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Court Holds Migratory Bird Treaty Act Does Not Apply to Incidental Takes in Energy Setting

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The Fifth Circuit Court of Appeals recently held that a Corpus Christi oil refinery could not be held liable under the Migratory Bird Treaty Act (MBTA) for "take" of dead migratory birds found in equalization tanks. The court's holding is limited to the Fifth Circuit, and is in contrast to Tenth Circuit precedent. However, it will have broader implications for proposed U.S. Fish and Wildlife Service (FWS) policy.

The MBTA was enacted in 1918 to protect birds as they migrated across North America. The MBTA makes it a crime "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird" protected by the Act. 16 U.S.C. § 703(a); § 704(a). Convictions under the Act can carry fines of up to $15,000 and six months imprisonment. 16 U.S.C. § 707(a).

District Court Ruling and Tenth Circuit Precedent

In *United States v. Citgo Petroleum Corporation*, No. 14-40128, (5th Cir. Sept. 4, 2015), available here, the Fifth Circuit overruled a district court determination that the word "take" "involves more activities than those related to hunting, poaching and intentional acts against migratory birds." *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841, 842-43 (S.D. Tex. 2012). The district court found that that the oil refinery's act of leaving its equalization tanks uncovered, which in turn allowed birds to enter the tanks and die from exposure to the wastewater within, constituted a take.

The district court's holding is in line with precedent here in the Tenth Circuit. In *United States v. Apollo Energies, Inc.*, 611 F. 3d 679, 681 (10th Cir. 2010), the court upheld convictions of two Kansas oil rig operators for violating the MBTA when two dead birds were found in heater treaters. There, the court found it "obvious" that "unprotected oil field equipment can take or kill migratory birds." *Id.* at 686.

Fifth Circuit Decision and Reasoning

In contrast, the Fifth Circuit declined to follow the district court and Tenth Circuit's reasoning, stating that while the MBTA is a strict liability statute, "an element of an MBTA misdemeanor crime" requires that a defendant "take an affirmative action to cause migratory bird deaths[.]"

In forming its decision, the Fifth Circuit looked to both the statutory construction of the MBTA and the common law definition of "take" as applied to wildlife at the time of enactment of the MBTA, neither of which included accidental or indirect harm to animals. Conversely, the court noted, the Endangered Species Act and Marine Mammal Protection Act did specifically include terms such as "harm" and "harass" in its definition of "take," which encompass direct and indirect harm to animals, including negligent acts. "The absence from the MBTA of terms like 'harm' or 'harass', or any other language signaling Congress' intent to modify the common law definition supports reading 'take' to assume its common law meaning." Therefore, the Fifth Circuit found that Congress specifically intended to exclude indirect and negligent harm to animals.

Based on the historical common law interpretation of the MBTA, the Fifth Circuit held that while the oil refinery's uncovered equalization tanks caused the bird deaths, there was no deliberate or intentional act that caused the bird deaths and conferred criminal liability.

Broader Implications

While the Fifth Circuit's reasoning does not apply here in the Tenth Circuit, the *Citgo* court did discuss the absurdity of a broad reading of the MBTA, stating that "[i]f the MBTA prohibits all acts or omissions that 'directly' kill birds, where bird deaths are 'foreseeable,' then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA." Such a reading of the Act, the court stated, would allow the government to prosecute at will and against any object or pet that kills a bird.

The *Citgo* court's decision, and especially the discussion regarding the absurdity of a broad reading of the MBTA, stands to have implications on the FWS's May 2015 notice of an intent to prepare a programmatic environmental impact statement to evaluate the impacts of a proposal to authorize incidental take of migratory birds under the MBTA, including permitting oil and gas activities. *See* 80 Fed. Reg. 30032, 30035 (May 26, 2015). Based on the *Citgo* decision in the Fifth Circuit, and similar decisions in the Eighth and Ninth Circuits, any permitting program developed by the FWS would have limited enforceability.

For more information on the court's ruling or its implications, please contact Theresa Sauer.