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Kevin J. Bliss

HUNTING REGULATIONS HELD CONSTITUTIONAL

WILDLIFE CONSERVATION LAW–THE MIGRATORY BIRD TREATY ACT: The Fifth Circuit Court of Appeals affirms certain regulations of the Secretary of the Interior prohibiting the hunting of migratory waterfowl in "baited areas" or in areas influenced by the presence of callers, against claims that the regulations are unconstitutionally vague and hence a violation of due process. *U.S. v. Delahoussaye,* 573 F.2d 910 (5th Cir. 1978).

Defendants were found guilty of violating two hunting regulations of the Secretary of the Interior.[1] The facts of the case, as determined by the magistrate, showed that defendants were hunting from a duck blind located less than 300 yards from live calling decoys and scattered grain in an area over which ducks were flying. It was determined that the defendants knew or should have known of the presence of the callers and enticements. The magistrate therefore concluded that the defendants had violated the two federal regulations by hunting in a "baited area" and within an "area" influenced by the presence of callers.[2]

The regulations which defendants were convicted of violating were established by the Secretary of the Interior pursuant to the Migratory Bird Treaty Act[3] (the Act). The Act is part of Chapter 7, Title 16 of the U.S. Code, entitled, "Protection of Migratory and Insectivorous Birds,"[4] whose stated object is to "aid in the restoration of such birds . . . where the same have become scarce or extinct and to regulate the introduction of American or foreign birds or animals into localities where they have not heretofore existed."[5] The preamble to the Act states that it is "to give effect to the conventions between the United States and other nations for the protection of migratory birds, birds in danger of extinction, game mammals, and their environment. . ."[6] The Act is the result of three separate

1. 50 C.F.R. § 20.21(f), (i) (1977).
2. U.S. v. Delahoussaye, 573 F.2d 910, 912 (5th Cir. 1978).
3. 16 U.S.C. § § 703-11 (1974).
4. *Id.* § § 701-18(h).
5. *Id.* § 701.
6. Act of June 1, 1974, Pub. L. No. 93-300, § 1, 88 Stat. 190.

treaties entered into by the United States with the governments of Great Britain, Mexico, and Japan. The first treaty was signed with Great Britain in 1916[7] and enacted into law in 1918.[8] It was subsequently amended and extended as a result of treaties with Mexico in 1936,[9] and Japan in 1972.[10]

Section 703 of the Act, as amended, makes it unlawful to hunt, take, kill, sell or transport any migratory bird, or the nest or egg of such bird, or to attempt these activities unless specifically permitted by the regulations as authorized by §§703-711 of the Act. Further, §704 of the Act authorizes and mandates the Secretary of the Interior to regulate the hunting and taking of migratory birds, consistent with the treaties and their purposes.

Pursuant to that mandate, the Secretary of the Interior issued migratory bird hunting regulations.[11] Of particular concern in *U.S. v. Delahoussaye* are paragraphs (f) and (i) of regulation §20.21 of Subpart C.[12] Paragraph (f) prohibits the taking of migratory birds by the use or aid of live birds as decoys, and paragraph (i) the taking of migratory birds with the aid of baiting or "on or over any baited area."[13] Baiting is described as the scattering of grain, salt or other feed so as to constitute an attraction or enticement to such birds, and "baited area" as any area over which such grain, salt or other feed capable of attracting or luring birds has been directly or indirectly scattered or deposited. Baiting does not include grain or crops which are either standing or which are there as the result of normal bona fide agricultural planting or harvesting.

Defendants appealed their conviction to the Fifth Circuit raising essentially three issues. First, they contended that the phrases "baited area" or the "area benefitting from the presence of live decoys," were unconstitutionally vague and uncertain.[14] Second, they argued that the minimum form of scienter used, namely, "should have known," especially when combined with the term "area," was too vague and uncertain to be constitutionally valid, and hence a violation of due process.[15] Their third contention was that

