birdlife: Nest-builders No Dummies*, KNOXNEWS.COM, Apr. 4, 2010, <http://www.knoxnews.com/news/2010/apr/04/nest-builders-no-dummies/> (explaining how such extra nests are known as “dummy nests”).

181. *Id.*

182. *Id.*

183. Karen J. Metz, *The Enigma of Multiple Nest Building by Male Marsh Wrens*, 108 THE AUK 170, 171 (1991), available at <http://elibrary.unm.edu/sora/Auk/v108n01/p0170-p0173.pdf>.

to build them after the females have begun to incubate, and a study found that the number of dummy nests was unimportant to female Marsh Wrens in choosing a mate, while males did not need to build a minimum number of nests to attract a mate.<sup>184</sup> Rather, some biologists believe that these extra nests could serve as decoys to distract and deter predators, decreasing the likelihood that predators such as rats or chipmunks may discover the actual nest to which a mating pair has entrusted its young, before leaving the area.<sup>185</sup> Additionally, a nest could be used as a second or third nest later in the season.<sup>186</sup> Multiple-brooding species, which can compensate for nesting losses in habitats with low nesting success, are more successful than single-brooding species.<sup>187</sup> This is especially true in the face of increasing predation associated with the expansion of development and agriculture. Further, birds rarely remain at a nest-site where they have experienced breeding failure.<sup>188</sup> Additional nests could

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184. *Id.* at 170.

185. *Id.* at 171.

186. Davis, *supra* note 180.

187. Joseph A. Reale & Robert B. Blair, *Nesting Success and Life-History Attributes of Bird Communities Along an Urbanization Gradient*, 3 URBAN HABITATS 1, 10 (2005), available at [http://urbanhabitats.org/v03n01/nesting\\_pdf.pdf](http://urbanhabitats.org/v03n01/nesting_pdf.pdf).

188. George J. Divoky & Michael Horton, *Breeding and Natal Dispersal, Nest Habitat Loss and Implications for Marbled Murrelet Populations*, U.S. FOREST SERV. GEN. TECH. REP. PSW-GTR-152 at 83-84 (1995), available at [http://www.fs.fed.us/psw/publications/documents/psw\\_gtr152/psw\\_gtr152\\_chap07.pdf](http://www.fs.fed.us/psw/publications/documents/psw_gtr152/psw_gtr152_chap07.pdf) (asserting that fidelity for Black Guillemots is 92% for successful pairs and 48% for failed pairs, re-occupancy rates for Ancient Murrelets were 80% for burrows supporting successful breeding and 50% for unsuccessful burrows); Robert J. Fletcher, Jr., Rolf R. Koford & Dana A. Seaman, *Critical Demographic Parameters for Declining Songbirds Breeding in Restored Grasslands*, 70 J. WILDLIFE MGMT. 150 (2006), available at [http://avianscience.dbs.umt.edu/documents/2006\\_JWildManage\\_Fletcheretal.pdf](http://avianscience.dbs.umt.edu/documents/2006_JWildManage_Fletcheretal.pdf) (noting that the distances between successive nesting attempts of Dickcissels and Bobolinks that re-nested after a nest failure ranged from 35 to 125 meters for Dickcissels and 430 to 8,600 meters for Bobolinks); Wieslaw Walankiewicz, *Nest predation as a limiting factor to the breeding population size of the Collared Flycatcher in the Bialowieza National Park (NE Poland)*, 37 ACTA ORNITHOLOGICAL 91, 101 (2002), available at <http://www.ib.uph.edu.pl/pdf/Walankiewicz%20Predation%20Apodemus%20fluctuations%20holes%20oak%20crop%20martes%20densit.pdf> (describing how after a year of high breeding success many birds show a higher site fidelity, Collared Flycatcher females and males regularly abandon a territory after a clutch is destroyed).

increase the probability of re-nesting after a brood is lost to predation.

Moreover, a nest that is unoccupied by eggs, nestlings, or juveniles may still be used, i.e., “occupied,” by birds. Some species continue to use the same nests throughout a particular bird’s life. For example, nests can be used for shelter by adults outside the breeding season.<sup>189</sup> Additionally, some waterbirds spend all day at sea feeding, after which they need a safe place to roost at night.<sup>190</sup> Adult survival and the long-term recovery of bird populations therefore depend upon nest availability during the non-breeding season for shelter and roosting, and the elimination of these nests will exacerbate documented declines in adult survival during the non-breeding season.<sup>191</sup>

Site fidelity can reduce reproductive effort by increasing the chances of breeding with the previous year’s mate, as well as eliminating the need to locate a suitable nest site and allowing the development of familiarity with the environment, increasing breeding success and lifetime fitness.<sup>192</sup> Thus, some birds also return to the same nest each breeding season. Flamingos, Ospreys, Goshawks, Storm Petrels, Kingfishers, Phoebe, and Mountain Bluebirds may reuse the same exact nest year after year. Breeding dispersal is particularly low for most alcid species, for example, with a nest-site fidelity rate of 91.5% among Razorbills, 96% among Common Murres, 93.2% among Atlantic Puffins, and 57% to 95% among Black Guillemots.<sup>193</sup> The endangered Marbled Murrelet has been recorded in the same forest stands for a minimum of twenty years in northern California, eighteen years in central California, seven years in

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189. Special Purpose Permit, Inactive Nest Removal (May 7, 1996) (on file with author) (excluding from permitted activities the removal of nests used as roosting sites for “adults outside the breeding season”); Sara Sánchez, José Javier Cuervo & Eulalia Moreno, *Suitable Cavities as a Scarce Resource for both Cavity and Non-Cavity Nesting Birds in Managed Temperate Forests: A Case Study in the Iberian Peninsula*, 54 ARDEOLA 261, 268, 270 (2007), available at [http://www.mncn.csic.es/docs/repositorio/es\\_ES/investigacion/Ecologia\\_evolutiva/Cuervo/0527.pdf](http://www.mncn.csic.es/docs/repositorio/es_ES/investigacion/Ecologia_evolutiva/Cuervo/0527.pdf).

190. *Colonial-Nesting Waterbirds*, *supra* note 23.

