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Environmental Law – Endangered Species: Interpreting the Migratory Bird Treaty Act and its Prohibition Against the "Taking" of Protected Birds

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ENVIRONMENTAL LAW – ENDANGERED SPECIES: INTERPRETING THE MIGRATORY BIRD TREATY ACT AND ITS PROHIBITION AGAINST THE "TAKING" OF PROTECTED BIRDS

United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012)

ABSTRACT

In *United States v. Brigham Oil & Gas, L.P.*, the United States District Court of North Dakota refused to adopt an expansive interpretation of the Migratory Bird Treaty Act (MBTA) and held that oil and gas companies' use of reserve pits, which resulted in the deaths of numerous protected birds, did not fall under the prohibitions of the MBTA. The court expressly found "take," within the context of the statutory language of the MBTA, refers to conduct directed at birds, such as hunting and poaching, not acts or omissions having the incidental or unintended effect of causing bird deaths. As a result, oil development and production activities, which incidentally kill protected birds, do not fall under the MBTA's prohibitions. Although this decision does not constitute new case law regarding the applicability of the MBTA, it is significant because it expands the holding of existing Eighth Circuit precedent to exclude commercial activity by oil and gas producers from the prohibitions of the MBTA. The decision also contributes to the disagreement among the circuit courts regarding the proper scope of the MBTA.

I. FACTS

In 2011, United States Fish and Wildlife Service (the Service) agents discovered a variety of dead migratory birds located near three different reserve pits owned by three oil and gas companies operating in North

Dakota's Williston Basin.[1] These reserve pits, which are regulated by North Dakota law,[2] were allegedly contaminated with oil and other by-products of oil and gas drilling operations and were not properly fenced at the time the dead birds were found.[3] As a result, the federal government charged Brigham Oil & Gas, L.P. (Brigham Oil), Newfield Production Company (Newfield Production), and Continental Resources, Inc. (Continental Resources), with violating the Migratory Bird Treaty Act (MBTA)[4] for their respective "takings" of migratory birds.[5]

The federal government filed Informations against each company with the United States District Court of North Dakota.[6] The allegations contained in the Informations stated the companies "without being permitted to do so . . . did take migratory birds . . . in violation of the [MBTA]."[7] On the same day the federal government filed the Informations against the companies, it also filed separate Requests for Summons and Issuances of Arrest Warrants for Brigham Oil, Newfield Production, and Continental Resources.[8]

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1. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1203, 1205-06 (D.N.D. 2012).

2. *See* N.D. CENT. CODE § 38-08-02(15) (2004) (A reserve pit is defined as "an excavated area used to contain drill cuttings accumulated during oil and gas drilling operations and mud-laden oil and gas drilling fluids used to confine oil, gas, or water to its native strata during the drilling of an oil and gas well."); N.D. ADMIN. CODE § 43-02-03-19.1 (2011) ("All pits and ponds which contain oil must be fenced, screened, and netted.").

3. Affidavit for Issuance of Arrest Warrant or Summons at 2, 7, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (No. 4:11-po-005), No. 4:11-po-00005-DLH [hereinafter Affidavit for Brigham Oil]. *But see* Affidavit for Issuance of Arrest Warrant or Summons at 8, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (No. 4:11-po-005), No. 4:11-po-00009-DLH [hereinafter Affidavit for Newfield Production]. The Government brought separate charges against Newfield Production because one of the company's reserve pits overflowed into a nearby coulee and wetland area, where four "dead and oiled" migratory birds were later found. Affidavit for Newfield Production, *supra* note, at 8. As a result, the charges brought against Newfield Production were silent as to whether the reserve pit was properly netted at the time the dead birds were found. *See id*.

4. 16 U.S.C. §§ 703-712 (2006).

5. *Brigham Oil*, 840 F. Supp. 2d at 1204-06. On May 6, 2011, Brigham Oil was charged for taking two mallards. *Id*. at 1204-05. On May 18-19, 2011, Newfield Production was charged for taking two mallards, one a northern pintail and the other a ring-necked duck. *Id.* at 1205. On May 6, 2011, Continental Resources was charged with taking one Say's Phoebe. *Id.* at 1206.

6. *Id*. at 1204-06.

7. *See* Information, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (No. 4:11-po-005), 2011 WL 8318111 [hereinafter Information-Brigham Oil]; Information, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (No. 4:11-po-005), 2011 WL 6258223 [hereinafter Information-Newfield Production]; Information, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (No. 4:11-po-005), 2011 WL 8318120 [hereinafter Information-Continental Resources]. The Information documents filed against Newfield Production and Continental Resources were virtually identical to the Brigham Oil Information, except for the dates of the charged offense and the list of the birds taken.

8. *Brigham Oil*, 840 F. Supp. 2d at 1204-06.

