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Two Birds by the Pit: Courts Split Over Well Operator Liabilities under the Federal Migratory Bird Treaty Act

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Introduction

A recent federal court decision in North Dakota focuses on an issue of concern to oil and gas operators nationwide – whether unintended fatalities of migrating birds at well sites can give rise to criminal liability under the Migratory Bird Treaty Act (“MBTA”).¹ The North Dakota district court dismissed criminal charges brought by the United States Fish and Wildlife Service (“FWS”) against several operators for unintended bird deaths that occurred near reserve pits at well sites. The court’s decision in *United States v. Brigham Oil & Gas, L.P.*² represents the narrow view that the MBTA should only impose criminal liability on those who deliberately “take” or “kill” migratory birds, but not those engaged in lawful activities that happen to result in unintended deaths of migratory birds. Other federal courts have taken a different view, interpreting the MBTA as imposing criminal liability for reasonably foreseeable migratory bird fatalities proximately caused by otherwise lawful conduct, including well-site operations. As the *Brigham Oil & Gas* decision illustrates, the courts that have imposed criminal penalties for unintended bird deaths have struggled to define the scope of liability under the MBTA.

The federal government has appealed the decision to the Eighth Circuit Court of Appeals.³ Operators may wish to consider ways to weigh in on the issues, such as participating as an *amicus* party, to offer additional industry perspectives to the next court poised to decide this important and developing issue.

The Migratory Bird Treaty Act

The key issue for operators with respect to the MBTA is whether unintended bird deaths that result from well-site operations can lead to criminal liability. Section 703 of the MBTA provides that “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill . . . any migratory bird” protected under the Act, or “any part, nest, or egg of any such bird.” The key words are “take” and “kill.” The statute does not define those words, and the implementing regulations merely add shooting, wounding, trapping, and collecting to the list of prohibited acts. Given the lack of clear guidance in the statute and regulations, courts have interpreted the statute on a case-by-case basis and reached different conclusions about whether otherwise lawful conduct that results in an unintended bird death constitutes a violation of the Act.

The differences in judicial interpretation of the MBTA are highlighted in other contexts that may influence court decisions and impact the oil and gas industry. For example, in a habitat-destruction

¹ Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (“MBTA” or “the Act”).

² *United States v. Brigham Oil & Gas, L.P.*, No. 4:11-po-005, -009, -004, 2012 U.S. Dist. LEXIS 5774 (D.N.D. Jan. 17, 2012).

³ *United States v. Brigham Oil & Gas, L.P.*, No. 12-1376 (8th Cir.).

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case in the Marcellus Shale region, a district court in Pennsylvania endorsed a narrow reading of the MBTA, explaining that “the loss of migratory birds as a result of timber sales . . . do[es] not constitute a ‘taking’ or ‘killing’ within the meaning of the MBTA.”⁴ In contrast, courts in other oil-and-gas-producing areas have interpreted the MBTA broadly. For instance, a federal court in Colorado held that, if the government established proximate cause, an electricity provider could be criminally liable for the unintended electrocution of birds from power lines that supplied electricity to oil fields.⁵

Cases in the Oil and Gas Context

In the 1970s, the government first demonstrated its willingness to prosecute the oil and gas industry under the MBTA for bird deaths resulting from pits at well sites. These cases were resolved without meaningful court interpretations of the Act. Recently, however, several courts have addressed the scope of criminal liability under the MBTA for unintended bird deaths at oil and gas well sites, with differing outcomes.

- ***No liability under the Act for unintended migratory bird deaths at well sites.***

In New Mexico and Louisiana, federal district courts have taken a narrow view of liability under the MBTA for bird fatalities at well sites. In *United States v. Ray Westall Operating, Inc.*, fifty dead birds had been discovered in the operator’s evaporation pit. The pit was covered by chicken wire, but a technical malfunction caused overflow water to pool above the level of the sagging netting. The federal district court concluded “that Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths.”⁶ As a result, the court held that the operator was not liable under the Act.