191. Fletcher, Koford & Seaman, *supra* note 188, at 155.

192. Divoky & Horton, *supra* note 188, at 83.

193. *Id.*

Oregon, and three years in Washington, due in part to its adaptation to stable old-growth nesting habitat, rarely disturbed by the natural destruction of fire or wind storms.<sup>194</sup>

Some birds, including Least Terns and Peregrine Falcons, will abandon the area altogether if nest destruction occurs there.<sup>195</sup> In fact, the Service encourages destruction of inactive nests as a non-lethal method of discouraging birds from nesting in sensitive areas, like bridges, where their presence may result in harm to human health or safety, or to the birds themselves. However, the owner of a private island applying for a depredation permit was likewise encouraged by the Service to destroy the inactive nests of a group of displaced herons before they laid eggs so the herons would leave the island, for no other reason than to personally benefit the owner.<sup>196</sup> For alcids specifically, simple breeding failure often results in only small-scale movements.<sup>197</sup> Chronic disturbance, on the other hand, can cause breeders to move to new locations thousands of meters away.<sup>198</sup> For example, a Pigeon Guillemot that had been repeatedly disturbed was found several years later breeding at a site 7.7 kilometers away.<sup>199</sup> A colony of Black Guillemots that normally only moved to adjacent sites saw much greater movement up to five kilometers away after repeated disruption of nesting by Horned Puffins.<sup>200</sup> Increased rate and distance of dispersal affects productivity and adult survival. Indeed, it is suggested in the case of the Marbled Murrelet that increased natal dispersal may have an overall depressing effect on reproductive output.<sup>201</sup>

On the other hand, species with high site fidelity such as the Lesser and Greater Prairie-Chicken and Sharp-tailed Grouse may continue in former territories even though the habitat is no

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194. *Id.* at 84.

195. *Interior Least Tern*, KENTUCKYAWAKE.ORG, [http://www.kentuckyawake.org/Interior\\_Least\\_Tern](http://www.kentuckyawake.org/Interior_Least_Tern) (last visited May 13, 2013).

196. E-mail from Bill Howe, Nongame Coordinator, U.S. Fish & Wildlife Serv., to Diane Pence, Assistant Reg'l Dir., Migratory Birds & State Programs, U.S. Fish & Wildlife Serv. (Jan. 25, 2001) (on file with author).

197. Divoky & Horton, *supra* note 188, at 84.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 87.

longer suitable for breeding and results in lower fitness.<sup>202</sup> For example, Marbled Murrelets have been recorded visiting the remnants of newly harvested stands before disappearing from the area, and other alcids have shown fidelity to nest sites up to two years after they are destroyed.<sup>203</sup> Birds that remain in such sites forgo any chance of breeding success, and increase the likelihood of mortality.

In 2001, in the midst of debate over the new policy, protections for perennial nests were considered in initial discussions on the formation of a new nest policy at Easton, but ultimately were rejected.<sup>204</sup> Among other arguments, it was suggested that perennial nesters will rebuild when their nest is destroyed.<sup>205</sup> Marvin E. Moriarty wrote to Senator Mitch McConnell that “[r]emoving unoccupied nests at the end of nesting, or while they are being built, typically cause birds to build a new nest nearby in their defended territory, thus preventing further damage at the site of concern . . . thereby reducing the number of birds killed and eggs destroyed.”<sup>206</sup> Even if true, this still constitutes take of individual birds, because it eliminates a significant part of the energy savings these birds gain by adopting the site-fidelity nesting strategy. Moreover, Pale Male’s experience indicates that nest destruction can lead to negative consequences on breeding success. Pale Male rebuilt his

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202. Stanley A. Temple & John A. Wiens, *Bird Populations and Environmental Changes: Can Birds be Bio-indicators?*, 43 AM. BIRDS 260, 260 (1989), available at [http://www.ibiologia.unam.mx/directorio/r/d\\_renton/pdf/22.pdf](http://www.ibiologia.unam.mx/directorio/r/d_renton/pdf/22.pdf); N. AM. BIRD CONSERVATION INITIATIVE, *supra* note 123, at 6, 28.

203. Divoky & Horton, *supra* note 188, at 86.

204. E-mail from Susan Lawrence, Assistant Dir. of Migratory Birds & State Programs, U.S. Fish & Wildlife Serv., Region 9, to Gary Mowad, U.S. Fish & Wildlife Serv., Region 9 (June 5, 2000) (on file with author); E-mail from Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv., to Chuck Hunter, Chief, Div. of Planning & Res. Mgmt., U.S. Fish & Wildlife Serv., Region 4 (Feb. 2, 2001) (on file with author); E-mail from Steve Kendall to Diane Pence, *supra* note 157.

205. E-mail from Mike Elkins, Assistant Special Agent in Charge, U.S. Fish & Wildlife Serv., Region 4, to Chuck Hunter, Chief, Div. of Planning & Res. Mgmt., U.S. Fish & Wildlife Serv., Region 4 (Jan. 2, 2002) (on file with author).

206. Letter from Marvin E. Moriarty, Reg’l Dir., Div. of Migratory Bird Mgmt., U.S. Fish & Wildlife Serv., Region 5, to Senator Mitch McConnell, U.S. Senate 1 (2005) (on file with author).

nest after its destruction on December 7, 2004.<sup>207</sup> However, although he continued to lay eggs, none of them hatched until May 20, 2011, and the reason remains a mystery.<sup>208</sup> In the case of a colony of cliff swallows that returns to Seattle every March to nest on a park building, it was suggested that the annual removal of the colony's nests itself will "be a hardship on the swallows."<sup>209</sup> Regarding the destruction of nests under construction or refurbishment in preparation for breeding, which is exempted by the Policy Memo from permitting requirements, the Oregon Department of Transportation (ODOT) reports that swallows "may otherwise not realize reproductive success in the year that their nests are constantly removed."<sup>210</sup>

The impact of nest destruction both aggravates, and is aggravated by, habitat loss. The likelihood of movement is increased when nests are destroyed to make way for industrial or residential development or construction activities because it is often unlikely that the completed project will allow birds to re-nest.<sup>211</sup> When birds are unable to select sites based on the suitability of the landscape for nesting success, they are forced to rely on poor-quality nest sites vulnerable to predators.<sup>212</sup> Multiple-brooding species replaced single-brooding species in urban environments because these could compensate for nesting losses in habitats with low nesting success.<sup>213</sup> Abundance was no longer determined by the success of individual nests, but of an

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207. Margie Goldsmith, *New York City's Biggest Stud: Pale Male*, HUFFINGTON POST, Mar. 8, 2012, [http://www.huffingtonpost.com/margie-goldsmith/new-york-citys-greatest-s\\_b\\_1324150.html](http://www.huffingtonpost.com/margie-goldsmith/new-york-citys-greatest-s_b_1324150.html).

208. Browne, *supra* note 4.

209. Jane Hadley, *Grudging Welcome for Seattle Swallows: City Removes Barrier to Nests at Park*, SEATTLE POST-INTELLIGENCER REPORTER, Jan. 4, 2005, <http://mailman1.u.washington.edu/pipermail/tweeters/2005January/03428.htm>.

