

## Federal District Court Rejects U.S. Fish and Wildlife Service's Imposition of Criminal Penalties Under the Migratory Bird Treaty Act

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In *United States v. Brigham Oil and Gas, L.P.*, 2012 WL 120055 (D. N.D.), issued January 17, 2012, a federal district court in North Dakota dismissed several criminal complaints against seven oil and gas companies operating in North Dakota's Williston Basin for allegedly violating the Migratory Bird Treaty Act (16 U.S.C. §§ 703 and 707(a)) ("MBTA"). The U.S. Fish and Wildlife Service alleged that each company operated an oil reserve pit near a drill site that contained chemicals, and that it was reasonable to conclude that the dead migratory birds found in or around each of these pits died due to exposure to the chemicals in the reserve pits. The reserve pits were part of the companies' operations licensed by the North Dakota Secretary of State, and regulated by North Dakota state law. The court held, as a matter of law, that "lawful commercial activity which may indirectly cause the death of migratory birds does not constitute a federal crime" under the MBTA.

### BACKGROUND

The MBTA provides for criminal penalties for the "taking, killing or possessing" of any of the approximately 836 listed species of migratory bird. The court concluded that, under the MBTA definitions, "take" and "kill" are both action-forcing words that do not contemplate accidental activity or unintended results of other conduct. Accordingly, the court held that the use of the reserve pits in commercial oil development is outside the reach of the MBTA noting that "[l]ike 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]."

Based on the definition of "take" found in the regulations, the court concluded that the MBTA prohibits harmful conduct (i.e., taking, killing or possessing) to migratory birds, but does not criminalize negligent acts or omissions that may incidentally or proximately cause bird deaths. In doing so, the court reasoned:

If the [MBTA] concepts of "take" or "kill" were read to prohibit any conduct that proximately results in the death of a migratory bird, then many everyday activities become unlawful – and subject to criminal sanctions – when they cause the death of pigeons, starlings and other common birds. For example, ordinary land uses which may cause bird deaths include cutting brush and trees, and planting and harvesting crops. In addition, many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, inevitably cause migratory bird deaths....To be consistent, the Government would have to criminalize driving, construction, airplane flights, farming, electricity and wind turbines, which cause bird deaths, and



many other everyday lawful activities.

Relying on the prior Eighth Circuit precedent in *Newton County Wildlife Ass'n v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997), and other cases, the court noted the well-established principle that a criminal statute should be construed narrowly. Thus the court concluded that “it is highly unlikely that Congress ever intended to impose criminal liability on the acts or omissions of persons involved in lawful commercial activity which may indirectly cause the death of” migratory birds.

### IMPLICATIONS

This decision confirms the limited application of the MBTA to natural resource development activities (including wind projects and transmission line projects) which incidentally impact migratory birds. While it is unclear whether the federal government will appeal this decision, the court’s analysis should inform U.S. Fish and Wildlife Service enforcement of the MBTA. That said, as the court acknowledged, there now appears to be a split between the Eighth Circuit and other U.S. Courts of Appeals in interpreting the scope of the MBTA. Until this split is resolved, there will continue to be uncertainty regarding the application of the MBTA to commercial activities that indirectly impact migratory birds.

### FOR ADDITIONAL INFORMATION

Van Ness Feldman provides clients with vital legal and political counsel on a broad range of land and water use issues. The firm is experienced in navigating complex and overlapping regulations, including the Migratory Bird Treaty Act, that govern the development of energy projects. For more information on the federal district court’s decision, please contact Matt Love, Joe Nelson, or any member of the firm’s Public Lands & Natural Resources practice in Seattle, WA at 206.623.9372 or in Washington, D.C. at 202.298.1800.

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