Similarly, a federal district court in Louisiana found that the MBTA and its implementing regulations were “not intended to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities, as happened here.”⁷ Thirty-five Brown Pelicans had died in the space between the outer wall of a wellhead and the inner wall of a “caisson,” a steel structure designed to protect the wellhead from damage due to contact with boats. The court’s opinion suggests that liability might attach when a “prohibited act” leads to bird deaths, highlighting the importance of regulatory compliance.

- ***Strict liability under the Act for activities that “proximately cause” migratory bird deaths at well sites.***

The United States Court of Appeals for the Tenth Circuit (which includes Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) has concluded that operators are strictly liable for unintended bird deaths “proximately caused” by well-site activities.⁸ In *United States v. Apollo Energies, Inc.*, dead birds had been found in the defendants’ heater-treaters. The court found it inconsequential that one of the operators had attempted (unsuccessfully) to prevent birds from entering the equipment. Instead, the critical question was whether it was reasonably foreseeable that migratory birds would die because of the equipment. The court held operators strictly liable for any bird deaths that occurred after they had been put on notice of the threat posed by heater-treaters.

⁴ *Curry v. U.S. Forest Service*, 988 F. Supp. 541 (W.D. Pa. 1997).

⁵ *United States v. Moon Lake Electric Ass’n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999).

⁶ *United States v. Ray Westall Operating, Inc.*, No. CR 05-1516-MV, 2009 U.S. Dist. LEXIS 130674 (D.N.M. Feb. 25, 2009).

⁷ *United States v. Chevron USA, Inc.*, No. 09-CR-0132, 2009 U.S. Dist. LEXIS 102682 (W.D. La. Oct. 30, 2009).

⁸ *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

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Under a broad reading of the Tenth Circuit’s decision, nearly every migratory bird death at an oil and gas site may be criminally punishable under the MBTA.

United States v. Brigham Oil & Gas, L.P.

Against this back-drop, the court in *Brigham Oil & Gas* addressed the issue of MBTA liability for bird deaths near reserve pits. The government alleged that two of the well-operator defendants’ reserve pits were not netted when inspected by the FWS. While there was no indication whether the third company’s reserve pit was netted, it had allegedly overflowed, releasing fluid into a nearby wetland where dead birds were found. The court dismissed charges against all defendants, holding “that the use of reserve pits in commercial oil development is legal, commercially useful activity that stands outside the reach of the [MBTA].”

The following are some key elements of the court’s opinion:

- ***The court endorsed a narrow reading of the Act.*** Relying on Eighth Circuit precedent interpreting the MBTA in other contexts, the court concluded that “take” and “kill” meant only “physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.” Because oil and gas development is not like hunting and poaching, the court held that these lawful activities cannot give rise to liability under the MBTA even if they incidentally cause the death of a protected migratory bird.
- ***The court construed all doubt in favor of the accused.*** The court also relied upon the venerable interpretative maxim that an ambiguous criminal statute should be construed narrowly and in favor of defendants in cases of uncertain application (the “rule of lenity”).
- ***The court rejected a broader reading that would criminalize lawful behavior.*** The court noted that a reading of the statute that allowed liability for any activity that “proximately causes” bird deaths would mean criminalizing many everyday activities, such as driving a vehicle, owning a building with windows, and cutting brush and trees, all of which are perfectly legal but may cause the death of a protected migratory bird.

Conclusion

Brigham Oil & Gas represents another small step in favor of a narrow interpretation of the MBTA. However, the court’s decision should not be construed as settling the scope of MBTA liability. As noted, some courts have reached different conclusions about the scope of liability under the MBTA, and there remains no reliable indication of how broadly or narrowly the federal courts will apply the MBTA to incidental bird deaths at oil and gas well sites.

In light of the government’s appeal, the *Brigham Oil & Gas* case is now in the hands of the Eighth Circuit. Given that the court’s decision may influence interpretations of the Act in other regions that have substantial oil and gas activities, the industry should consider opportunities to participate as an *amicus* party in this case. In addition, there may be other opportunities for stakeholders to participate in agency interpretations or legislation that will address the issue going forward. In the meantime, until greater clarity develops, the industry should be mindful of potential liabilities under the MBTA and possible means of reducing those risks by limiting attraction and exposure of migrating birds.

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