210. E-mail from Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv., to Andrew Monie, Biologist, Ecosystem Mgmt., Inc. (Feb. 8, 2005) (on file with author); OR. DEP'T OF TRANSP., CREATION OF ALTERNATIVE NEST SITES TO MINIMIZE SWALLOW CONFLICTS ON TRANSPORTATION STRUCTURES, FY 2008 RESEARCH PROBLEM STATEMENT GHE-08-18 2 (2008), *available at* [http://www.oregon.gov/ODOT/TD/TP\\_RES/NewProblemStatements/2008\\_StageOneProbStatements/GHE/GHE08\\_18SwallowsBridges.pdf](http://www.oregon.gov/ODOT/TD/TP_RES/NewProblemStatements/2008_StageOneProbStatements/GHE/GHE08_18SwallowsBridges.pdf).

211. Reale & Blair, *supra* note 187, at 1, 10.

212. *Id.*

213. *Id.*



entire nesting season, and single-brooding species were unable to maintain their populations.<sup>214</sup> Nor has the addition of small urban forests and parks resulted in increased bird numbers, due to the surrounding urbanization. One study found that grassland birds have lower reproductive rates in habitat islands than in large habitat blocks.<sup>215</sup> That study explained that “[i]n fragmented landscapes, high rates of nest predation and nest parasitism by brown-headed cowbirds significantly reduce the ability of many avian species to successfully reproduce.”<sup>216</sup> Another study also concluded that “[a]ny further fragmentation [in forests] and [forest-interior] birds would likely not return to nest because they are presently only occurring at the sites with the largest areas of forest,” while smaller areas mean reduced cover and increased predator densities.<sup>217</sup>

Returning to a site to nest has become increasingly difficult as forests continue to shrink. Whether a bird chooses to abandon a site, or a site is made unsuitable as a result of the activities that first made removal of the nest necessary, nest destruction can entail more than the loss of the nest structure itself. The presence of the nest indicates the existence of several conditions that are necessary for nesting. A nesting opportunity is often lost when a nest deemed inactive is destroyed. Researchers have suggested that “the availability of suitable nesting sites may be more limiting than food.”<sup>218</sup> Further, “most birds are highly specialized in their nesting-site location, while foraging preferences are more generalized and exhibit greater interspecific overlap.”<sup>219</sup> For example, creation of habitat for tree-nesting Marbled Murrelets can take 200 years.<sup>220</sup>

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214. *Id.*

215. *Nesting Ecology*, *supra* note 118, at 1.

216. *Id.* at 2.

217. Andrew Weber, Effects of Surrounding Landscape Features on Avian Populations 6 (Aug. 5, 2004) (unpublished student paper, Goshen College), available at <http://www.goshen.edu/cWtools/download.php/mnF=diversity.pdf,mnOD=05symposium,mnOD=My%20Documents,dc=honors,dc=www,dc=goshen,dc=edu>.

218. Reale & Blair, *supra* note 187, at 1, 10.

219. *Id.*

220. Divoky & Horton, *supra* note 188, at 86.

When nest sites are limiting in these ways, such losses have long-term ecological ramifications as well as immediate impacts on reproductive potential.<sup>221</sup> As more birds are unable to find suitable breeding habitats, they may begin to investigate habitats that do not support successful breeding, or they could end up not breeding at all.<sup>222</sup> For example, Marbled Murrelets suffer a decreasing ability to disperse in response to increased predation as suitable nesting habitat in old growth forests continues to fragment into smaller disjunctive patches.<sup>223</sup> Areas of high productivity can end up producing young to be incorporated into regions with low productivity and/or high mortality, counteracting recovery efforts.<sup>224</sup> Therefore, the existence of suitable nesting sites is a determining factor in the composition of bird community organization and species richness.

It is difficult to quantify the impact of non-regulation of inactive nest destruction for all migratory birds, as there is a lack of research on nesting habits and the various factors affecting nesting success and productivity. To accurately assess the viability of bird populations, more information is needed on the ability of bird species to disperse from natal sites, the fidelity of species to breeding sites, habitat use and needs outside the breeding season, feeding sites and the distances traveled to reach them, appropriate buffer distances around colonies and breeding sites for different species and types of sites, and the implications of all these factors in species response to habitat loss and reestablishment of breeding areas when habitat is altered.<sup>225</sup> However, a current lack of information does not mean there are no consequences, but rather that humans should act with caution lest there turn out to be unforeseen detrimental consequences. Because there is a possibility of harmful effects when destroying a nest, the situation should be scientifically evaluated by someone with sufficient expertise before the nest destruction.<sup>226</sup> In 1983,

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221. *Id.*

222. *Id.*

223. KUSHLAN ET AL., *supra* note 63; Divoky & Horton, *supra* note 188, at 86.

224. Divoky & Horton, *supra* note 188, at 86.

225. *Nesting Ecology*, *supra* note 118; KUSHLAN ET AL., *supra* note 63, at 20; Divoky & Horton, *supra* note 188, at 83.

226. KUSHLAN ET AL., *supra* note 63, at 16, 19.

the Acting Associate Director of the Service advised that “the circumstances must be carefully reviewed from several perspectives” before a special purpose permit is granted to allow an unoccupied nest to be destroyed.<sup>227</sup> Furthermore, a Region 2 interim nest policy stated that destruction of inactive nests in colonies would only be allowed “on a case-by-case basis as determined by the Migratory Bird Permits Office,” likely “after evaluation of the possible impact upon the bird species in question, and the larger ecological impact of that effect.”<sup>228</sup>

The Policy Memo excludes the inactive nests of threatened and endangered species as well as bald and golden eagles from the permit exemption.<sup>229</sup> However, many migratory bird species in a critical state are not federally listed as endangered or threatened, including species suffering local or regional declines, and recently delisted species that are still at risk. Furthermore, while some bird species of priority status may not be affected by inactive nest destruction, other bird species that have not made it on to any priority species list could still be negatively impacted by an increase in the destruction of inactive nests.

The following factors all vary by species: biology, life history, niche specificity, habitat requirements throughout the season, nesting location and placement of nests, nesting flexibility, nest-site fidelity, coloniality, migration strategies, foraging behaviors, dispersal ability, mobility, range, and population dynamics. Therefore, bird species respond differently, and with varying levels of sensitivity, to different threats and processes like habitat fragmentation or urbanization.<sup>230</sup> Even within a single species, some pairs can nest successfully dozens of yards from human activity, while others abandon sites in response to activities much farther away. This behavior depends on a number of factors, including visibility, duration, noise levels, extent of the area

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227. Memorandum from Acting Assoc. Dir. to Reg'l Dir., *supra* note 172.

