

CLIENT ALERT

Federal Court Rejects Expansive Interpretation of Criminal Liability Under Migratory Bird Treaty Act

Jan.19.2012

In a decision with broad implications, a federal judge in North Dakota recently dismissed three criminal cases brought under the Migratory Bird Treaty Act by the federal government as part of a targeted enforcement action on the "North Dakota oil patch." See *United States v. Brigham Oil & Gas L.P.*, -- F. Supp. 2d --, 2012 WL 120055 (D.N.D. Jan. 17, 2012). The federal government argued that the Migratory Bird Treaty Act should be broadly interpreted to impose criminal liability for actions that indirectly result in a protected bird's death. The U.S. District Court for the District of North Dakota rejected this sweeping interpretation of the Act and dismissed criminal Informations filed against three oil and gas companies on whose properties protected birds had allegedly been found dead. The court's reasoning is applicable to numerous legal activities that may indirectly kill migratory birds, including oil and gas activities, wind energy operations, and mining activities.

The Migratory Bird Treaty Act, passed in 1918, criminalized a long list of actions relating to migratory birds such as "pursue," "hunt," "capture," "sell," "purchase," and "barter." 16 U.S.C. § 703. The pivotal issue in the case was the proper interpretation of the words "kill" and "take" in that list. The court interpreted them narrowly to mean actions taken with the intent to kill or take a bird, not actions that merely happen to kill or take a bird. In support of this interpretation, the court relied on the plain language of the statute, precedent from the Eighth and Ninth Circuits narrowly construing the statute, see *Newton County Wildlife Ass'n. v. U.S. Forest Serv.*, 113 F.3d 110, 115-16 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991), as well as other district court cases in which courts have declined to impose criminal liability for legal activities that incidentally resulted in bird deaths. See *United States v. Ray Westall Operating Inc.*, No. CR 05-1516-MV, 2009 U.S. Dist. LEXIS 130674, at *1 (D.N.M. Feb. 25, 2009); *United States v. Chevron USA, Inc.*, No. 09-CR-0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009).

Critical to the court's decision was its finding that the "use of reserve pits [in and around which the birds were allegedly found] in commercial oil development is legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act." *Brigham Oil & Gas*, Slip op. at 15. This distinction between the intentional activity criminalized by the statute and lawful activity that incidentally results in bird death was central to the court's decision: "Like the common understanding of 'hunt,' 'capture' or 'attempt to take,' the words 'take' and 'kill' mean an intentional act and do not suggest coverage of a lawful action that may result in the death of a bird." *Id.* at 17. The court further held that the government's interpretation of the statute would lead to "absurd results" by criminalizing everyday behaviors. *Id.* Citing statistics from the U.S. Fish and Wildlife Service identifying major sources of bird deaths, the court reasoned that "[t]o 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." *Id.* at 18-19. The court thus rejected the government's interpretation as improperly authorizing "unlimited potential for criminal prosecutions" and "unwarranted under the Migratory Bird Treaty Act as it is currently written." *Id.* at 19.

The *Brigham Oil & Gas* decision joins a growing body of case law in which federal courts have rejected the federal government's expansive interpretation of the Migratory Bird Treaty Act. Although some courts appear to have accepted the government's interpretation, see *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978), the *Brigham Oil & Gas* decision continues a trend toward a limited interpretation of the Act that restricts criminal liability to activities directed at birds. This interpretation protects numerous industries, including oil and gas, electrical transmission, mining, and wind energy from criminal liability for bird deaths incidental to their lawful and commercially-useful activities.

John Martin and Sarah Bordelon of Crowell & Moring led the briefing of this case, and John argued the motion to dismiss before the district court.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.