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Caitlin Brown

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Aransas Project v. Shaw: The Need for State Permitting Agency Liability under the Endangered Species Act

INTRODUCTION

By August 2009, all seventeen counties in the Guadalupe and San Antonio River Basins were experiencing exceptional drought.¹ The Guadalupe and San Antonio Rivers drain into the Aransas National Wildlife Refuge, whose wetlands provide seasonal habitat for endangered whooping cranes.² The Texas Commission on Environmental Quality (TCEQ) issues permits for water withdrawals along these two rivers,³ meaning the future of the whooping cranes depends on the TCEQ's ability to adapt and limit its permits to the changing climate. Climate change models predict that Texas will experience rising temperatures as well as more frequent and severe droughts, which will greatly affect the wetlands available for whooping crane nesting and reproduction.⁴ If the TCEQ is not held liable for harm to endangered species caused by overpermitting, the state risks losing many of its water dependent species.

Fully enforcing the Endangered Species Act (ESA) is essential if we are to protect endangered species from these extreme weather patterns. The Fifth Circuit's decision in *Aransas Project v. Shaw*, however, is a step in the wrong direction.⁵ During the 2008–09 drought, four emaciated whooping crane carcasses were found in their habitat in the San Antonio Bay along the Gulf Coast of Texas.⁶ Scientists using aerial surveys concluded that an additional

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1. Exceptional drought is the most severe category of drought used by the U.S. Drought Monitor. *U.S. Drought Monitor Classification Scheme*, U.S. DROUGHT MONITOR, <http://www.droughtmonitor.unl.edu/AboutUs/ClassificationScheme.aspx> (last visited Aug. 6, 2015); U.S. DROUGHT MONITOR CLASSIFICATION SCHEME JOHN NIELSEN-GAMMON & BRENT MCROBERTS, TEX. OFFICE OF STATE CLIMATOLOGIST, AN ASSESSMENT OF THE METEOROLOGICAL SEVERITY OF THE 2008-09 TEXAS DROUGHT THROUGH JULY 2009, at 4 (2009), *available at* http://climatetexas.tamu.edu/files/osc_pubs/august_2009_drought.pdf.

2. *Aransas Project v. Shaw (Aransas II)*, 756 F.3d 801, 806, *amended by* 775 F.3d 641, *reh'g denied*, 774 F.3d 324 (5th Cir. 2014).

3. *Id.*

4. Terrence Henry, *More Drought, Heat and Water Wars: What Climate Change Already Means for Texas*, ST. IMPACT TEX. (May 6, 2014, 2:50 PM), <http://stateimpact.npr.org/texas/2014/05/06/more-drought-heat-and-water-wars-what-climate-change-already-means-for-texas>.

5. *Aransas II*, 756 F.3d 801.

6. *Id.* at 806; *Aransas National Wildlife Refuge*, WILDTEXAS.COM, www.wildtexas.com/texas-parks/aransas-national-wildlife-refuge (last visited Apr. 26, 2015)

nineteen had died.⁷ The Aransas Project was formed to sue the TCEQ under the ESA for failing to adequately manage water diversions in the San Antonio and Guadalupe Rivers, thus causing the deaths of the endangered cranes.⁸ The Fifth Circuit held that the Aransas Project did not prove proximate cause, which requires the foreseeability of both the result and the causal factors leading to it.⁹ Because the court did not find proximate cause, it did not reach the issue of the TCEQ's liability for causing take of cranes through its water permitting.¹⁰ With this liability question left unanswered, it is uncertain whether the ESA will have the strength to protect species harmed by the permitted activities of a multitude of dispersed actors—a question that will only become more pressing as climate change decreases available water supplies.

I. LEGAL BACKGROUND AND EXISTING LAW

Section 9 of the ESA prohibits the “take” of endangered species.¹¹ To take means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” an endangered or threatened species.¹² Although the ESA does not further define these explanatory terms, the Department of the Interior's implementing regulations state that “harm” “include[s] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”¹³ In 1995, the Interior Department's definition of harm was challenged and upheld as valid by the Supreme Court.¹⁴

Given these broad definitions, could state water permitting constitute a take of an endangered species? A preliminary and broader question is whether *any* state licensing or permitting can cause a take under the ESA. Thus far, the First Circuit is the only court of appeals to have answered this question in the affirmative. In *Strahan v. Coxe* the court held that Massachusetts state officers violated the ESA when they issued gillnet and lobsterpot fishing licenses, since this fishing equipment harmed endangered Northern Right whales.¹⁵ A district court in Minnesota reached a similar conclusion in *Animal Protection Institute v. Holsten*.¹⁶ In that case, the Minnesota Department of Natural Resources was held to have violated section 9 of the ESA for issuing trapping licenses that caused take of the endangered lynx.¹⁷ Consequently, there is precedent for

7. *Aransas II*, 756 F.3d 806.