228. U.S. FISH & WILDLIFE SERV., INTERIM EMPTY NEST POLICY OF THE U.S. FISH & WILDLIFE SERVICE, REGION 2 (May 2000) [hereinafter INTERIM NEST POLICY] (on file with author).

229. Policy Memo, *supra* note 8.

230. See N. AM. BIRD CONSERVATION INITIATIVE, *supra* note 123, at 4; Weber, *supra* note 217, at 1; see also Reale & Blair, *supra* note 187, at 1, 10; *Nesting Ecology*, *supra* note 118.

affected by the activity, prior experiences with humans, and tolerance of the individual nesting pair.<sup>231</sup>

Furthermore, factors impacting an individual bird of a particular species, including weather and habitat conditions, also vary by location.<sup>232</sup> Many birds have large ranges crossing national and continental borders or spanning oceans and some may cover enormous distances even in a period of weeks. Some birds use recognizable migration flyways, but others do not.<sup>233</sup> Across these ranges, a multitude of natural and human causes are constantly altering breeding, wintering, and migratory distributions.<sup>234</sup> Populations and ranges can change rapidly, especially in response to food availability.<sup>235</sup> In some cases, local populations that are not a conservation concern nationwide could be in danger, while in others species that are generally of high concern can suddenly rise to local abundance. Given the multitude of variables involved, the emphasis placed by the Service on instituting a consistent nationwide policy does not appear sustainable.<sup>236</sup>

Thus, in the midst of debate over the development of a new nest policy, Service employees from different regions have objected to this policy interpretation and have encouraged the national office to allow enforcement flexibility.<sup>237</sup> Specifically, employees suggested that regions be able to propose exceptions to the nest policy, taking into account population impacts.<sup>238</sup>

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231. DEFINITION OF "DISTURB", *supra* note 19, at 7.

232. E-mail from Steve Wilds, U.S. Fish & Wildlife Serv., to Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv. (Dec. 28, 2001) (on file with author).

233. KUSHLAN ET AL., *supra* note 63, at 12.

234. *Id.*

235. *Id.* at 18.

236. See E-mail from Eliza Savage to Bill Howe, *supra* note 171; E-mail from Bill Howe, U.S. Fish & Wildlife Serv., to Kamille McKeever, Permits Adm'r, U.S. Fish & Wildlife Serv., Region 2 (Sept. 18, 2000) (on file with author); see also E-mail from Karen Laing, U.S. Fish & Wildlife Serv., to Chuck Hunter, Chief, Div. of Planning & Res. Mgmt., U.S. Fish & Wildlife Serv., Region 4 (Feb. 7, 2001) (on file with author) (discussing difficulty of instituting such a policy).

237. E-mail from Karen Laing, U.S. Fish & Wildlife Serv., to Robert Leedy, U.S. Fish & Wildlife Serv. (Feb. 12, 2001) (on file with author); see also E-mail from Karen Laing to Eliza Savage, *supra* note 157.

238. *Id.*

Waterbird Conservation for the Americas also advised flexibility, stating that bird species “need to be managed within their social context,” and that “conservation requires flexibility and openness to redirection or change, such as might be justified by the results of research, monitoring, and experiential learning.”<sup>239</sup> Finally, Partners in Flight suggested that “[t]he most effective conservation measures, therefore, will often be site-specific, and in some cases species-specific.”<sup>240</sup>

However, the requests for flexibility in enforcement were denied, and the sweeping Policy Memo was issued in 2003, allowing bird nests to be destroyed even if adult birds still occupied them—so long as the bird is not in the nest at the time of destruction.<sup>241</sup> If there are no eggs, there is no need for a permit to destroy a nest, without exception.<sup>242</sup> The Center for International Environmental Law suggested that:

[t]his abdication of enforcement responsibilities cannot be considered prosecutorial discretion, because [the Service] has made a sweeping policy decision, not a case-by-case judgment associated with prosecutorial discretion. . . . A policy decision to avoid prosecutions and investigations in all cases all the time, including all future cases, bears no relation to a “reasonable exercise of . . . discretion in respect of investigatory, prosecutorial, regulatory or compliance matters.”<sup>243</sup>

Under the new policy, anyone may destroy a nest so long as no egg or fledgling is within it, at any time, including a more fragile species at a critical time in the nesting season, thus there is no reason for those contemplating nest destruction to seek information from the Service.<sup>244</sup> Further, there is no opportunity

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239. KUSHLAN ET AL., *supra* note 63, at 14, 18.

240. BERLANGA ET AL., *supra* note 17, at 23.

241. E-mail from Eliza Savage to Chuck Hunter, *supra* note 204.

242. *Id.*

243. Submission to Comm’n on Env’tl. Cooperation, *supra* note 127, at 15 (quoting North American Agreement on Environmental Cooperation, U.S.-Can.-Mex. art. 45(1), 1993, available at <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567>).

244. See E-mail from Karen Laing, Wildlife Biologist, U.S. Fish & Wildlife Serv., to Robert Leedy, Chief, Div. of Migratory Bird Mgmt., U.S. Fish & Wildlife Serv. (Feb. 12, 2001) (on file with author); E-mail from Karen Laing to

for the Service to review the context of the nest destruction. This discourages informed decision-making. As stated by one Service employee, when the permit was granted for 927 Fifth Avenue Corporation to destroy Pale Male and Lola's nest, "[the Service] had no clue that this was the nest of a famous pair of hawks."<sup>245</sup>

It can be difficult for the public to determine whether the single nest they are destroying is active, and they are liable to make mistakes without the expertise to know otherwise. Service employees were concerned that the public could have difficulty determining whether an inactive nest is part of a colony, as some are, or more loosely associated.<sup>246</sup> Further, the Policy Memo admits that the destruction of nests can create a risk of taking migratory birds in violation of the MBTA. Although it is generally agreed that nests are still considered active if, as stated in the Region 2 Interim Policy, "recently fledged birds are returning to roost in the nest at night," it can be hard to know if there are such fledglings still dependent on a currently unoccupied nest.<sup>247</sup> One Service official warns that "a person could end up responsible for the death of a juvenile if it was in the process of fledging and not actually on the nest, but not fully departed from it either, and so still somewhat dependent on it."<sup>248</sup>

Finally, the MBTA itself is clear in stating:

Nothing in this subchapter shall be construed to prevent the several States and Territories from making or enforcing laws or

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Eliza Savage, *supra* note 157; E-mail from Karen Laing, Wildlife Biologist, U.S. Fish & Wildlife Serv., to Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv. (Dec. 5, 2001) (on file with author); E-mail from Chuck Hunter, Chief, Div. of Planning & Res. Mgmt., U.S. Fish & Wildlife Serv., Region 4, to Cyndi Perry, Chief, Branch of Bird Conservation, U.S. Fish & Wildlife Serv., and Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv. (Dec. 27, 2001) (on file with author); and E-mail from Bill Howe, Nongame Coordinator, U.S. Fish & Wildlife Serv., to Cyndi Perry, Chief, Branch of Bird Conservation, U.S. Fish & Wildlife Serv. (Nov. 28, 2001) (on file with author).

