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MBTA: Unintended Consequences Of An Old Law

Law360, New York (November 16, 2015, 1:02 PM ET) -- Congress passed the Migratory Bird Treaty Act (MBTA) in 1918 in order to implement a treaty between the United States and Great Britain on behalf of Canada. The MBTA was passed to protect migratory birds from overzealous sport and commercial hunting practices, stemming in large part not from a demand for food but for feathers desired by the millinery industry to adorn women's hats. While the MBTA has changed very little, the world we live in has changed a great deal and the most significant threats to migratory birds today are vastly different than in the past. Safeguarding migratory birds from modern day threats is a continuing challenge made even more difficult by varying regulatory and judicial interpretations of what many consider to be an antiquated statute.



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The MBTA makes it illegal to take or kill by any means over 1,000 species of birds. It is a federal crime to take birds or bird parts, yet no language was included in the statute requiring intent for prosecution under the MBTA. In addition, the MBTA provides no definition for the term "take" and no description of the specific type of activities prohibited under the law. Courts called upon to interpret the MBTA in enforcement cases are split on interpreting the MBTA with respect to legislative history or the real-time assessment of behavior and intent necessary for a conviction.

Legislative History/MBTA Overview

The MBTA was one of the earliest federal wildlife protection statutes. Wildlife management traditionally had been left to state governments, and some states objected to the passage of the MBTA, claiming it unconstitutionally usurped state power to regulate wildlife. The state of Missouri tried to bar the enforcement of the MBTA within its boundaries based upon the state ownership doctrine. In its 1920 decision in *Missouri v. Holland*, the United States Supreme Court upheld the MBTA as a valid exercise of congressional treaty power.

The United States Department of Interior, acting through the U.S. Fish and Wildlife Service (FWS), is the federal agency charged with implementing and enforcing the MBTA. The MBTA's primary focus is to regulate the taking of migratory birds. The MBTA makes it unlawful to take or kill individuals of most bird species found in the United States, unless that taking or killing is authorized pursuant to regulation. MBTA implementing regulations define "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." "Migratory bird" means any bird protected by any of the treaties and currently includes 1,027 bird species in the United States, regardless of whether the particular species actually migrates.

The key provisions of the MBTA include:

- Section 703: Prohibits taking migratory birds unless authorized by the secretary.
- Section 704: Authorizes the secretary to promulgate regulations on the taking of migratory birds and prohibits baiting of migratory game birds.
- Section 707: Provides criminal penalties for violators.
- Section 712: Authorizes the secretary to promulgate regulations generally and to allow taking of migratory birds by indigenous peoples of Alaska.

Recent MBTA Cases

The intent of the MBTA is to protect migratory birds but many of the problems birds encounter today are relatively new or did not exist when the law originally was passed in 1918. According to the FWS, these industrial- and development-oriented threats result in the following bird deaths annually:

- High tension power lines: 175 million
- Communication towers: 50 million
- Uncovered oil waste pits: 500,000 – 1 million
- Wind turbines: 300,000

Recent MBTA cases involving bird kills associated with wind farms have pitted environmentalists against clean energy advocates. While wildlife advocates may believe that MBTA enforcement has been sporadic and arbitrary, these cases highlight that criminal prosecutions under the MBTA simply have become a cost of doing business in certain industry sectors.

1. Duke Energy Renewables Inc., a subsidiary of Duke Energy Corp., pled guilty in the deaths of golden eagles and other birds at two wind farms in Wyoming. Prosecutors alleged that Duke failed to make all reasonable efforts to build the projects in a way that would avoid the risk of avian deaths by collision with turbine blades. The plea agreement cited approximately 163 deaths of migratory birds, including golden eagles, other raptors, larks, buntings and other birds at the Campbell Hill and Top of the World wind facilities in Converse County, Wyoming.
2. PacifiCorp Energy agreed to pay \$2.5 million to settle charges arising from bird deaths at two of its wind farms located in Wyoming. PacifiCorp pled guilty in Wyoming federal court to two misdemeanor violations of the MBTA and was sentenced to five years' probation. The company also agreed to institute a compliance program to prevent bird deaths at the utility's four commercial wind farms in Wyoming. According to allegations, the company failed to make all reasonable efforts to build projects in a way that would avoid risk of bird deaths by collision with turbine blades consistent with guidance finalized by the FWS in 2012. The MBTA violations were charged following discovery of the carcasses of 38 golden eagles and 336 other protected birds at the company's Seven Mile Hill and

Glenrock/Rolling Hills wind farms in Carbon and Converse counties.

In another highly publicized MBTA case, the Fifth Circuit reversed Citgo Petroleum Corporation's conviction on Clean Air Act and MBTA violations at its Corpus Christi facility holding that the MBTA's ban on takings only prohibits intentional acts that directly kill migratory birds. In this case, the court determined that the concept of "taking" is limited to deliberate acts done intentionally to migratory birds. This latest ruling appears to set up a split in the circuits where the Fifth, Eighth and Ninth Circuits agree that some intentional act is required for a criminal violation while the Second and Tenth Circuits interpret the MBTA's strict liability scheme more broadly.

Incidental Take of Migratory Birds

In May 2015, FWS announced its intent to prepare a programmatic environmental impact statement pursuant to the National Environmental Policy Act to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds under the MBTA. The FWS seeks to provide legal clarity regarding MBTA compliance and possibly legal authorization for incidental take of migratory birds, including mitigation and compensation associated with any taking. The FWS is considering the following actions in conjunction with incidental take:

1. A general, conditional authorization for incidental take by certain hazards to birds associated with particular industry sectors, provided that those industry sectors adhere to appropriate standards for protection and mitigation of incidental take of migratory birds. According to the proposal, the general permit approach could apply to oil and gas reserve pits and wastewater ponds, flares, exhaust pipes, and vents at oil and gas production sites, communication towers, and transmission lines.
2. Legal authority for issuing individual incidental take permits for projects or activities not covered under the described general, conditional authorization that present complexities or siting considerations that inherently require project-specific considerations, or for which there is limited information regarding adverse effects.
3. Authorize incidental take by federal agencies that commit in a memorandum of understanding with us to consider impacts to migratory birds in their actions and to mitigate that take appropriately.

At this time, the FWS has suggested that the proposal would not apply to incidental take associated with the transportation and building sectors.

Conclusion

Congress clearly did not address the issue of incidental take in the text of the MBTA. Traditionally, the FWS has managed incidental take matters through reliance upon voluntary industry guidelines, restricted permitting options, and agency enforcement discretion. The new proposal appears to be a positive development offering other alternatives to address these challenges.

Without legislative or possibly regulatory change, MBTA compliance for industry remains complicated, uncertain and costly. All industry sectors are entitled to a fair and just statute that delineates in a straightforward manner what is required to comply with the MBTA, as well as a clear understanding of the enforcement consequences of noncompliance. The FWS proposal may be a step in the right direction. An even better development would be an MBTA amendment consistent with the recent Fifth Circuit Citgo ruling that imposes strict liability only in cases of intentional and direct takes of migratory birds.

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