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Aransas Project v. Shaw, 756 F.3d 801 (5th Cir. 2014) (per curiam)

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COURT REPORTS

FEDERAL COURTS

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Aransas Project v. Shaw, 756 F.3d 801 (5th Cir. 2014) (per curiam) (holding (i) The Aransas Project had standing to bring action under the Endangered Species Act ("ESA"); (ii) the district court did not abuse its discretion by declining to abstain from exercising federal jurisdiction; (iii) the district court's finding that twenty-three endangered whooping cranes died was not clearly erroneous; (iv) the district court erred in excluding the admission of defendants' survey after trial, but the error was harmless because the district court concluded the survey lacked importance; (v) the district court's application of the incorrect test for causation was clear error; and (vi) the district court failed to find that a future harm was "certainly impending," meaning the grant of an injunction was an abuse of discretion).

The Aransas National Wildlife Refuge ("Refuge") sits adjacent to San Antonio Bay in Texas. The San Antonio and Guadalupe Rivers provide freshwater inflows to this area, also known as the Guadalupe Estuary. The Refuge is the winter home of the Aransas-Wood Buffalo ("AWB") whooping crane flock, consisting of approximately three hundred birds. The freshwater inflows in the Guadalupe Estuary provide critical habitat for the flock. Texas owns the surface waters of the state and the Texas Commission on Environmental Quality ("TCEQ") administers the capture and use of those waters through its permitting and regulatory powers.

During the winter of 2008-2009, the Refuge's biologist recovered four crane carcasses and determined another nineteen missing cranes had died, a claimed loss of twenty-three cranes. Over the previous seventy years, authorities recorded the deaths of only twenty cranes. The whooping crane is an endangered species under the ESA. After the media publicized the crane deaths, a group of concerned citizens formed The Aransas Project ("TAP"), a non-profit dedicated to protecting the whooping cranes' habitat. TAP sued TCEQ, pursuant to the ESA's citizen suit provision, alleging that TCEQ's actions and omissions in managing the waters of the Guadalupe and San Antonio River Systems had harmed the flock and ultimately caused the death of twenty-three cranes. TAP sought declaratory and injunctive relief that would ensure sufficient water resources for the AWB flock.

TAP alleged a lengthy chain of events leading to liability: (i) TCEQ's permitting and regulatory practices significantly reduced the amount of freshwater in the estuary; (ii) the reduction in available freshwater increased salinity in the estuary which decreased available food supplies; (iii) the reduction in available

food led to emaciation and predation among the cranes; (iv) these conditions combined to cause the deaths of twenty-three cranes in the winter of 2008-2009; and (v) these deaths constituted illegal "takings" under the ESA.

Before trial, the US District Court for the Southern District of Texas ("district court") granted motions to intervene for the Guadalupe-Blanco River Authority, the Texas Chemical Council, and the San Antonio River Authority ("intervenor defendants"). The district court conducted an eight-day bench trial, took testimony from nearly thirty witnesses, and issued a 124-page opinion concluding that TCEQ's permitting effected a taking under the ESA. The district court enjoined TCEQ from issuing any new permits, unless required for the public's continued health and safety, until the agency applied to the US Fish and Wildlife Service ("FWS") for an Incidental Take Permit ("ITP"). ITPs allow an exception to the ESA's prohibition on both purposeful and incidental harm and harassment of endangered species. ITPs require the development of a "Habitat Conservation Plan" to "minimize and mitigate" the impacts of incidental takings. TCEQ and the intervenor defendants appealed.

The US Court of Appeals for the Fifth Circuit ("court") first addressed whether TAP had standing. On appeal, WDEQ challenged TAP's standing for the first time. The court spent little time addressing the issue, concluding that TAP's allegations satisfied federal requirements for standing because TAP alleged an injury (crane deaths), a theory of causation (regulatory actions resulted in reduced water flows), and future deaths attributable to an ESA violation (continued crane deaths if not corrected).

The court then discussed whether the district court erred by not abstaining from exercising federal jurisdiction. While the Court reviews an abstention decision under an abuse of discretion standard, it reviews *de novo* whether the elements of abstention were satisfied. Courts may decline to exercise jurisdiction over a particular case, or *abstain,* if exercising jurisdiction would be prejudicial to the public interest–including cases involving basic issues of state policy that the federal courts should avoid. The court analyzed five factors pursuant to the *Burford* abstention doctrine: (i) whether the cause of action arises under federal law; (ii) whether the case requires inquiry into unsettled issues of state law or into local facts; (iii) the importance of the state interest involved; (iv) the state's need for a coherent policy in that area; and (v) the presence of a special state forum for judicial review.

The court found that factors one, two, and five weighed against abstention The ESA is a federal law with no "skein of state law" to untangle before resolving the federal case, and neither the TCEQ nor the Texas state courts had authority to provide a remedy. With respect to remedy, the court found that (i) the Texas Water Code expressly prohibited granting water rights for environmental reasons; (ii) TCEQ was likely prohibited from providing water for cranes during an emergency (*e.g.*, a drought); and (iii) Texas law provided no cause of action under which TAP could sue TCEQ in state court. The court considered factor three–the importance of the state interest involved–a tossup. Although Texas had a strong interest in managing its natural resources, especially water, the federal interest in endangered species was equally strong. The only factor the court found to weigh in favor of abstention was number four, the state's need for a coherent policy in the management of its finite natural re-

sources. Here, TCEQ administered the Texas Water Code pursuant to a regulatory scheme that balances water rights and stakeholder interests. The court concluded that "[f]ederal intervention could easily upset that delicate balancing." After balancing all five factors, the court concluded the federal courts could avoid entanglement in Texas state law by "treading carefully." Accordingly, the court held that the district court did not abuse its discretion in declining to abstain.