245. Greenspan, *supra* note 1 (quoting Diane Pence, Assistant Reg'l Dir., Migratory Birds & State Programs, U.S. Fish & Wildlife Serv.).

246. E-mail from Bill Howe to Cyndi Perry, *supra* note 244; E-mail from Chuck Hunter to Cyndi Perry and Eliza Savage, *supra* note 244.

247. INTERIM NEST POLICY, *supra* note 228, at 1; *see also* E-mail from Stephanie Jones, Nongame Coordinator, U.S. Fish & Wildlife Serv., Region 6, to Bill Howe, Nongame Coordinator, U.S. Fish & Wildlife Serv. (July 19, 2000).

248. E-mail from Eliza Savage to Andrew Monie, *supra* note 210.

regulations not inconsistent with the provisions of said conventions or of this subchapter, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs . . . .<sup>249</sup>

The Service Manual correspondingly states that a permit is not valid unless accompanied by appropriate state permits where required.<sup>250</sup> Some such state laws prohibit the destruction of inactive nests. Wyoming Ecological Services states that “[n]o nest manipulation is allowed without a permit,” although “[n]o permits will be issued for an active nest of any migratory bird species, unless removal of an active nest is necessary for reasons of human health and safety.”<sup>251</sup> The Florida Fish and Wildlife Conservation (FFWC) Commission issues permits to take active and inactive Osprey nests.<sup>252</sup> FFWC policy toward Burrowing Owl nests, is that “[w]hen such permits are issued [to destroy burrowing owl nest burrows], they apply only to inactive nests.”<sup>253</sup>

It was made abruptly apparent in December 2004 that the Service’s policy set forth in the Policy Memo violates at least one state law when Pale Male’s nest was destroyed in New York. New York state law mandates that “[n]o person shall rob or willfully destroy a nest of any protected birds unless a permit shall first be obtained from the department.”<sup>254</sup> “Protected birds” is defined to include all wild birds, except English sparrows, starlings, pigeons, and psittacine birds.<sup>255</sup> Permits are issued by the New York State Department of Environmental Conservation for nests that pose a nuisance or danger to the public. The 927 Fifth Avenue co-op board did not apply to New York for a permit to remove Pale Male’s nest; the board only applied to the Service,

249. 16 U.S.C. § 708 (2012).

250. U.S. Fish & Wildlife Serv., 724 FW 2, Authorities, Objectives, and Responsibilities for Migratory Bird Permits § 2.14 (2003), *available at* <http://www.fws.gov/policy/724fw2.pdf>.

251. Wyo. Ecological Servs., *Migratory Birds*, U.S. FISH & WILDLIFE SERV., (July 1, 2010), [http://www.fws.gov/wyominges/Pages/Species/Species\\_MigBirds.html](http://www.fws.gov/wyominges/Pages/Species/Species_MigBirds.html).

252. OSPREY NEST REMOVAL POLICIES, *supra* note 120, at 1.

253. BURROWING OWL NEST PROTECTION, *supra* note 120.

254. N.Y. ENVTL. CONSERV. LAW § 11-0505(5) (McKinney 2012).

255. N.Y. ENVTL. CONSERV. LAW §§ 11-0103(5)(a), (b) (McKinney 2013).

which informed the board that no permit was required. This likely led to 927 Fifth Avenue Corporation's assumption that its actions were legal at the federal and state levels and thus to its pell-mell destruction of a ten-year-old home.

This illustrates the fears of some Service officials that shifting from a position in which all nests are protected from destruction to one in which only some are protected might lead to public confusion, compounding the potential for mistakes generated by the lack of expert oversight.<sup>256</sup> The public may assume the exemption from permitting applies to all nests and otherwise interpret the policy too liberally. It is generally understood that, as stated in the Department of Transportation Guidance, "[the Service] has essentially issued a blanket permit for removal of nests on bridges and the demolition of bridges housing nests during the nonnesting season."<sup>257</sup> Should this perception result in destruction of apparently inactive nests on a massive scale, even a slight negative impact is necessarily magnified, not least because diminished enforcement capability can generally lead to more activities that negatively affect migratory birds.<sup>258</sup> On the other hand, Partners in Flight states that "[r]elatively small policy changes can have dramatic cumulative benefits . . . ."<sup>259</sup>

The Service's answer in the Policy Memo is to

[M]ake every effort to raise public awareness regarding the possible presence of birds and the risk of violating the MBTA, the Endangered Species Act (ESA), and the Bald and Golden Eagle Protection Act (BGEPA), and should inform the public of factors that will help minimize the likelihood that take would occur should nests be destroyed . . . .<sup>260</sup>

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256. Memorandum from Diane Pence, Assistant Reg'l Dir., Migratory Birds & State Programs, U.S. Fish & Wildlife Serv., Region 5, to Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv. (May 2002) (on file with author).

257. WIS. DEP'T OF TRANSP., GUIDANCE, SWALLOW NESTING ON WISCONSIN BRIDGES SCHEDULED FOR DEMOLITION. PERMITTED ACTIVITY. ALTERNATIVES AND COORDINATION (1994) (on file with author).

258. DEFINITION OF "DISTURB", *supra* note 19, at 3-5.

259. BERLANGA ET AL., *supra* note 17, at 27.

260. Policy Memo, *supra* note 8, at 2.



However, the North American Commission for Environmental Cooperation states:

Initiatives such as International Migratory Bird Day may educate members of the public on the importance of protecting migratory birds, but the response does not address issues such as the resources that have been committed to outreach efforts, whether these programs have addressed all significant sources of threats to migratory birds (including logging), the extent of their actual beneficial effect, or the comparative educational benefits of public outreach efforts and the use of MBTA prosecutions as “leveraging” tools.<sup>261</sup>

Although it is clear that there are many different situations where birds rely on unoccupied nests and that the Service should not authorize destruction of such nests, in situations where destruction is appropriate, a permitting process is necessary. Without the permitting process, few will come to the Service for information, especially once it comes to be understood that no permit is needed. The position of the Service prevents prosecution for the unnecessary removal of a red-tailed hawk nest, or in any case where a negative impact occurs as a result of the destruction of a so-called inactive nest, essentially abdicating regulation.

