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September 15, 2015

Fifth Circuit Holds that Migratory Bird Treaty Act Does Not Apply to Incidental Takes

What It Means for Energy Developers

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On September 4, 2015, the Fifth Circuit Court of Appeals reversed the misdemeanor convictions of Citgo Petroleum Corporation and Citgo Refining and Chemicals Company, L.P. (collectively Citgo) for "taking" migratory birds in violation of the Migratory Bird Treaty Act of 1918 (MBTA). *United States v. Citgo Petroleum Corp.*, No. 14-40128, 2015 WL 5201185 (5th Cir. Sept. 4, 2015). The case has broad implications for both traditional and renewable energy projects within the Fifth Circuit's jurisdiction, as migratory bird deaths resulting from development and operation of these projects will no longer constitute a violation of the MBTA. But while the holding is binding only within the Fifth Circuit, it has much broader implications for U.S. Fish and Wildlife Service (Service) policy.

The MBTA is a criminal statute that makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill" approximately 836 different species of birds. Citgo's MBTA convictions stemmed from the government's discovery of the remains of 35 protected birds in two uncovered equalization tanks containing more than 130,000 barrels of oil at the Company's Corpus Christi refinery. In overturning Citgo's MBTA convictions, the Fifth Circuit held that "the MBTA's ban on 'taking' only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds." In reaching its decision, the court explicitly rejected Tenth and Second Circuit decisions holding that the MBTA, as a strict liability statute, forbids acts that accidentally or incidentally kill birds. Instead, the court aligned itself with decisions of the Eighth and Ninth Circuits that limited the scope of criminal violations under the MBTA to deliberate acts directly and intentionally directed at migratory birds.

The Court's Reasoning Explained

In support of its conclusion that the MBTA does not apply to incidental takes, the Fifth Circuit panel relied heavily on the common law origin of the term "take." The court emphasized that "when the MBTA was passed in 1918, 'take' was a well understood term of art" that, when applied to wildlife, meant to "reduce those animals, by killing or capturing, to human control." The court concluded that "one does not reduce an animal to human control accidentally or by omission, he does so affirmatively." Drawing a comparison with other relevant federal wildlife statutes, the court also highlighted that the MBTA does not broadly define "take" to include harassment or harm as the Endangered Species Act and Marine Mammal Protection Act do. The court explained that the way take is defined in those Acts demonstrates that Congress knew how to expand the definition of take "beyond its common law origins to include accidental or indirect harm." It therefore concluded that "[t]he absence from the MBTA of terms like 'harm' or 'harass', or any other language signaling Congress's intent to modify the common law definition supports reading 'take' to assume its common law meaning."

While the court agreed that the MBTA is a strict liability statute, it emphasized that this merely eliminates the need for the government to prove *mens rea*, or criminal intent. The government must still prove that the defendant committed the underlying act. Under the MBTA, the court reasoned that the required underlying act is 'to take' which, "even without a *mens rea* is not something that is done unknowingly or involuntarily." As such, the court held that even under the strict liability regime imposed by the MBTA, the government must prove that a defendant took an affirmative action to cause migratory bird deaths in order to support a conviction under the statute.

Significantly, the court made clear that the affirmative action required to support a conviction is not merely an act or omission that directly and foreseeably kills birds, as the government had suggested. It specifically mentioned that under the government's interpretation, "owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church

steeples" would be subject to potential criminal liability, calling that result "absurd" and noting that it would allow the government to "prosecute at will and even capriciously." Finally, the court expressed concern about the far reaching societal impacts that could result from the government "exercising its muscle to prevent 'takings' and 'killings' by regulating every activity that proximately causes bird deaths."

What the Decision Means for Energy Developers

The Fifth Circuit's decision in this case should provide energy developers and industrial operators in Texas, Louisiana, and Mississippi with comfort that bird deaths that occur incidentally during project construction and operation will not constitute violations of the MBTA. The decision is likely to significantly impair the ability of the Service to influence behavior without legal action. The "absurd" interpretation with which the court was concerned is precisely the interpretation that the Service has historically relied upon to influence the siting, development and operation of commercial and industrial projects, by selectively dangling prosecutorial discretion and selecting enforcement targets based on compliance with Service policy and guidance. Within the Fifth Circuit's jurisdiction, the Service's ability to "exercise its muscle" is now limited to those sites and projects where compliance with the ESA or Bald and Gold Eagle Protection Act is a potential concern. While far more robust in the protections they provide, the reach of those statutes is considerably more limited than the reach of the MBTA has historically been.

Looking forward, the *Citgo* ruling is also likely to have implications on the Service's proposed development of a permitting program under the MBTA. The Service announced in May of 2015 that it intends to prepare a programmatic environmental impact statement to evaluate the impacts of a permitting program authorizing incidental take of migratory birds under the MBTA. This MBTA permitting program would likely provide companies legal coverage for incidental take in exchange for commitments to implement measures that avoid or minimize take and restore or protect habitat. The basis for such a permitting program rests on the assumption that the MBTA prohibits incidental take. The Fifth Circuit's decision in this case invalidates that assumption for an important part of the country, particularly when combined with similar decisions from the Eighth and Ninth Circuits. This calls into question both the need for and the ability of the Service to develop an MBTA permitting program. Even if the Service did proceed to develop such a program, as a result of the Citgo decision the Service would be powerless to require companies operating in the Fifth Circuit's jurisdiction to obtain or apply for such permits.

Of course, the Fifth Circuit's decision is subject to appeal to the U.S. Supreme Court. Given the emerging split between circuits that have addressed the issue of incidental take under the MBTA, the issue may well be ripe for consideration by the Supreme Court. However, the Justice Department is likely to be very deliberate in choosing the right case with the right fact pattern for such an appeal to give itself the best chance of preserving broad MBTA jurisdiction nationwide.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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