Each Request for Summons and Issuance of an Arrest Warrant consisted of a Statement of Probable Cause (Statement) by Richard A. Grosz, Special Agent for the the Service who inspected the reserve pits.[9] The Statements provided detailed summaries of the allegations against the companies and assessed the migratory birds' likely causes of death.[10] In addition, the Statements also discussed the chemicals generally found in reserve pits, the tendencies of migratory birds to interact with reserve pits, and the companies' past violations for similar acts.[11] According to the Statements, Special Agent Grosz determined the deaths of the migratory birds found near the reserve pits of Brigham Oil, Newfield Productions, and Continental Resources were likely caused as a "result of exposure to the contents of the oil reserve pit."[12]

The oil companies brought motions to dismiss the charges against them.[13] The companies argued ascribing strict liability to behavior "that indirectly results in the death of migratory birds" would "stretch [the MBTA] far beyond the bounds of reason" and that the MBTA "does not, and was never meant to, criminalize the commercial activity of a legitimate business that incidentally and indirectly injures or kills a migratory bird."[14] Instead, the oil companies argued the court should to interpret the MBTA's ambiguous terms "take" and "kill" to apply only to "physical conduct of the sort engaged in by hunters and poachers," not commercial activity that indirectly results in the deaths of migratory birds.[15]

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9. *Id.*

10. Affidavit for Brigham Oil, *supra* note 3, at 7; *see also* Affidavit for Newfield Production, *supra* note 3, at 8-9. In 2008, Brigham Oil, Newfield Production, and Continental Resources all were issued Violation Notices and fined in North Dakota after the the Service retrieved dead and oiled migratory birds from the companies' respective reserve pits. *See* Affidavit for Brigham Oil, *supra* note 3, at 4; Affidavit for Newfield Production, *supra* note 3, at 5; Affidavit for Issuance of Arrest Warrant, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (No. 4:11-po-005), No. 4:11-po-00004-DLH [hereinafter Affidavit for Continental Resources]. A letter from the Service accompanied the violation notice informing the companies of possible measures that could be taken to "prevent wildlife mortality" for future operations. *See, e.g.*, Affidavit for Brigham Oil, *supra* note 3, at 4-5.

11. Affidavit for Brigham Oil, *supra* note 3, at 2-4; Affidavit for Newfield Production, *supra* note 3, at 2-5; Affidavit for Continental Resources, *supra* note 10, at 2-5.

12. Affidavit for Brigham Oil, *supra* note 3, at 7.

13. Defendants Brigham Oil and Newfield Production's Joint Memorandum of Law in Support of Motion to Dismiss the Informations at 1, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (No. 4:11-po-005), 2011 WL 6258226 [hereinafter Brigham Oil and Newfield Production's Joint Motion to Dismiss]; *see also* Continental Resources Memorandum in Support of Motion to Dismiss at 1, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (No. 4:11-po-005), 2011 WL 8318178 [hereinafter Continental Resources' Motion to Dismiss].

14. Brigham Oil and Newfield Production's Joint Motion to Dismiss, *supra* note 13, at 1, 3 (citations and internal quotation marks omitted).

15. *Id*. at 11 (citations and quotations omitted); *see also* Continental Resources' Motion to Dismiss, *supra* note 13, at 12 (citations and internal quotation marks omitted).

II. LEGAL BACKGROUND

As a result of advances in horizontal drilling and hydraulic fracturing technology, which allows the mass exploration of the country's "virtually untouched shale and tight oil fields," the United States has experienced an "explosion" in domestic oil production in the last decade.[16] Although oil production from shale and tight oil fields is "still in its infancy," there has been an unexpected surge of oil production from the Bakken shale formation in North Dakota where production has risen from "a few barrels in 2006 to more than 530,000 barrels in December 2011."[17] According to expert studies, it is estimated the total amount of original oil in place (OOP) in the Bakken formation could be as high as 503 billion barrels – placing the Bakken formation "ahead of the largest oil basins in the world."[18]

Although this drastic expansion of oil and gas production activities has proven to be extremely beneficial for North Dakota in financial terms,[19] state and federal authorities have been forced to address the consequences of the increased oil and gas production activity, especially the environmental consequences.[20] Through various agencies, including the Service, the federal government has increased its enforcement efforts under the MBTA and criminally prosecuted industrial and commercial activities, such as oil and gas production, that directly or indirectly results in the deaths of migratory birds.[21] The United States Courts of Appeals have issued various interpretations of the MBTA and have remained divided in regard to determining the proper scope of the MBTA and its prohibitions.[22]

This Part will briefly discuss the background and legislative history of the MBTA.[23] Then it will analyze the statutory language of the MBTA's

16. Leonardo Maugeri, *Oil: The Next Revolution*: *The Unprecedented Upsurge of Oil Production Capacity and What it Means for the World*, BELFER CTR FOR SCI. & INT'L AFFS., HARV. KENNEDY SCH., June 2012, at 2.

17. *Id*. at 2, 8.

18. *Id*. at 47. In 1999, Leigh Price, a U.S. Geological Service geochemist, completed "the most comprehensive assessment of the Bakken," which estimated the Bakken formation contained between "271 billion and 503 billion barrels, with a mean of 413." *Id*. In 2011, Continental Resources estimated the formation contained 500 billion barrels of OOP. *Id*.

19. "Oil extraction and gross production tax revenues for 2011 were $1,296.1 million, representing a 73% increase from 2010." N.D. Petroleum Council, *Facts and Figures*, N.D. OIL, www.ndoil.org/cache/Facts_and_Figures_2012_6.5.pdf (last updated June 5, 2012).

20. James MacPherson, *Industry: New N.D. Oil Rules Could Curb Drilling*, WDAY NEWS (Mar. 15, 2012, 10:27 AM), http://www.wday.com/event/article/id/60636/. On April 1, 2012, new regulations became effective in order to limit liquid waste pits at well sites. *Id.*; *see also* Steve Hargreaves, *Obama Tightens Oil and Gas Drilling Regulations*, CNN MONEY (Apr. 18, 2012, 2:45 PM), http://money.cnn.com/2012/04/18/news/economy/drilling-regulations/index.htm.

21. KEVIN A. GAYNOR ET AL., AM. LAW INST., RECENT DEVELOPMENTS UNDER THE MIGRATORY BIRD TREATY ACT 307 (2012).

22. *See* discussion *infra* Part II.B.

