



North Dakota Federal Court Issues Significant Ruling Dismissing Attempted Criminal Prosecution of Oil and Gas Companies Under the Migratory Bird Treaty Act

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On January 17, 2012, the U.S. District Court for the District of North Dakota dismissed a criminal case brought by the federal government seeking to prosecute three oil and gas companies for alleged violations of the Migratory Bird Treaty Act ("MBTA" or "the Act"), 16 U.S.C. §§ 703 and 707(a). In this case, the federal government charged three companies with misdemeanor criminal violations of the MBTA for "taking" (killing) migratory birds found dead in or near their respective reserve pits. The case is styled as *United States v. Brigham Oil and Gas, L.P. et al.*, Case No. 4:11-po-005 (N.D. 2012).

The MBTA is a criminal statute enacted by Congress in 1918 to implement various treaties and conventions between the U.S. and Canada, Japan, Mexico and the former Soviet Union for the protection of migratory birds. The MBTA makes it unlawful to, among other things, "pursue, hunt, take, capture, kill" migratory birds without a permit. 16 U.S.C. § 703. The penalties for violating the Act are severe; with fines of up to \$15,000 for each taken (killed) migratory bird, as well as the possibility of jail time. 16 U.S.C. § 707. Over the past three years, there has been a significant increase in enforcement of the MBTA and prosecution of oil and gas companies for alleged violations of the Act. These cases generally arise when inspecting authorities such as the U.S. Fish and Wildlife Service or Bureau of Land Management find dead birds in reserve pits.

In this case, the defendants filed motions to dismiss arguing that the federal government failed to allege a crime under the MBTA. The Court granted the motions to dismiss, finding that otherwise lawful commercial activity which indirectly kills a migratory bird does not violate the MBTA. The Court found that incidental deaths of migratory birds during operation of legal and lawful activities is not subject to criminal charges.

The Court explained that the word “take” in the context of the Act refers to deliberate conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths during the operation of lawful and permitted commercial activity, such as oil and gas operations. The Court stated that the conduct must be deliberate, not accidental.

Specifically, the Court held:

[t]hat the use of reserve pits in commercial oil development is a legal commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act. Like timber harvesting, oil development and production activities are not the sort of physical conduct engaged in by hunters and poachers, and such activities do not fall under the prohibitions of the [MBTA].

Brigham Oil and Gas, L.P. et al., Case No. 4:11-po-005, at 15. In reaching this decision, the court relied upon established precedent in the U.S. Court of Appeals for the Eight Circuit, which includes North Dakota.

In rendering this decision, this North Dakota federal court expressly rejected a decision by the U.S. Court of Appeals for the 10th Circuit¹ holding in *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010). In *Apollo Energies*, two Kansas oil drilling operators were charged with violating the Act. The 10th Circuit rejected the oil companies arguments that the MBTA was unconstitutional for vagueness, holding that the statute was a strict liability crime and that the oil companies proximately caused the harm to the bird’s or “took” the birds, in violation of the Act.

The decision in *Apollo Energies, Inc.* is distinguishable from the North Dakota federal court decision, which found that the government failed to plead conduct that was in violation of the MBTA based upon the plain language of the statute and that accidental bird deaths resulting from lawful oil and gas operations does not constitute a “take” or violation of the Act, which requires a deliberate action such as hunting or poaching.

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¹ The 10th Circuit includes Colorado, Wyoming, Utah, New Mexico, Kansas and Oklahoma.