8. *Aransas Project v. Shaw (Aransas I)*, 930 F. Supp. 2d 716, 724–25 (S.D. Tex. 2013), *rev'd*, 756 F.3d 801, *amended by* 775 F.3d 641, *reh'g denied*, 774 F.3d 324 (5th Cir. 2014).

9. *Aransas II*, 756 F.3d at 820 (citing *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697 n.9 (1995)).

10. *Id.* at 817 n.9.

11. 16 U.S.C. § 1538(a)(1) (2012).

12. § 1532(19).

13. 50 C.F.R. § 17.3 (2014).

14. *Babbitt*, 515 U.S. at 708.

15. *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997).

16. *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1081–82 (D. Minn. 2008).

17. *Id.*

holding state agencies liable for issuing licenses that result in the taking of an endangered species.¹⁸ This case law is what makes the Fifth Circuit's holding in *Aransas Project v. Shaw* so troubling—there were ample legal grounds to rule the other way.

II. CASE SUMMARY

The Aransas Project, which consists of citizens, organizations, businesses, and municipalities, seeks to ensure responsible water management throughout the Guadalupe River Basin.¹⁹ In the Aransas Project's initial suit, it claimed that the TCEQ, by permitting water withdrawals during the drought, caused take of whooping cranes through a modification of their habitat.²⁰ The District Court for the Southern District of Texas agreed, holding that the TCEQ was responsible for take of whooping cranes under section 9 of the ESA.²¹ The flock in the San Antonio Bay is the only self-sustaining flock of whooping cranes in the wild; it spends winters in the Aransas National Wildlife Refuge in South Texas.²² The court found that the upstream water permits issued by the TCEQ resulted in less freshwater flow into the San Antonio Bay where the flock lived.²³ This caused increased salinity in the Bay, leading to a decrease in wolfberries and blue crabs, the cranes' primary food sources.²⁴ The decrease in available food, along with the stress of flying farther to find it, led to the malnourishment and eventual death, or take, of twenty-three cranes out of a flock of about 270 birds.²⁵ The court heard from scientists on both sides and found the evidence supporting the causal links asserted by the Aransas Project to be far stronger.²⁶ In fact, one of the TCEQ's expert witnesses admitted that he "made up" parts of his testimony.²⁷

18. The Fifth Circuit noted that "state governments may not be commandeered into enforcing federal prohibitions," but could point to no cases where the states have not been held liable for failing to enforce the ESA. *Aransas Project v. Shaw (Aransas II)*, 756 F.3d 801, 817 n.9 (citing *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (finding that Congress cannot prevent or sanction doctors from speaking with patients about medical marijuana use); *Willis v. Winters*, 253 P.3d 1058 (Or. 2011) (holding that Congress cannot prevent state authorities from issuing a concealed handgun license to a medical marijuana user despite federal law prohibiting possession of firearms by unlawful users of controlled substances)), *amended by* 775 F.3d 641, *reh'g denied*, 774 F.3d 324 (5th Cir. 2014).

19. THE ARANSAS PROJECT, <http://thearansasproject.org/> (last visited Apr. 19, 2015).

20. *Aransas Project v. Shaw (Aransas I)*, 930 F. Supp. 2d 716, 725 (S.D. Tex. 2013), *rev'd*, 756 F.3d 801, *amended by* 775 F.3d 641, *reh'g denied*, 774 F.3d 324 (5th Cir. 2014).

21. *Id.* at 788.

22. *Id.* at 722.

23. *Id.* at 731.

24. *Id.*

25. *Id.*

26. *Aransas Project v. Shaw (Aransas IV)*, 774 F.3d 324, 327 (5th Cir. 2014) (Prado, J., dissenting).

27. *Id.* In fact, to try to rebut the Aransas Project's assertion that the higher salinity would detrimentally effect the whooping cranes, the intervenor defendant's expert witness "Dr. Slack testified that the whooping cranes had well developed supraorbital salt glands which rid the body of excess salt, making them capable of living in a salt water marsh with no freshwater. When pressed by the Court, *he admitted that he had made up that entire statement.*" *Id.* (emphasis in original).