The court then turned its attention to the district courts' findings of fact and its imposition of liability upon the state defendants. Chief among its findings of fact, the district court, relying mainly on the Refuge biologists' testimony, concluded that twenty-three whooping cranes died during the winter of 2008-2009 in the Refuge. The biologist made this determination by conducting fly-overs of the Refuge. He noticed nineteen known birds missing from their usual territorial positions. Additionally, he found four crane carcasses. Because post-mortem examinations of two of these birds indicated emaciation as a cause of death, the biologist concluded that twenty-three cranes died during the winter of 2008-2009. He opined that lower water levels adversely impacted the flock's habitat. Despite the district court's finding that the biologist's opinions were reliable, the court noted many problems with the methods and data used to conclude that twenty-three cranes had died. Despite this, the court concluded that the district court's finding that twenty-three cranes had died was not clearly erroneous.

The ultimate issue confronting the court was whether TCEQ's issuance of permits to take water from the Guadalupe and San Antonio Rivers was the proximate cause of the twenty-three whooping crane deaths during the winter of 2008-2009. In order to affix liability for a taking under the ESA, the effect of the defendant's actions must be foreseeable—the ESA does not impose strict liability. The court noted that causation requires more than mere fortuity; it cannot rest upon "remote actors in a vast and complex ecosystem." The court emphasized that the foreseeability requirement acts as a limitation upon liability where, even if the links in the chain of causation can be connected, at some point liability becomes too remote.

The court cited several cases where a sufficiently close connection existed between certain regulatory acts and violations of the ESA to satisfy the foreseeability test. In one case, the US Forest Service permitted the removal of an excessive number of trees that were home for red cockaded woodpeckers. In another case, right whales were "taken" because a state agency authorized fisherman to use gillnets and lobster traps in certain areas, and these devices were known to cause harm to the whales. In each of these cases, the government agency was held liable for a "direct" taking under the ESA.

In this case, the court took issue with the district court's finding that "[p]roximate causation exists where a defendant government agency authorized the activity that caused the take." The court found the district court's opinion lacking in findings of fact sufficient to show causation and prove liability under the ESA, and chastised the district court for finding causation "without even mentioning concepts of remoteness, attenuation, foreseeability, or the natural and probable consequences of actions." Moreover, the court found the district court expressly disregarded other circumstances that clearly weighed against a finding of causation. Chief among these other circumstances was a drought during the

winter of 2008-2009 that experts considered an "outlier" among Texas' cyclical drought conditions. Other variables included constantly changing weather, tides, and temperature, as well as varying degrees of water use by permittees. Ultimately, the court concluded that a "fortuitous confluence" of "multiple, natural, independent, unpredictable and interrelated forces" caused the deaths of the whooping cranes in the Refuge. Calling this set of circumstances "the essence of unforeseeability," the court found causation lacking as a matter of law and vacated the district court's finding of liability against the state defendants.

Last, the court addressed the district court's grant of an injunction. The court held the district court erred in three ways in granting injunctive relief. First, the district court improperly based injunctive relief upon an improper proximate cause analysis. Hence, the court's vacation of the state defendants' liability "commanded" the quashing of the injunction. Second, assuming *arguendo* that TCEQ's actions did proximately cause the crane deaths, the district court erred in applying a "relaxed" standard for granting injunctions under the ESA. Third, the court held that the district court erred in finding a real and immediate threat of future injury to the cranes.

The district court had determined that a "relaxed" standard existed for granting injunctions under the ESA. The court noted that, while it is true that the balance of equities favor protecting wildlife under the ESA, an injunction still requires a showing of "certainly impending" future harm. Additionally, the court found that even if the district court had applied the correct standard, it did not make sufficient factual findings to support that conclusion. The court noted that, after 2008-2009, substantial evidence existed to the contrary, including no evidence of unusual deaths, no evidence of dangerous salinity levels, no evidence of deficient blue crabs or wolfberries, no evidence of lack of a drinking water shortage in the Refuge, and no evidence of emaciated birds or extreme behavioral patterns. The court concluded that "[i]njunctive relief for the indefinite future cannot be predicated on the unique events of one year without proof of their likely, imminent replication."

Accordingly, the court reversed the district court's finding that TCEQ caused the whooping crane deaths and denied TAP's request for injunctive relief.

Keith Tart

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

California *ex rel.* Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior, 767 F.3d 781 (9th Cir. 2014) (holding that the plaintiffs had standing to sue and that the Department of Interior's environmental impact statement on the effects of water transfer agreements on the Salton Sea in southern California did not violate the National Environmental Policy Act or the Clean Air Act).

Plaintiffs Imperial County and the Imperial County Air Pollution Control District ("Imperial") sued the Secretary of the Interior ("Secretary"), claiming that the Secretary's environmental impact statement ("EIS") did not comply with the National Environmental Policy Act ("NEPA") or the Clean Air Act ("CAA"). Several California water districts, parties to the proposed transfer