23. *See* discussion *infra* Part II.A.

prohibitions and penalties associated with the unlawful taking of migratory birds.[24] Finally, this Part will examine the circuit court split regarding the narrow and broad interpretation and application of the MBTA.[25]

A. OVERVIEW OF THE MIGRATORY BIRD TREATY ACT AND ITS PROHIBITIONS

Although the MBTA has been described as "one of the pioneering federal wildlife statutes" in efforts to protect migratory birds, there has been a longstanding debate concerning the interpretation and application of the MBTA and its prohibitions.[26] When the MBTA was introduced on the floor of the United States House of Representatives, opponents and proponents of the Act engaged in spirited debates over the passage of, and the need for, federal legislative efforts like the MBTA to protect migratory birds.[27] Today, courts around the country remain deeply divided in their interpretations of the MBTA and have been unable to reach a consensus in determining the scope of the MBTA's prohibitions.[28]

1. *The Genesis of the Migratory Bird Treaty Act*

One of the nation's oldest conservation statutes,[29] the MBTA was enacted by Congress and signed into law on July 3, 1918.[30] The MBTA was initially adopted in response to an agreement between the United States and Great Britain, on behalf of Canada.[31] Subsequent treaties between the United States, Mexico, Japan, and the Soviet Union were later implemented through amendments to the MBTA.[32] The MBTA was motivated by the

24. *See* discussion *infra* Part II.A.

25. *See* discussion *infra* Part II.B-C.

26. Craig D. Sjostrom, Comment, *Of Birds and Men: The Migratory Bird Treaty Act*, 26 IDAHO L. REV. 371, 372 (1990) (discussing the need to amend the MBTA in order to codify a broader interpretation of the Act). *See generally* George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 169-74 (1979) (discussing the history and expansion of the MBTA and its prohibitions).

27. *See* discussion *infra* Part II.A.1.

28. *See* discussion *infra* Part II.B.

29. United States v. Hardman, 297 F.3d 1116, 1122 (10th Cir. 2002); *see also* United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d. 1070, 1080 (D. Colo. 1999) (describing the enactment of the original MBTA).

30. Migratory Bird Treaty Act of 1918, ch. 128, § 2, 40 Stat. 755, 755 (codified as amended at 16 U.S.C. §§ 703-712 (2006)).

31. Convention Between the United States and Great Britain (for Canada) for the Protection of Migratory Birds, U.S.-Gr. Brit, Aug. 16, 1916, 39 Stat. 1702.

32. Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311; Convention Between the Government of the United State of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, Mar. 4, 1974, 25 U.S.T. 3329.

efforts to prevent the extinction of numerous species of migratory birds and sought to protect the migratory birds covered by the various treaties, primarily through the regulation of hunting.[33]

Prior to the passage of the original MBTA, Congress fiercely debated one of the most controversial aspects of the MBTA – the scope of its protection.[34] Proponents of the MBTA focused primarily on the agricultural and economic benefits derived from migratory birds and insisted it was necessary to not only protect "migratory game birds," but "insectivorous migratory birds" as well.[35] In addition, Congress recognized the "aesthetic value of migratory birds" and emphasized the need for preservation efforts.[36] As a result, the MBTA was written to ensure that the federal government would protect and preserve both the economic and aesthetic value of migratory birds.[37] Proponents argued the MBTA's broad powers were needed to ensure effective enforcement and assured the MBTA's reach would be limited through "prosecutorial discretion and judicial lenity."[38]

Opponents of the MBTA generally did not dispute the claims focusing on the economic value of migratory birds, nor did they deny the need for conservation efforts.[39] Instead, opponents argued the MBTA violated states' rights under the Constitution,[40] and feared the MBTA's reach would extend to all general killings of birds.[41] In addition, opponents were

33. *Hardman*, 297 F.3d at 1121; *see also* Coggins & Patti, *supra* note 26, at 169-74 (summarizing the terms of the various treaties).

34. Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties*, 77 DENV. U. L. REV. 359, 368 (1999).

35. 56 CONG. REC. 7360-61 (1918) (statement of Rep. Stedman) (arguing the importance of both "migratory game birds" and "insectivorous migratory birds"); *id*. at 7363 (statement of Rep. Cooper) (emphasizing the importance of regulating hunting).

36. *Id*. at 7458 (statement of Rep. Smith).

37. *Id*.

38. Corcoran & Colbourn, *supra* note 34, at 368; *see also* 56 CONG. REC. 7441 (1918) (statement of Rep. Miller) ("No man can say that the power given to the game wardens . . . is ever used in a way that violates unnecessarily the rights of man."); *id*. at 7444 (statement of Rep. Dowell) (stating punishment will be solely a matter for the courts).

39. Corcoran & Colbourn, *supra* note 34, at 367.

40. 56 CONG. REC. 7363 (1918) (statement of Rep. Tillman) (arguing that the MBTA is "a radical interference with the rights of the State."); *see also id*. at 7445 (statement of Rep. Bland) (questioning the constitutionality of delegation of authority to define illegal actions by regulation).