#### **E. The Service Must Require a Permitting Process for All Nest Destruction Activities**

It is through the permitting process that the Service implements its responsibilities to ensure that the injunctions of the MBTA are being complied with. Through this process, the Service identifies the impacts on migratory birds, as well as principles to minimize those impacts.<sup>262</sup> The Service is able place limiting conditions upon permitting take.<sup>263</sup> For example, the

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261. N. Am. Comm’n for Env’tl. Cooperation, *supra* note 122, at 12.

262. Submission to Comm’n on Env’tl. Cooperation, *supra* note 127, at 24.

263. U.S. Fish & Wildlife Serv. Director’s Order 131 Sec. 8 states, “[w]e will place conditions on permits based on the activities authorized, including, but not limited to, a requirement to file a report on the species and quantity of birds taken as a result of the permit.” Director’s Orders are temporary. This order

Service can require evaluation by trained personnel, and mandatory reporting on the impacts of activity. Further, Executive Order 13186 requires “that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds.”<sup>264</sup> Specifically, guidelines for implementing the rule exempting the Department of Defense (DoD) from incidental taking of migratory birds in military readiness activities requires the DoD to “engage in early planning and scoping and involve agencies with special expertise in the matters relating to the potential impacts of a proposed action.”<sup>265</sup>

The Service can also condition the permitting of take by requiring mitigation to minimize negative impact to migratory bird populations. That Secretary of Defense is also required, “in consultation with the Secretary of the Interior, . . . to minimize and mitigate, to the extent practicable, adverse impacts of the readiness activities on affected migratory birds.”<sup>266</sup> Specific measures are described, and additional measures may be developed.<sup>267</sup> Regarding the impact of nest destruction, mitigation measures can include constructing nesting platforms, purchase and preservation of habitat suitable for nesting of the affected species, and, where possible, relocation of the nest as an alternative to destruction. The FFWC Commission only permits take of nests after conservation recommendations are put in place.<sup>268</sup> To ensure Osprey populations do not decline as a result of nest removal and because Osprey “will often rebuild a nest in the undesirable location unless a superior site is provided

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expired August 6, 2003, and was superseded by a section 724 FW 2 of the U.S. Fish & Wildlife Service Manual.

264. Exec. Order No. 13186, 66 Fed. Reg. 3853, 3855 (Jan. 10, 2001), *available at* [http://www.doe.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/Req-EO13186migratorybirds.pdf](http://www.doe.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-EO13186migratorybirds.pdf).

265. Take of Migratory Birds by Dep’t of Def., 69 Fed. Reg. 31,074, 31,080 (June 2, 2004).

266. BALDWIN, *supra* note 134, at 1.

267. DEP’T OF DEF. PARTNERS IN FLIGHT, *2008 Annual Report: DoD Partners in Flight Program* (2009), *available at* [http://www.dodpif.org/downloads/factsheet18\\_2008report.pdf](http://www.dodpif.org/downloads/factsheet18_2008report.pdf).

268. E-mail from Chuck Hunter, U.S. Fish & Wildlife Serv., to Mike Elkins, Assistant Special Agent in Charge, U.S. Fish & Wildlife Serv., Region 4 (Jan. 3, 2002) (on file with author).

nearby,” the state “requires that osprey nests removed under migratory bird permits be replaced by replacement structures of comparable or better quality.”<sup>269</sup> If it is not possible to put up a replacement nest structure, “the situation will be reviewed on a case by case basis.”<sup>270</sup> Wyoming Ecological Services may also require mitigation for permitted loss of inactive golden eagle nests.<sup>271</sup>

Essentially, the permitting process allows the Service to make mandatory guidelines that are otherwise advisory, and promote migratory bird management objectives from bird conservation plans as well. For example, all three North American countries have identified the most critical sites for bird conservation based on a set of globally accepted criteria.<sup>272</sup> Three hundred eighty-three Important Bird Areas remain unprotected in the United States alone.<sup>273</sup> Thus, the public would greatly benefit from such a permitting process, a benefit that outweighs the perceived risk posed by migratory bird nests.

#### **F. The Service’s Policy Memo Does Not Alleviate Agency Resource Constraints**

The North American Commission for Environmental Cooperation reported that “the United States asserts that the [Service’s] Office of Migratory Bird Management lacks sufficient personnel to write permits for every incoming request,” as well as for a broad range of responsibilities, so that addressing hunters and prospective hunters keeps current resources occupied.<sup>274</sup> Service employees have documented concerns about the feasibility of setting up a permit program for all incidental takes, and have described being besieged by cities wishing to destroy egret colonies, and plagued by calls about nests interfering with

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269. OSPREY NEST REMOVAL POLICIES, *supra* note 120, at 5.

270. *Id.* at 2.

271. Wyo. Ecological Servs., *supra* note 251.

272. BERLANGA ET AL., *supra* note 17, at 23.

273. *Id.*

274. N. Am. Comm’n for Env’tl. Cooperation, *supra* note 122, at 16; see Patricia Breakey, *Bird Law Upsets Crews*, THE DAILY STAR, May 28, 2003, <http://old.thedailystar.com/news/stories/2003/05/28/birds.html>.

human activities.<sup>275</sup> These concerns include addressing the myriad of everyday situations in which nests are destroyed such as “logging program[s], homeowner removal of dead trees or limbs, trimming hedges, mowing lawns, bridge inspection and repair, [and] removing nests from chimneys . . . .”<sup>276</sup> Furthermore, most of those situations are not even brought to Service employees’ attention, thus the prohibition against their destruction goes largely unenforced.<sup>277</sup>

Moreover, the ability to regulate and prosecute does not necessitate prosecution of every violation.<sup>278</sup> Service employees themselves have characterized prosecution of incidental take as a “low enforcement priority,” while enforcement nevertheless remains “at the discretion of the law enforcement division.”<sup>279</sup> The North American Commission for Environmental Cooperation reported the Service’s statement that “the U.S. Congress and courts accept and acknowledge that non-prosecution of some violations of the MBTA is integral to the statutory scheme, and therefore that the Party is entitled to exercise some degree of enforcement discretion under the Act.”<sup>280</sup> In fact, such discretion is unavoidable.<sup>281</sup> Instead of abdicating all enforcement ability because of the impossibility of permitting every take of inactive nests unlikely to be reused, adopting a policy of discretion would allow the Service to prosecute takes of unoccupied nests where

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275. *Id.*; E-mail from Bill Howe, U.S. Fish & Wildlife Serv., to Susan Lawrence, Assistant Dir. of Migratory Birds & State Programs, U.S. Fish & Wildlife Serv., Region 9 (June 1, 2000) (on file with author); E-mail from Steve Wilds, U.S. Fish & Wildlife Serv. (May 23, 2002) (on file with author).

