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## New Ruling Highlights Split on Strict Liability for Incidental ‘Taking’ of Migratory Birds

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*Recent federal court decisions regarding the application of the criminal enforcement provisions of the Migratory Bird Treaty Act (MBTA) to the operations of oil and gas exploration and production facilities have resulted in conflicting interpretations of the Act. These decisions are significant for the oil and gas industry as well as other industries whose operations can impact migratory birds.*

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In the most recent case, *United States v. Brigham Oil and Gas, L. P., Newfield Production Company, and Continental Resources, Inc.*, \_\_\_F. Supp 2d\_\_\_, 2012 WL 120055 (January 17, 2012), the U.S. District Court for North Dakota held that the Act's criminal provisions do not apply to the operations of a permitted oil reserve pit which caused or resulted in the death of migratory birds. Accordingly, the court dismissed the misdemeanor criminal information complaints, holding “as a matter of law, that lawful commercial activity which may indirectly cause the death of migratory birds does not constitute a federal crime.” It would be surprising if the Federal Government fails to appeal this ruling.

The criminal information alleged that the migratory birds were illegally “taken” by these defendants when the bodies of the birds were discovered at or near the reserve pits, which are used to store, on a temporary basis, the drilling muds and other chemicals used in the drilling of these wells. The court noted that the information complaints were lacking the required specificity and were subject to dismissal for failure to properly state an offense.

The MBTA is a criminal statute, enacted in 1918, and amended from time to time. Section 703 of the Act makes it a crime to ‘take’ protected birds, a very large group of species, which are identified at 50 CFR Section 10.13, without regard to the species' rarity or viability (in contrast to bird species protected under the federal Endangered Species Act and equivalent state statutes as endangered or threatened). While the Act does not define “take,” the rules implementing the Act define the term as conduct in which a person “pursues, hunts, shoots, wounds, kills, traps, captures or collects.” See 50 CFR Section 10.12. Violations of the law have been consistently construed to be strict liability crimes, meaning that no criminal intent or mens rea must be proven to obtain a misdemeanor conviction.

The issue for the North Dakota court was whether the concept of “take” could be extended to the normal operation of a regulated commercial activity, i.e., the use of oil reserve pits. On the basis of Eighth Circuit

precedent, the court held that lawful commercial activity that is not directed at hunting or poaching—the primary targets of the Act—and has only incidental or unintended consequences to protected migratory birds, cannot be prosecuted under the MBTA.

The leading case in the Eighth Circuit on the reach of the MBTA is *Newton County Wildlife Association v. US Forest Service*, 113 F3d 110 (CA 8, 1997). In this case, the court of appeals rejected an attempt to place approved timber sales under the constraints of the MBTA even though extensive logging activities would disrupt nesting migratory birds, inevitably resulting in the death of at least some protected birds. The appeals court held that to agree with this proposition would be to "stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, which indirectly results in the death of migratory birds."<sup>1</sup>

This result contrasts sharply with the 2010 decision of the Tenth Circuit in the case of *United States v. Apollo Energies Inc.*, 611 F3d 679 (CA 10, 2010). In *Apollo Energies*, the court reviewed the misdemeanor criminal convictions of two Kansas oil companies in whose oil field equipment (heater treaters) protected migratory birds had been trapped and died. The cases were tried before a U.S. Magistrate and resulted in convictions and small fines for illegally "taking" these birds. The court first noted that the MBTA is a strict liability statute, and the Government was not obliged to establish criminal intent. The Tenth Circuit distinguished the Eighth Circuit's opinion in *Newton County* on the basis that the activity complained of involved the modification of bird habitat. While the court acknowledged that the Act could be stretched to the breaking point, it held that was not the case here. The basic issue was whether unprotected oil field equipment can take or kill migratory birds, and it was obvious to the court that it could. The only question for the court, in deciding whether the Act could be applied on a strict liability basis, was the due process consideration of adequate notice. One of the defendants had received government notices that birds were being found in such equipment, but took no measures to prevent this occurrence. The other defendant had not been so advised, and this lack of notice invalidated his conviction under the Act.

Surprisingly, there is very little Fifth Circuit precedent directly on point. However, the Fifth Circuit has refused to accept the imposition of the MBTA's strict liability scheme in cases involving hunters using poisoned bait. See *United States v. Delahoussaye*, 573 F. 2d 910 (CA 5, 1978), and *United States v. Sylvester*, 848 F. 2d. 520 (CA 5, 1988). On the basis of this lack of precedent, the U.S. Magistrate presiding over the government's MBTA prosecution of Chevron Corporation rejected an agreed plea of guilty where Chevron had attached steel structures known as caissons to wellheads to protect the wellheads from offshore weather conditions, and the caissons resulted in the trapping and death of several pelicans. According to the Magistrate, the employment of such caissons was legal and prevalent in the industry, and the regulations implementing the MBTA were clearly not intended to "apply to commercial ventures when, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities." See *United States v. Chevron Corporation*, \_\_\_ F. Supp2d \_\_\_, 2009 WL 3645170 (WD, La.), October 30, 2009.

In the event the Eighth Circuit's *Newton County* opinion is construed to support the ruling of the North Dakota federal court, then a significant conflict would be created between two appeals courts whose trial courts are likely to hear more of these disputes as oil and gas activity in these states increases rapidly. Any Supreme Court resolution is speculative, and unlikely to take place for some time. In the meantime,



<sup>1</sup> This result is consistent with the narrow language of the MBTA's regulatory definition of "take," which contrasts with the Endangered Species Act's regulatory definition of "take" (to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect," or attempt to engage in any such conduct; "harm" is defined by these regulations to mean "an act which actually kills or injures wildlife," including "significant habitat modifications or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." 50 CFR §17.3. The Endangered Species Act provides for criminal penalties as well, but only for "knowing violations."

oil and gas operators, including refiners, would be well advised to evaluate their operations, especially the use of unprotected oil field equipment and pits and ponds of all sorts. The government's Trial Memorandum in the case of *United States v. CITGO Refining and Chemicals Company* (which can be found at 2007 WL 2049382, (SD TX, June 26, 2007) cites several unreported cases in which oil companies have accepted guilt or were found guilty under the MBTA's strict liability provisions for the operation of oil sumps and oil pits. In addition, the Congressional Research Service published a survey of the criminal provisions of the MBTA and other legislation in a 2010 report entitled, "The 2010 Oil Spill: Criminal Liability Under Wildlife Laws," which also lists these decisions. Until the courts universally recognize that criminal liability does not result from the deaths of migratory birds that are clearly *incidental* to lawful operations—as opposed to affirmative acts that are arguably implicit in the terms used in the MBTA's regulatory definition of "take" (hunt, capture trap)—operators will continue to be at risk of criminal liability under the MBTA.

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