41. *Id.* at 7364 (statement of Rep. Huddleston) (discussing the possibility of allowing "a thoughtless boy that may rob a bird's nest or may kill a robin to be haled before a court, sent to jail, or fined the heavy fine provided in this bill."); *id*. at 7449 (statement of Rep. Caraway); *id*. at 7450-51 (statement of Rep. Mondell); *id*. at 7452 (statement of Rep. Huddleston).

concerned with the "warrantless search provisions" of the MBTA as it was originally proposed.[42]

After modifying the MBTA to require search warrants, Congress enacted the MBTA into law in 1918.[43] Shortly after, the MBTA's constitutionality was first challenged in *Missouri v. Holland*,[44] where the State of Missouri argued the MBTA violated the Tenth Amendment's reservation of states' rights.[45] In defending the constitutionality of the MBTA against Missouri's Tenth Amendment challenge, Justice Holmes "declared the protection of migratory birds to be a 'national interest' warranting 'national action.'"[46] Today, the MBTA has taken the role of a regulatory device for implementing and amending provisions deemed necessary to protect "migratory birds"[47] and their environment.[48]

2. *Statutory Analysis of the Migratory Bird Treaty Act*

Compared to other federal wildlife legislation, the MBTA is "short, succinct, and comprehensive" and its main operative provisions are contained in 16 U.S.C. §§ 703-704.[49] Section 703(a) states "[u]nless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill, . . . any migratory bird . . . ."[50] Despite the seemingly basic nature of this congressional sanction against "harmful and contributory" human activities, the MBTA and its prohibitions against harming birds in "any means or in any manner" are comprehensive measures intended to protect migratory birds.[51] Although the MBTA's statutory language is comprehensive, the MBTA does not directly define the term "take."[52] As a result, courts

42. Corcoran & Colbourn, *supra* note 34, at 368; *see also* 56 CONG. REC. 7440-61 (1918). Opponents warned that federal officers "will pin the bottom of an oyster can upon their coats and invade the homes of free citizens." *Id*. at 7449 (statement of Rep. Caraway); *id*. at 7447 (statement of Rep. Tillman) ("Such a person may come with the end of a tomato can appended to the lapel of his coat as his badge of authority . . . .").

43. Corcoran & Colbourn, *supra* note 34, at 368.

44. 252 U.S. 416 (1920).

45. *Holland*, 252 U.S. at 431.

46. *See* Hye-Jong Linda Lee, *The Pragmatic Migratory Bird Treaty Act: Protecting "Property,"* 31 B.C. ENVTL. AFF. L. REV. 649, 655 (2004) (citing Missouri v. Holland, 252 U.S. 416, 434-35 (1920)).

47. 50 C.F.R. §§ 10.12 to .13 (2011).

48. *See* Lee, *supra* note 46, at 653.

49. Coggins & Patti, *supra* note 26, at 174.

50. 16 U.S.C. § 703(a) (2006). Regulations authorized by the MBTA have defined, "take" to mean, "to pursue, hunt, shoot, kill, trap, capture, or collect." 50 C.F.R. § 10.12 (2011).

51. Coggins & Patti, *supra* note 26, at 175; *see also* 16 U.S.C. § 703.

52. *See* 16 U.S.C. §§ 703-712.

disagree as to what type of conduct or activity constitutes an unlawful taking under the MBTA.[53]

The MBTA imposes both misdemeanor and felony criminal penalties on any taking of a migratory bird.[54] Section 707(a) of the MBTA specifies "any person . . . who shall violate any provisions of . . . this subchapter . . . shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $15,000 or be imprisoned not more than six months, or both."[55] Unlike a felony offense, a misdemeanor conviction under the MBTA is considered a strict liability offense, in which "no knowledge is required."[56]

Where no exception applies and no permit has been obtained, 16 U.S.C. § 707(b) provides "[w]hoever, in violation of this subchapter shall knowingly (1) take by any manner whatsoever any migratory bird . . . or (2) sell, offer for sale, [or] barter . . . any migratory bird shall be guilty of a felony . . . ."[57] The types of activities that can be considered for felony convictions are more limited than the activities that can be considered for misdemeanor convictions.[58] Felony convictions under 16 U.S.C. § 707(b) are reserved for activities involving elements of commerce and knowledge.[59]

Historically, criminal prosecutions under the MBTA focused on activities associated with hunting and poaching.[60] Beginning in the 1970s, this changed when federal prosecutors and private citizens brought cases involving activities such as timber harvest, pesticide use, and the maintenance of power poles.[61] Today, the question of whether the MBTA can be interpreted to address non-hunting activity that indirectly results in the taking of migratory birds has been left undecided.[62]

B. CASE LAW DEVELOPMENT OF THE SCOPE OF THE MIGRATORY BIRD TREATY ACT

Perhaps the most significant issue in MBTA case law is whether the term "take." as used in 16 U.S.C. § 703(a), includes incidental takings of

53. *See* GAYNOR ET AL., *supra* note 21, at 308-09.
54. *See* 16 U.S.C. § 707.
55. *Id.* § 707(a).
56. Corcoran & Colbourn, *supra* note 34, at 377 (citing United States v. Reese, 27 F. Supp. 833, 835 (W.D. Tenn. 1939)).
57. 16 U.S.C. § 707(b).
58. Corcoran & Colbourn, *supra* note 34, at 375.
59. *Id*.
60. *Id*. at 385.
61. *Id*. at 385-86.
62. *See* discussion *infra* Part II.B.

migratory birds, or is restricted to conduct engaged in by hunters and poachers.[63] The circuit courts are split as to whether there is criminal liability under the MBTA when the taking of a migratory bird is not the result of an intentional, affirmative act targeted at migratory birds.[64] For example, the Eighth and Ninth Circuits have refused to extend the MBTA's scope beyond "physical conduct of the sort engaged in by hunters and poachers."[65] However, the Tenth Circuit has embraced an interpretation of the MBTA prohibiting all takings of migratory birds, and declined to adopt the approach of the other courts limiting MBTA violations to those caused only by "purposeful" activities.[66]