276. E-mail from Ellen Paul, Exec. Dir. of the Ornithological Council, to Diane Pence, Assistant Reg’l Dir., Migratory Birds & State Programs, U.S. Fish & Wildlife Serv. (Dec. 28, 2004).

277. E-mail from Chuck Hunter to Cyndi Perry and Eliza Savage, *supra* note 244.

278. E-mail from Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv., to Cyndi Perry, Chief, Branch of Bird Conservation, U.S. Fish & Wildlife Serv. (Sept. 30, 2003) (on file with author).

279. Breakey, *supra* note 274 (quoting Susan Lawrence, Staff Biologist, U.S. Fish & Wildlife Serv.).

280. N. Am. Comm’n for Env’tl. Cooperation, *supra* note 122, at 20 (footnote omitted).

281. *Id.* at 16.

there is an effect upon migratory bird populations, while maximizing Service resources.

Service officials and employees have suggested that the Service maintain flexibility to protect birds under this policy, and even that it is possible to authorize with conditions by regulation, as is done under the Marine Mammal Act, hunting regulations, the Bald and Golden Eagle Act, and even the MBTA in cases of migratory bird possession.<sup>282</sup> Therefore, a few categories of nests can be exempted from permitting. Those within the Service have also suggested that an official list of birds with “special nesting needs” be compiled and maintained.<sup>283</sup>

To create such a list one would need to establish set criteria for protecting particular nests from destruction, proving negative impact. It is challenging to identify all the situations in which nest protection may be desired, specifically to define just what constitutes a perennial nest, or a colonial nest, as a justification for not providing these with extra protection.<sup>284</sup> For example, it becomes more difficult to justify giving protection to some nests and not others, thus the list of exceptions continues to grow. Finally, it will still be necessary for enforcement officials to evaluate instances in which the nests of other species are destroyed, because the public will generally be unable to distinguish which nests are which.<sup>285</sup> Therefore, it may make more sense just to issue permits.<sup>286</sup>

Another option is to determine which situations make up the bulk of requests for inactive nest destruction, and institute special policies in these instances, as this is likely to be a shorter list. For example, one can determine which bird species are

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282. *Id.*

283. E-mail from Karen Laing to Eliza Savage, *supra* note 244; E-mail from Bill Howe to Cyndi Perry, *supra* note 244.

284. U.S. Fish & Wildlife Serv., Director’s Order, Permit Requirements for Take of Nests Under the MBTA, Easton, MD meeting (May 2000) (on file with author); E-mail from Stephanie Jones to Bill Howe, *supra* note 247.

285. E-mail from Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Serv., to Cyndi Perry, Chief, Branch of Bird Conservation, U.S. Fish & Wildlife Serv. (Nov. 29, 2001) (on file with author).

286. E-mail from Eliza Savage, U.S. Fish & Wildlife Serv., to Karen Laing, Wildlife Biologist, U.S. Fish & Wildlife Serv. (Nov. 30, 2001) (on file with author).

responsible for the bulk of nuisance nests, and exempt these alone from permitting requirements.<sup>287</sup> Furthermore, a programmatic permit is defined in the Federal Register as a permit that authorizes take “that is recurring, is not caused solely by indirect effects, and that occurs over the long term or in a location or locations that cannot be specifically identified.”<sup>288</sup> When the prohibition against the traditional hunt ended up not being enforced, the Canadian Federal Government recognized the right of the aboriginal people to hunt and the Protocol Amending the 1916 Convention for the Protection of Migratory Birds brought the Convention into conformity with practice.<sup>289</sup> Nevertheless, permitting continues to allow for the effective regulation of the hunt for conservation purposes.<sup>290</sup> Additionally, Service officials have suggested issuing limited numbers of permits for inadvertent injuries to birds or nests, prior to engaging in activities or on projects that may harm migratory birds, and the same could be done for activities that may interfere with migratory bird nests.<sup>291</sup>

The Service often handles frequent and recurring activities, which cannot be easily accommodated under the permitting system, by entering into agreements that reduce case-by-case consultation.<sup>292</sup> To support sustainable land use, the Service can prescribe mandatory practices to support bird populations and habitats, in return for enforcement concessions and alternative

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287. *Id.*

288. 50 C.F.R. § 22.3 (2012).

289. See S. REP. NO. 105-5 (1997), available at <http://www.gpo.gov/fdsys/pkg/CRPT-105erpt5/html/CRPT-105erpt5.htm>.

290. Protocol Amending the 1916 Convention for the Protection of Migratory Birds, *supra* note 126, at 2.

291. Diane Henry, Migratory Bird Nest Destruction Policies Questioned: Fall Trial Will Look Into a Number of Pressing Issues When it Comes to Protecting Endangered Birds, *HERE*, June 19, 2008, at A12, available at <http://herenb.canadaeast.com/news/article/330624>; Draft Memorandum from Steve Williams, Dir., U.S. Fish & Wildlife Serv. on Migratory Bird Permit Policy (Dec. 3, 2001) (on file with author).

292. E-mail from Andrew Monie, Biologist, Ecosystem Mgmt., Inc., to Eliza Savage, Regulatory Analyst, U.S. Fish & Wildlife Service (Feb. 8, 2005) (on file with author); see WIS. DEP’T OF TRANSP., *supra* note 257; see also BALDWIN, *supra* note 134, at 6.

methods for complying with existing regulations.<sup>293</sup> Creative enforcement of regulations, for example, enables landowners to maintain agriculture and timber production while managing wetlands.<sup>294</sup> The Service has worked with industries and individuals whose actions result in bird deaths in the Avian Power Line Interaction Committee, the Avian Subcommittee of the National Wind Coordinating Committee, the Communication Tower Working Group, the Interagency Seabird Working Group, the Cat Indoor Program, and the Fatal Light Awareness Program.<sup>295</sup> Most significantly, Executive Order 13186 provides the framework for establishing agreements of this sort with other Federal agencies:

Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.<sup>296</sup>

MOUs should “minimize the intentional take of species of concern by: (i) delineating standards and procedures for such take; and (ii) developing procedures for the review and evaluation of take actions.”<sup>297</sup>

Convenience is not a justification for the abdication of all enforcement authority. The Service must fulfill its responsibilities toward migratory birds in a way that is consistent with the statutory requirements of the law. Although the Service is concerned that doing so will be a burden, this Article has argued otherwise. Indeed, a Service policy that is in accordance with the laws and regulations aimed to protect migratory birds can be implemented efficiently and would be an enormous benefit to the public, as birds have great economic, ecological, and

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293. BERLANGA ET AL., *supra* note 17, at 27.

