Endangered Species and Texas Water: Will the Whooping Crane and the Sharpnose Shiner Change the Course of State Law?

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Water is the lifeblood of municipal, agricultural, and industrial development in the United States. Shortages of freshwater, exacerbated by drought and inadequate infrastructure, threaten to cause regional crises and, ultimately, to limit growth. Freshwater shortages also cause harm to aquatic organisms and other wildlife that rely on ecosystems that have evolved in response to historic flow levels and specific water quality conditions. The challenge of balancing the water needs of a thirsty, growing population in the U.S. with the requirements of wildlife and its habitats is becoming acute, and is at the center of multiple legal battles over water usage.

The intersection — and potential clash — of state water law and the Endangered Species Act is at the heart of *The Aransas Project v. Shaw*, which was argued before a panel of the United States Court of Appeals for the Fifth Circuit on August 8. Regardless of how the Fifth Circuit rules in the *TAP* case, the issue will be salient for years to come, as the U.S. Fish and Wildlife Service is considering whether to list dozens of additional species in Texas over the next several years. Many of those species depend on ecosystems supported by springs and freshwater flows that are threatened by the current drought.

The law that governs the use and allocation of water resources is primarily state, not federal, law. In Texas, permits for withdrawals from rivers and streams are issued by the Texas Commission on Environmental Quality (TCEQ). The federal government has generally played a minor role, if any, in decisions related to water allocation. But the states' water allocation decisions are not exempt from federal law. Indeed, certain federal statutes, including the Endangered Species Act, serve as a check on the states' authority with respect to water allocations.

The Endangered Species Act (ESA)'s structure is simple: animals and plants that are at risk of becoming extinct may be "listed" as "threatened" or "endangered" by the U.S. Fish and Wildlife Service (USFWS) (for terrestrial and freshwater species) or the National Marine Fisheries Service (NMFS) (for marine species). A species is added to the list by the Service through a rulemaking process when the agency finds, based on the best scientific and commercial evidence, that the species is at risk of extinction in all or a significant portion of its range. The Service may list a species on its own volition, but the ESA also provides that any "interested person" has the right to petition the Service to add a species to the list.

Once listed, the species are covered by the ESA's protective measures. The Service must designate "critical habitat" for listed species and formulate a "recovery plan" for them. Most importantly, Section 9 of the ESA prohibits the "take" of listed species by any "person." "Person" is defined broadly to mean "an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, *of any State, municipality, or political subdivision of a State*, or of any foreign government; *any State*, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States."

"Take" is also defined broadly in the statute. It means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Joint Service regulations define "harm" as "an act which actually kills or injures wildlife," including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." The United States Supreme Court upheld that regulatory definition in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, thereby affirming the Service's position that harm to a species' habitat can constitute "take" under the ESA.

Section 10 of the ESA contains a process for nonfederal entities to obtain "incidental take" authorization from the Service for take associated with an activity that would be legal, but for the impact on a listed species. To obtain an incidental take permit, the applicant must prepare a "habitat conservation plan" (HCP) that meets certain statutory requirements, including measures that are designed to minimize and mitigate the impact to the species to the "maximum extent practicable."

As noted above, the ESA's prohibition on take applies to the states and state agencies. The Texas Department of Transportation, for example, may not construct a highway that would destroy habitat for a listed species, unless it first obtains an incidental take permit from the Service. In addition to being liable for take caused by activities carried out directly by the state or one of its political subdivisions, the state faces potential liability for issuing a permit to a third party that will carry out an activity that results in take. Some federal courts have imposed so-called "vicarious liability" on the regulator. In *Strahan v. Coxe*, for example, the Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement and the Division of Marine Fisheries were found liable for issuing permits to fishermen for lobster traps, which harmed the endangered Right Whale.

Earlier this year, the Service issued an incidental take permit to the Edwards Aquifer Authority, San Antonio Water System, City of San Marcos, and Texas State University. The Edwards Aquifer Authority (EAA) regulates withdrawals from the southern portion of the Edwards Aquifer by promulgating regulations and issuing permits to groundwater users within its jurisdiction. Among other things, the incidental take permit was sought by the EAA to authorize take associated with the "*regulation and use of the aquifer.*" Implicit in the HCP is the acknowledgement of the EAA's potential liability under the ESA should it issue permits that authorize pumping at levels that deplete spring flows and result in harm to the listed species in the Edwards Aquifer region.

The plaintiff's theory in the *TAP* case is that TCEQ caused the take of whooping cranes by issuing permits to irrigators, river authorities, and other water users in the Guadalupe and San Antonio River basins, which in turn depleted flows to such an extent that the cranes' habitat on the Texas coast was harmed. The federal district court agreed with the plaintiffs and issued an injunction against TCEQ forbidding the issuance of any additional water withdrawal permits until TCEQ obtained an incidental take permit from the Service. Upon appeal, the Fifth Circuit issued an emergency stay of the district court's injunction and ordered an expedited oral hearing, which took place on August 8. As of October 8, the Fifth Circuit has not ruled in the case.

TCEQ raised a number of issues in its appeal in the *TAP* case. One of the state's central arguments is that the vicarious liability theory endorsed by the First Circuit in *Strahan* was wrong, because the Tenth Amendment of the U.S. Constitution forbids the federal government from requiring states to implement federal regulatory programs. Under the "commandeering doctrine," the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."

In addition to the Tenth Amendment argument, TCEQ takes issue in *TAP* with the district court's finding that the permitted withdrawals of water in the Guadalupe and San Antonio Rivers actually caused take of the whooping cranes, pointing out that, during the time period at issue in the case (the winter of 2007-2008), the state was suffering from a serious drought. But even if TCEQ prevails and the Fifth Circuit rules that the agency is not liable for take of the whooping crane because the chain of causation is too attenuated, the underlying tension between the ESA and the state's surface water permitting program will remain.

The Service currently is reviewing the status of over 750 candidate species pursuant to the terms of a settlement agreement it entered into with two environmental organizations in 2011. The settlement requires the Service to complete its evaluations by 2018. Among the species under review are more than 20 aquatic species that occur in Texas rivers and streams and which are vulnerable to impaired water quality conditions and/or depleted flows. Six west Texas aquatic invertebrate species were listed on August 8, 2013 and the Sharpnose shiner and Small eye shiner were proposed for listing as endangered on August 6.

The Sharpnose and the Smalleye shiners occur in the upper Brazos River basin. Among the threats to the species identified by the Service in its proposal to list "include habitat loss and modification due to river fragmentation and decreased river flow, resulting mainly from reservoir impoundments. Drought, exacerbated by climate change, and groundwater withdrawals also act as sources to reduce stream flows and modify stream habitats. Fragmentation due to reservoir construction has resulted in a substantially reduced range" for the fish. If the listing is finalized, water diversions that deplete stream flows in the Brazos where the fish are found could cause take of the species. Under the theory of vicarious liability described above, TCEQ could again be subject to an ESA enforcement action for issuing permits for withdrawals in the Brazos, unless the agency has obtained an incidental take permit from the Service.

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