1. *Restrictive Interpretations of "Taking" Under the MBTA*

In the following cases, courts have narrowed the scope of the MBTA and refused to apply a strict liability standard for unlawful takings of migratory birds.[67] These courts determined the MBTA's penalty provisions and implementing regulations "are limited in their intended scope to the types of activities engaged in by hunters and poachers, and do not extend to other acts that indirectly or unintentionally cause the death of migratory birds."[68] As a result, these courts determined lawful commercial activities that are not associated with hunting or poaching, such as logging and oil production activities, do not constitute takings under the MBTA.[69]

In *Seattle Audubon Society v. Evans*,[70] the Ninth Circuit explored the meaning of the MBTA and narrowly interpreted it to apply only to affirmative conduct, such as conduct engaged in by hunters and poachers, directed specifically at migratory birds.[71] Here, the Ninth Circuit addressed the Seattle Audubon Society's attempt to block a logging company from harvesting trees in an area that served as the habitat to the northern spotted owl, and rejected the notion that "logging of old-growth timber, which

63. GAYNOR ET AL., *supra* note 21, at 310.

64. *Id*.

65. *See* Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991) (holding that the MBTA's prohibition against killing protected birds did not extend to logging timber from lands that may provide suitable habitats for northern spotted owls).

66. *See generally* United States v. Apollo Energies, Inc., 611 F.3d 679, 685 (10th Cir. 2010) ("As a matter of statutory construction, the 'take' provision of the MBTA does not contain a scienter requirement.").

67. *See infra* pp. 118-21.

68. James Lockhart, Annotation, *Validity, Construction, and Application of the Migratory Bird Treaty Act, 16 U.S.C.A. §§ 703 to 712, and its Implementing Regulations*, 3 A.L.R. FED. 2D 465, 517 (2005).

69. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1210 (D.N.D. 2012).

70. 952 F.2d 297 (9th Cir. 1991).

71. *Seattle Audubon Soc'y*, 952 F.2d at 302-03.

adversely affects owl habitat, constitutes a violation of the MBTA."[72] Instead, the court held the term "take," applies only to direct and physical conduct, such as hunting and poaching, which is directed at migratory birds.[73]

Another case repeating the trend of narrowly interpreting the MBTA to exclude indirect or unintentional acts causing death to migratory birds, is *Newton County Wildlife Ass'n v. U.S. Forest Service*.[74] In *Newton County*, the Newton County Wildlife Association brought an action against the Forest Service seeking to enjoin timber sales that allegedly violated the MBTA.[75] The Wildlife Association argued logging activities, which disrupt the nesting of migratory birds and often result in their death, violated the MBTA's "absolute prohibition" against killing or taking of migratory birds.[76] However, the Eighth Circuit found "[s]trict liability may be appropriate when dealing with hunters and poachers," but it would "stretch [the MBTA] far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the deaths of migratory birds."[77] Further, the court agreed with the Ninth Circuit that the ambiguous terms "take" and "kill" in 16 U.S.C. § 703 mean "physical conduct of the sort engaged in by hunters and poachers."[78]

In *United States v. Ray Westall Operating, Inc.*,[79] the United States District Court for the District of New Mexico decided oil production activities, like logging activities, which can result in direct and indirect takings of migratory birds, are exempt from the prohibitions of the MBTA.[80] In *Westall Operating*, fifty dead birds were discovered in the operator's oil evaporation pit.[81] The evaporation pit was netted to ensure birds would not access the pit, but a technical malfunction caused the pit to overflow above the level of the netting, allowing migratory birds to come in contact with the contents of the pit.[82] As a result of exposure to the contents in the evaporation pit, numerous migratory birds died.[83]

72. *Id*. at 299.
73. *Id*. at 303.
74. 113 F.3d 110 (8th Cir. 1997).
75. *Newton Cnty. Wildlife Ass'n*, 113 F.3d at 112.
76. *Id*. at 115.
77. *Id*. (emphasis in original).
78. *Id*.
79. No. CR 05-1516-MV, 2009 U.S. Dist. LEXIS 130674 (D.N.M. Feb. 25, 2009).
80. *Ray Westall Operating, Inc.*, 2009 U.S. Dist. LEXIS 130674, at *19.
81. *Id*. at *5.
82. *Id*.
83. *Id*.

Nevertheless, the court reversed a previous decision finding Westall Operating guilty of taking migratory birds in violation of the MBTA.[84] In its decision, the court applied the logic used by the Eighth and Ninth Circuits and concluded "Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths."[85] Therefore, Westall Operating's negligence that allowed the overflow of the evaporation and resulted in the death of protected birds, did not subject the company to liability under the MBTA.[86]

2. *Expansive Interpretations of "Taking" Under the MBTA*

In the following cases, various courts have ruled to adopt a broad interpretation of the scope of the MBTA and its prohibitions.[87] Rather than limiting the reach of the MBTA to only activities normally exhibited by hunters and poachers, these courts have expanded the reach of the MBTA to any activities resulting in the unintentional taking or killing of migratory birds.[88] Under these decisions, courts have found activities such as pesticide application[89] and maintenance of power lines[90] fall within the scope of the MBTA when they result in unintentional deaths of migratory birds.[91] Rather than require proof of intent to take or kill migratory birds, these courts have found violations of the MBTA are subject to strict criminal liability.[92]

In 1978, in *United States v. Corbin Farm Service*,[93] the United States District Court for the Eastern District of California expressly found that activity other than that associated with hunting or poaching, which resulted in the unintentional takings or killings of migratory birds, falls within the scope of the MBTA.[94] In *Corbin*, the government charged the defendant with unlawfully taking ten protected birds as a result of incorrectly applying pesticides to an alfalfa field.[95] The court analyzed the statutory language of

84. *Id*. at *20.
85. *Id*. at *19.
86. *Id*. at *20.
87. *See infra* pp. 122-25.
88. *Id*.
89. *See* United States v. Corbin Farm Serv., 444 F. Supp. 510, 514 (E.D. Cal. 1978).
90. *See* United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999).
91. *Id*. at 1074.
92. *Id*. at 1084.
93. 444 F. Supp. 510 (E.D. Cal. 1978).
94. *Corbin Farm Serv.*, 444 F. Supp. at 540.
95. *Id*. at 515.