294. N. AM. BIRD CONSERVATION INITIATIVE, *supra* note 56, at 19.

295. MIGRATORY BIRD MORTALITY, *supra* note 106.

296. Exec. Order No. 13186, 66 Fed. Reg. 3853, 3854 § 3(a) (Jan. 10, 2001), available at [http://www.doe.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/Req-EO13186migratorybirds.pdf](http://www.doe.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-EO13186migratorybirds.pdf).

297. *Id.* at 3855 § 3(e)(8).

cultural value in our society. As such, the current policy should be changed to reflect the conclusions presented herein.

## VI. CONCLUSION

Based on the information presented above, this Article proposes several ways that the Service can reinstate protection for nests under the MBTA and begin conserving birds as required by Congress. The Service could implement each of these proposed regulations, or one or more of them, to effectuate the changes suggested in this article.

1. **Add “including the constructive possession entailed by destruction or having the intent to destroy” to the term “possession” found within the Migratory Bird Treaty Act**

The Migratory Bird Treaty Act states that:

[I]t 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 bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain, [Mexico, Japan, and the Union of Soviet Socialist Republics] . . . for the conservation of migratory birds and their environments . . .<sup>298</sup>

Because of the Service’s specious argument that its “possession” definition is inapplicable to the destruction of nests,<sup>299</sup> thereby differentiating nest from bird and then active nests from inactive nests, the Secretary of Interior should adopt

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298. 16 U.S.C. § 703(a) (2006) (emphasis added).

299. See Moholt Memo, *supra* note 146.



the following regulation to ensure that destruction of nests is included in the definition of “possession.” The regulation should be adopted in order to fulfill the MBTA’s mandate that migratory birds *and their nests* be protected.

Proposed definition:

50 CFR 10.12: Possession means the detention and control, or the manual or ideal custody of anything which may be the subject of property, for one’s use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one’s place and name. Possession includes the act or state of possessing, and that condition of facts under which one can exercise one’s power over a corporeal thing at one’s pleasure to the exclusion of all other persons. Possession includes constructive possession, which means not actual but assumed to exist, where one claims to hold by virtue of some title, without having actual custody, including the constructive possession entailed by destruction or having the intent to destroy, and any act of destruction toward a corporeal thing.

**2. Defining “nest” as a structure to protect adults, young, and eggs, including perennial bird nests, decoy nests, and abandoned nests**

The Service has not yet promulgated a definition for nest. It should do so because the MBTA directly restricts contact with nests. Types of contact prohibited by the MBTA include possession, sale, purchase, barter, transport, import, export, and take.<sup>300</sup> The Service will be unable to prevent possession, sale, purchase, barter, transport, import, export, or take of a nest if no one—including the Service—knows or agrees upon what a nest is.

A broad central theme connects the nest definitions found in various dictionaries,<sup>301</sup> biologists’ opinions, and ornithological

300. 16 U.S.C. § 703(a) (2006).

301. See, e.g., OXFORD ENGLISH DICTIONARY, [http://oxforddictionaries.com/us/definition/american\\_english/nest?q=nest](http://oxforddictionaries.com/us/definition/american_english/nest?q=nest) (last visited May 13, 2013) (defining “nest” as “(1) a structure made by a bird for laying eggs and sheltering its young,” and “(2) a place where an animal or insect breeds or shelters.”); WEBSTER’S NEW COLLEGIATE DICTIONARY 771 (1978) (defining “nest” as “a: a bed or receptacle prepared by an animal and especially a bird for its eggs and young,” and “b: a place or specially modified structure serving as an abode of animals and especially of their immature stages.”).

resources: that of shelter. Birds create multiple nests to not only provide an area in which they lay eggs and raise young, but also to take shelter for themselves.<sup>302</sup>

Nests are generally made by using organic materials. Birds may use materials such as twigs or grass to construct nests, placing the nest on a ledge, in a tree, or even on the ground.<sup>303</sup> However, some nests may simply be completed by creating an indentation, or scrape, on the ground or on a ledge, a practice employed by threatened snowy plovers and endangered California condors.<sup>304</sup> Nests may also be found in cavities in dead or live trees, the sole nesting place for the western bluebird.<sup>305</sup> Because nest materials and location vary widely from bird to bird, a broad definition that encompasses the purpose of the nesting site, rather than the way it looks, should be enacted.

Accordingly, to further the purpose of the MBTA to protect migratory birds *and their nests*, the Service should adopt a broad definition of nest which does not limit the various purposes of bird nests: shelter for adults, eggs, and young, decoy for predators, and shelter for other species. This article proposes the following definition of nest:

Proposed definition:

50 CFR 10.12: Nest means the structure, material, or surface created and/or used purposefully and instinctively by a wild bird to support, protect, or enclose eggs and/or nestlings and/or itself.

**3. Create a regulation to ensure that Service actions are otherwise legal under current federal, state, and territorial law.**

Many states have laws prohibiting the destruction of inactive nests, especially those of particularly sensitive species. However, in December 2004, the 927 Fifth Avenue Corporation destroyed Pale Male's nest without applying to the state for a permit,

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302. 16 U.S.C. § 668(c) (2006) (defining inactive nest to include adults, fledglings, and eggs). Similarly, an MBTA definition involving nests should include adults, fledglings, and eggs.

303. *Nesting Ecology*, *supra* note 179.

304. *Id.*

305. *Id.*

despite New York's prohibition of nest destruction. The Service's assurances that no permit was necessary to remove the nest likely led to 927 Fifth Avenue Corporation's assumption that its actions were legal at the federal and state levels. Therefore, the Service should promulgate a policy for its MBTA actions to comply with state and territorial law.

Proposed definition

50 CFR 10.12: Permit means any document designated as a "permit," "license," "certificate," or any other document issued by the Service to authorize, limit, or describe activity and signed by an authorized official of the Service. Such permits shall not be issued unless the Service determines that the actions covered by the permit are lawful under all other international, federal, state, and local laws regulating migratory birds.

**4. Require mitigation measures and supervision by a federally certified agent as conditions for nest destruction authorized by permit**

The Service's current nest destruction permitting scheme requires no mitigation of the ecological damage caused by the nest's removal, nor does it require supervision of the nest destruction by a public official. Failure to require these elements hinders the Service's ability to carry out its mandate to protect migratory birds under the MBTA.

Additionally, the presence of a biologist trained in ornithology during the nest destruction would help to ensure that the nest is correctly identified and that the destruction is limited to what is authorized by the permit. The certified official would also review and inspect the required mitigation measures to ensure that adequate alternative nesting opportunities for the affected birds are provided.