7. Convention on Protection of Migratory Birds, United States-United Kingdom, Aug. 16, 1916, 39 Stat. 1702, T.S. 628.
8. Act of July 3, 1918, Pub. L. No. 186, 40 Stat. 755.
9. Act of June 20, 1936, Pub. L. No. 728, 49 Stat. 1555.
10. Act of June 1, 1974, Pub. L. No. 93-300, §1, 88 Stat. 190.
11. 50 C.F.R. §§20.1 to 20.143 (1977).
12. *Id.* §20.21.
13. *Id.*
14. U.S. v. Delahoussaye, 573 F.2d 910, 912 (5th Cir. 1978).
15. *Id.*

the decision in *United States v. Olesen*[16] should control as to the definition of the maximum "area" constitutionally allowable under the regulations.[17]

In *United States v. Olesen*[18] the defendant was charged with hunting ducks from a "baited area," at a distance of greater than 200 yards from the baiting site. Defendant contended, as did the State of California as amicus curiae, that the term "area" as defined in the federal regulations was unconstitutionally vague.[19] The U.S. District Court for the Southern District of California, however, avoided deciding the issue of vagueness by concluding that since the California state regulations prohibited the taking of fowl only within 200 yards, and since the state regulations were reasonable, the federal regulations were in *pari materia* with the state regulations, or they must be construed with reference to each other. Therefore, "area" as defined by California must be held as having been adopted by the Secretary of the Interior since he took no steps to overrule the state regulations, although he had knowledge of their existence.[20]

In response to the issues raised by the defendants in *U.S. v. Delahoussaye*, the Fifth Circuit held that the term "area" as used in the challenged regulations was not unconstitutionally vague and uncertain, since the "area" intended by the regulations was "rather plainly that within and over which the bait or the callers exercised an attraction."[21] The court did concede that an "area," as defined above, could expand and contract with such factors as wind and weather, and that there could be dubious zones at the area's edges, requiring that "hunters resist the temptation to sail close to the wind."[22]

On the issue of scienter, the court concluded that it was a very necessary element for a criminal conviction under the regulations, but found that the minimum form, "should have known," will suffice for conviction. To require the stricter form of actual guilty knowledge would render the entire regulations difficult to enforce and would encourage hunters to take no precautions to insure that they were not hunting in either a "baited area" or an "area" influenced by the presence of callers.[23]

16. 196 F. Supp. 688 (S.D. Cal. 1961).
17. U.S. v. Delahoussaye, 573 F.2d 910, 913 (5th Cir. 1978).
18. 196 F. Supp. 688 (S.D. Cal. 1961).
19. *Id.* at 689-90.
20. *Id.* at 690-91.
21. U.S. v. Delahoussaye, 573 F.2d 910, 912 (5th Cir. 1978).
22. *Id.*
23. *Id.*

Finally, as to defendant's contention that "area" as defined in *U.S. v. Olesen*[24] was controlling, the court concluded that the *Olesen* decision turned on the existence of the narrower California definition of "area." There being nothing in the record here to suggest a similar Louisiana law, the case had no bearing. The court added, however, that even if there had been such a law, they would have been inclined not to follow *Olesen* because the hunting regulations are national, founded on treaty, and should be consistent from state to state.[25]

U.S. v. Delahoussaye is significant because the court upheld the relatively broad language of the regulations as established by the Secretary of the Interior. This will enable enforcement of the regulations consistent with the purposes of migratory waterfowl conservation as established by treaty and reaffirmed by the Migratory Bird Treaty Act. To have held that the term "area" was unconstitutionally vague and must be more narrowly defined, or to have held that the scienter requirement be the stricter form of actual guilty knowledge would have rendered the regulations less capable of achieving the purposes for which they were formed.

If appealed, it is unlikely that this decision would be overturned since the definition ascribed by the court to the term "area," is clearly that intended and enunciated by the regulations and is comprehensible to the average reader. In addition, given the facts of the case, it is clear that the defendants were within that "area" and should have known so. It is possible, however, that the question may have to be decided again if, to paraphrase the court in *Delahoussaye,* hunters refuse to resist the temptation and sail too close to the wind by locating themselves in the dubious zones at the "area's" edges.[26]

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24. 196 F. Supp. 688 (S.D. Cal. 1961).
25. U.S. v. Delahoussaye, 573 F.2d 910, 913 (5th Cir. 1978).
26. *Id.* at 912.