16 U.S.C. § 703, which states it shall be unlawful "by any means or in any manner" to take migratory birds, and held "it is sufficient to declare that the MBTA can be constitutionally applied to impose criminal penalties on those who did not intend to kill migratory birds."[96] Therefore, the court found the defendant was strictly liable under the MBTA for unlawfully taking protected birds by his accidental poisoning.[97]

Shortly after, in *United States v. FMC Corp.*,[98] the Second Circuit affirmed a corporate pesticide manufacturer's conviction under the MBTA for taking migratory birds by accidentally poisoning a retaining pond frequented by migratory birds.[99] The Second Circuit's decision in *FMC Corp.* expanded the interpretation of a "taking" under the MBTA to include unintentional takings or killings of migratory birds.[100] The court noted cases involving MBTA violations by hunters, although not apposite, had consistently held it was not necessary for the government to prove a defendant violated the MBTA "with guilty knowledge or specific intent to commit the violation."[101] The Second Circuit held strict criminal liability was properly imposed, rejecting FMC's argument that there must be intent to "take" or "kill" birds culminating in their deaths in order for a conviction.[102]

More recently, the issue of the application of the MBTA to non-hunting conduct has been further analyzed in *United States v. Moon Lake Electric Ass'n.*[103] In *Moon Lake*, the United States District Court for the District of Colorado was faced with the question of whether the MBTA applied to the deaths of protected migratory birds that were electrocuted by the defendant's power poles.[104] Unlike the Ninth Circuit, which held the MBTA only prohibits activities associated with hunting and poaching,[105] the *Moon Lake* court held the language of the MBTA was intended to prohibit activities beyond those normally associated with hunting and poaching.[106] The court stated, "[i]f Congress intended to proscribe only

96. *Id*. at 536.
97. Corcoran & Colbourn, *supra* note 34, at 387.
98. 572 F.2d 902 (2d Cir. 1978).
99. *FMC Corp.*, 572 F.2d at 903.
100. *Id*. at 908.
101. *Id*. at 906.
102. *Id*. at 906, 908.
103. 45 F. Supp. 2d 1070 (D. Colo. 1999).
104. *Moon Lake*, 45 F. Supp. 2d at 1071.
105. *See* discussion *supra* Part II.B.
106. *Moon Lake*, 45 F. Supp. 2d at 1074.

capture[s], injur[ies], and deaths that occur as a result of conduct associated with hunting or poaching, Congress could have said so."[107]

In *Moon Lake*, the defendant argued extending the MBTA's prohibitions beyond activities associated with hunting and poaching would cause "absurd results."[108] Rather than relying on prosecutorial discretion to ensure the MBTA prosecution did not "offend reason and common sense," the *Moon Lake* court stated a "proximate cause" standard could ensure the MBTA remains in its proper confines by requiring the Government to demonstrate proximate cause to obtain a guilty verdict.[109] The court stated, "[b]ecause the death of a protected bird is generally not a probable consequence of driving an automobile, piloting an airplane . . . or living in a residential dwelling with a picture window, such activities would not normally result in liability under § 707(a) . . . ."[110]

III. ANALYSIS

In *United States v. Brigham Oil & Gas, L.P.*,[111] the United States District Court for the District of North Dakota found oil development and production activities, such as the use of reserve pits, are "not the sort of physical conduct engaged in by hunters and poachers," and as a result, these activities are not prohibited by the MBTA.[112] In order to reach this decision, the court separated its analysis into three different parts.[113] First, the court examined the "key statutory language" of the MBTA to determine the appropriate interpretation of the MBTA's ambiguous term "take."[114] Second, the court compared the case to other jurisdictions that addressed similar questions of interpretation and application.[115] Third, by utilizing a reductio ad absurdum[116] argument, the court argued extending the MBTA to reach activities that indirectly result in the deaths of migratory birds would "yield absurd results."[117]

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107. *Id*. at 1075.
108. *Id.* at 1084.
109. *Id*. at 1084-85.
110. *Id*.
111. 840 F. Supp. 2d 1202 (D.N.D. 2012).
112. *Brigham Oil*, 840 F. Supp. 2d at 1211.
113. *See id.* at 1208-12.
114. *Id*. at 1208-09.
115. *Id*. at 1209-10.
116. "Reductio ad absurdum" is used in logic to disprove "an argument by showing that it leads to a ridiculous conclusion." BLACK'S LAW DICTIONARY 1089 (9th ed. 2010).
117. *Brigham Oil*, 840 F. Supp. 2d at 1212.