Despite this compelling evidence, the Fifth Circuit reversed the district court's ruling and did not find the TCEQ liable because it believed that the Aransas Project had failed to establish proximate cause and foreseeability.²⁸ The opinion suggested that the district court's finding of proximate cause was based on a "butterfly effect," on "remote actors in a vast and complex ecosystem."²⁹ Specifically, the Fifth Circuit criticized the lower court for failing to explain "why the remote connection between water licensing, decisions to draw river water by hundreds of users, whooping crane habitat, and crane deaths that occurred during a year of extraordinary drought compels ESA liability."³⁰ The links between the causes and effects depended on "modeling and estimation" rather than on directly visible consequences.³¹ The court also found a lack of foreseeability given the number of other factors that could have caused the cranes' deaths, including water withdrawals by river users not required to obtain permits and natural events affecting water salinity such as weather, tides, and temperature conditions.³² In sum, the court found the deaths of the cranes to be due to the "confluence of adverse factors," and thus to be the "essence of unforeseeability."³³

Because the court found that proximate cause and foreseeability were lacking as a matter of law, it did not reach the issue of liability.³⁴ However, even if the court had found proximate cause, it is unlikely to have held the TCEQ liable under the ESA for licensing third parties whose actions led to take of an endangered species. The TCEQ argued that water permitting could never be considered a take because states cannot be held liable "under the ESA for licensing third parties who take an endangered species."³⁵ The court stated specifically that it was not reaching this issue.³⁶ Still, the opinion's overall tone signaled that, despite the favorable precedents discussed above, if the court had reached the issue it would likely have decided in the TCEQ's favor.³⁷ Such a decision would have undermined the ESA's ability to protect endangered species, as Part III explains.

28. *Aransas Project v. Shaw (Aransas III)*, 775 F.3d 641, 660–63, *reh'g denied*, 774 F.3d 324 (5th Cir. 2014).

29. *Aransas Project v. Shaw (Aransas II)*, 756 F.3d 801, 818, *amended by* 775 F.3d 641, *reh'g denied*, 774 F.3d 324 (5th Cir. 2014).

30. *Id.*

31. *Id.* at 820.

32. *Id.* at 822.

33. *Id.* at 823.

34. *Id.* at 817 n.9.

35. *Id.* The ESA defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2012).

36. *Aransas Project v. Shaw (Aransas III)*, 775 F.3d 641, 656 n.9, *reh'g denied*, 774 F.3d 324 (5th Cir. 2014).

37. *Id.*

III. CASE ANALYSIS

The Fifth Circuit's failure to address agency liability is unfortunate.³⁸ The ESA can only practicably protect downstream endangered species from take caused by hundreds of users' upstream water withdrawals if the state agency issuing water permits can be held responsible. Because there are over one thousand active water users along the Guadalupe and San Antonio Rivers, a single water user's withdrawals cannot be directly linked to a take of an endangered species downstream.³⁹ In other words, proving proximate cause in a suit against an individual is simply impossible in these cases. Just as pinning climate change on one driver makes little sense, attributing responsibility for the damage to whooping crane habitat on a single water user's withdrawals is a lost cause. The problem arises from water use in the aggregate, so the fault lies with the agency that authorizes aggregate water withdrawals—not with individuals. It was, after all, the accumulation of individual water withdrawals that caused the salinity increase in the San Antonio Bay and killed the whooping cranes by significantly impairing their food supply.⁴⁰

As the United States begins to feel the effects of climate change, it is imperative that we hold the state agencies administering the use of natural resources responsible for decisions that indirectly violate the ESA. Indeed, climate change may actually make doing so easier. As droughts and heat waves become more common, proximate cause may become easier to prove since droughts will be foreseeable and their likely impacts will already be known. Thus, state permitting agencies will be on notice that their water withdrawals are likely to cause take of endangered species. And when they do so, we must ensure that they are held liable.

CONCLUSION

In *Aransas Project v. Shaw*, the court did not find that the TCEQ proximately caused the take of endangered whooping cranes in part because the extreme drought was not foreseen.⁴¹ However, as droughts and other climate change impacts become more common, and therefore more foreseeable, courts will have to fully address the question that the Fifth Circuit avoided in this case: Can state agencies be held liable under the ESA for issuing permits, which, in the aggregate, cause take of endangered species? It is imperative that we answer this question affirmatively. It is neither economically nor ecologically efficient to target specific permit holders for take of endangered species. Consequently, if agencies are not held liable for the mismanagement of

38. *See id.*

39. There are 1194 water rights in active use with permits from the TCEQ along the Guadalupe and San Antonio Rivers as of 2015. *Water Rights Database*, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, http://www.tceq.state.tx.us/permitting/water_rights/wr_databases.html (last visited Apr. 26, 2015).

40. *Id.* at 646–47.

41. *Id.* at 661.

critical resources, the ESA will not be able to effectively protect species in the face of climate change.

Caitlin Brown