A. STATUTORY ANALYSIS OF THE MIGRATORY BIRD TREATY ACT

Due to the ambiguous nature of the MBTA's term "take," the court examined the statutory language of the MBTA to determine its appropriate interpretation and application.[118] The court stated, because the MBTA does not define "take," the court would "construe a term according to its ordinary meaning."[119] To establish this ordinary meaning, the court referred to the Webster's Third New International Dictionary, which defines "take" as "to get into one's hands or into one's possession, power, or control by force or stratagem . . . to get possession of (as fish or game) by killing or capturing."[120]

Similarly, the court examined the definition of "take" found in the MBTA's implementing regulations.[121] According to 50 C.F.R. § 10.12,[122] "take" means "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to purse, hunt, shoot . . . or collect."[123] The court found the regulation's use of these actions words "reinforce[] the dictionary definition, and confirm[] that 'take' does not refer to accidental activity or the unintended results of other conduct."[124] As a result, the court held "[i]n the context of the [MBTA], 'take' refers to conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths."[125]

B. RELEVANT CASE LAW AND THE APPLICATION OF THE MIGRATORY BIRD TREATY ACT

In *Brigham Oil*, the court utilized the analysis of previous decisions to reach its determination, holding oil and gas production activities, which resulted in the unintentional deaths of migratory birds, did not constitute an illegal "take" under the MBTA.[126] While the court focused primarily on the controlling Eighth Circuit precedent, it was also influenced by numerous decisions outside of the Eighth Circuit, which discussed the interpretation and application of the MBTA.[127] In each of these cases, the various courts

118. *Id*. at 1208-09.
119. *Id*. at 1208.
120. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2329-30 (2005).
121. *Brigham Oil*, 840 F. Supp. 2d at 1209.
122. 50 C.F.R. §§ 10.12 to .13 (2011).
123. *Brigham Oil*, 840 F. Supp. 2d at 1209.
124. *Id*.
125. *Id*. at 1208.
126. *Id*. at 1209-10.
127. *Id*. at 1209; *see also* Curry v. U.S. Forest Serv., 988 F. Supp. 541, 543 (W.D. Pa. 1997) (holding that the MBTA was not the proper statutory basis upon which to contest a Forest Service timber sale and concluding that the loss of migratory birds as a result of logging operations did not

determined lawful commercial activities, such as logging or oil and gas production activities, are excluded from the reach of the MBTA's prohibitions.[128]

First in its decision, the *Brigham Oil* court cited *Newton County*, and stated its precedential value in the Eighth Circuit.[129] Next, the *Brigham Oil* court examined *Seattle Audubon Society*, which was partially relied on by the *Newton County* court.[130] Finally, the court examined the District of New Mexico's decision to exclude evaporation pits, which indirectly caused the deaths of migratory birds, from the reach of the MBTA. By analogizing the holdings of these cases, the *Brigham Oil* court expanded the holding of *Newton County* to exclude commercial activity by oil and gas producers from the prohibition of the MBTA and refused to interpret the MBTA as a strict liability statute.[131]

C. EFFECTS OF EXPANSIVE APPLICATIONS OF THE MIGRATORY BIRD TREATY ACT

Rather than relying on the "proximate cause" application of the MBTA suggested in *Moon Lake*, the *Brigham Oil* court employed a reductio ad absurdum argument to prove the extension of the MBTA would "yield absurd results."[132] The court stated if the MBTA were interpreted to prohibit any activity that "proximately results in the death of a migratory bird," then many common activities would become unlawful when they result in the death of any migratory bird."[133] For example, the court argued an expansive application of the MBTA would allow for the criminalization of many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat because these activities have been reported to result in the deaths of migratory birds.[134]

As a result of the possible absurd consequences of expanding the application of the MBTA, the court found it is "highly unlikely" that Congress intended to impose criminal liability on lawful commercial

constitute a taking under the MBTA); Mahler v. United States, 927 F. Supp. 1559, 1561 (E.D. Ind. 1996) (holding that indirect taking of migratory birds as a result of habitat destruction did not fall within the MBTA).

128. *Brigham Oil*, 840 F. Supp. 2d at 1209.

129. *Id.*

130. *Id.*

131. *Id*. at 1211 (citing Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997)).

132. *Id*. at 1212.

133. *Id*.

134. *Id*. at 1213.

activity, which indirectly causes migratory bird deaths.[135] Further, the court held "[j]ust as in the case of driving, flying or farming, the MBTA cannot reasonably be read to criminalize the legal operation of a reserve pit at an oil exploration site."[136]

IV. IMPACT

Although this decision does not constitute new case law regarding the applicability of the MBTA and its prohibitions, it is significant because it expands the holding of existing Eighth Circuit precedent to exclude commercial activity by oil and gas producers from the prohibitions of the MBTA.[137] In addition, *Brigham Oil* contributes to the split amongst the circuits regarding the unresolved question of proper interpretation and application of the MBTA in cases involving lawful commercial activity that indirectly results in the taking of migratory birds.[138] With the recent oil boom in North Dakota, the extent and importance of the MBTA's prohibitions, particularly their application to activities outside the context of domestic hunting or poaching, will become more important as their outcomes will likely have a considerable impact on the regulatory environment the oil and gas companies will be subjected to.[139]

A. THE ISSUE OF PROPER INTERPRETATION AND APPLICATION OF THE MBTA'S TERM "TAKE" IS UNRESOLVED

Shortly after *Brigham Oil* was decided, the United States District Court for the Southern District of Texas, in *United States v. CITGO Petroleum Corp.*,[140] declined to follow the holding in *Brigham Oil* and its application of the MBTA.[141] In *CITGO Petroleum Corp.*, the defendant oil company was convicted of unlawfully taking migratory birds after ten birds were found in the company's "open-top tanks."[142] Despite the oil company's attempt to persuade the court to vacate the previous conviction based upon the holding of *Brigham Oil*, the court dismissed the motion to vacate.[143] The court stated, "[b]ased on the evidence . . . not only was it reasonably

135. *Id.*
136. *Id.*
137. *See supra* Part II.B.
138. *Id.*
139. *See* Corcoran & Colbourn, *supra* note 34, at 401.
140. No. C-06-563, 2012 WL 3866857, at *8 (S.D. Tex. Sept. 5, 2012).
141. *CITGO Petrol. Corp.*, 2012 WL 3866857, at *8.
142. *Id.* at *1. CITGO complained that to hold it strictly liable under the MBTA and extend the statute "to reach other activities that indirectly result in the deaths of covered birds would yield absurd results." *Id.* at *4.
143. *Id.* at *8.

foreseeable that protected migratory birds might become trapped in the layers of oil on top of Tanks 116 and 117, CITGO was aware that this was happening for years and did nothing to stop it."[144] This decision to decline the interpretation and application of the MBTA set forth in *Brigham Oil* highlights the controversial and unresolved question of determining the proper scope of the MBTA in regard to commercial activity that results in the deaths of migratory birds.

B. THE NEED FOR LEGISLATIVE ACTION TO ENSURE UNIFORM APPLICATION OF THE MIGRATORY BIRD TREATY ACT

Due to the confusion and inconsistency surrounding the interpretation and application of the MBTA, it has become evident that both federal and state legislative action is needed to ensure courts are able to interpret and apply the MBTA in a uniform manner. In *Brigham Oil*, the United States District Court for the District of North Dakota stated "[i]f there is a desire on the part of Congress to criminalize commercial activity that incidentally injures migratory birds protected under the [MBTA], it may certainly do so – but the criminal laws should be clear and certain."[145] This ability to criminalize commercial activity that results in the deaths of migratory birds, could be easily achieved by amending the MBTA to closely model the definition of "take" under the Endangered Species Act (ESA), which is defined broadly to include the term "harm."[146]

According to its regulations, the term "harm" under the ESA definition of "take" means any act, such as habitat destruction, which actually kills or injures wildlife.[147] By amending the MBTA's definition of "take" to include activities that "harm" migratory birds, Congress can alleviate the confusion surrounding the various applications of the MBTA in regard to the criminalization of commercial activity that indirectly or unintentionally causes the death of migratory birds. In addition, by amending the MBTA to mirror the ESA's definition of "take," courts will ensure uniform application of the MBTA throughout the federal circuit courts.

In addition to federal efforts to amend and extend the MBTA in order to criminalize commercial activity that results in the deaths of migratory birds, legislative action is needed from the states as well. For example, Texas, a state familiar with oil and gas production activities and their

144. *Id*.
145. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d. 1202, 1211 (D.N.D. 2012).
146. Endangered Species Act of 1973, 16 U.S.C. § 1532(19) (2006).
147. 50 C.F.R. § 17.3 (2011).

effects,[148] has implemented strict state regulation of oil and gas production activities and their impacts on the environment and wildlife.[149] The Texas Administrative Code specifically states an operator, who "does not take protective measures necessary to prevent harm to birds" will be subjected to liability under "federal and state wildlife protection laws" such as the MBTA.[150] In *CITGO Petroleum Corp.*, the court made reference to this influential state regulation in its decision to deny CITGO's motion to vacate previous convictions for violations of the MBTA.[151]

Unlike Texas, North Dakota's oil industry is still "in its infancy" and its state laws are far more relaxed with regard to the liability of oil and gas companies when their actions cause the death of migratory birds.[152] Despite this infancy, the need for strict regulations of the oil and gas industry to protect the state and its resources is becoming more apparent.[153] In *Brigham Oil*, oil companies were able to avoid liability for the unlawful takings of migratory birds because the court ruled the migratory bird deaths resulted indirectly from "lawful commercial activity."[154] In order to ensure oil and gas companies in North Dakota are held liable for their actions in the future, the North Dakota Legislature should consider amending the state's laws and regulations in a manner consistent with Texas law. As a result, oil and gas companies in North Dakota would be required by law to take preventative measures to protect migratory birds, and would be subjected to federal and state wildlife protection laws for failure to do so.[155]

V. CONCLUSION

In *Brigham Oil*, the District Court of North Dakota found, in the context of statutory language of the MBTA, "take" refers to conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing migratory bird deaths.[156] Conversely, the court held oil development activities, such as the

148. Oil was discovered in Texas on January 1, 1901. *Oil and Texas: A Cultural History*, TEXAS ALMANAC, http://www.texasalmanac.com/topics/business/oil-and-texas-cultural-history (last visited Nov. 4, 2012).

149. 16 TEX. ADMIN. CODE § 3.22(b)(1) (1991).

150. *Id*. § 3.22(a).

151. United States v. CITGO Petrol. Corp., No. C-06-563, 2012 WL 3866857, at *6 (S.D. Tex. Sept. 5, 2012).

152. Maugeri, *supra* note 16, at 3.

153. Nicholas Kusnetz, *North Dakota's Oil Boom Brings Damage Along with Prosperity*, PROPUBLICA (June 7, 2012, 10:47 AM), http://www.propublica.org/article/the-other-fracking-north-dakotas-oil-boom-brings-damage-along-with-prosperi.

154. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d. 1202, 1211 (D.N.D. 2012).

155. *See* 16 TEX. ADMIN. CODE § 3.22(a).

156. *Brigham Oil*, 840 F. Supp. 2d. at 1211.

use of reserve pits, 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.[157] The *Brigham Oil* decision contributes to the split in the federal courts of appeals regarding the unresolved question of proper interpretation and application of the MBTA in cases involving lawful commercial activity that indirectly results in the taking of migratory birds.[158]

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157. *Id.* at 1213.

158. *Id.*

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