The Aransas Project v. Shaw:

An Endangered Species Act Decision With Potential Implications for Water Rights

Last month, a federal district court in Texas ruled that state regulators proximately caused an unlawful "take" of listed whooping cranes in violation of the Endangered Species Act (ESA) because the state surface water permit system did not ensure sufficient instream flows in the Guadalupe and San Antonio river systems. *The Aransas Project v. Shaw*, No. 2:10-cv-075, 2013 WL 943780 (S.D. Tex. Mar. 11, 2013). This far-reaching opinion has nationwide implications for both natural resource regulators and entities that obtain water through an appropriative water rights system.

Facts

On March 11, 2013, Judge Janis Jack of the U.S. District Court for the Southern District of Texas issued a 124-page opinion concluding that the Texas Commission on Environmental Quality (TCEQ) and other state officials violated Section 9 of the ESA because they caused the deaths of 23 whooping cranes at the Aransas National Wildlife Refuge (Refuge) during the winter of 2008-2009. The court ruled in favor of plaintiff The Aransas Project (TAP), a Texas nonprofit corporation of citizens, businesses and municipalities concerned with protection of the whooping cranes and the overall health of the San Antonio Bay. TAP filed the lawsuit on March 10, 2010, and an eight-day bench trial was held in December 2011.

Holdings

The court held that TCEQ proximately caused an unlawful "take" of at least 23 whooping cranes by failing to properly manage freshwater inflows in the Guadalupe and San Antonio river systems during the 2008-2009 winter. TAP demonstrated through expert testimony that TCEQ regulates surface freshwater capture and use within the State of Texas through its permit system and other regulatory powers. There was a severe drought during the 2008-2009 winter, which caused a reduction in the amount of freshwater inflows to the Refuge. According to the court, the reduction of inflows from the drought was exacerbated by TCEQ's water management practices, which did not consider the needs of the whooping cranes. Less water increased the salinity of the San Antonio Bay, which adversely affected the abundance of blue crabs and wolfberries, the whooping cranes' primary food source in the Refuge. The whooping cranes became emaciated, exhibited stress behavior, and some left their site territories, which exposed them to increased predation. Out of the approximately 270 individuals that comprised the only self-sustaining wild whooping crane population in 2008, at least 23 died at the Refuge and an additional 34 left the Refuge in the spring, but did not return in the fall.

Although an explanation of the facts and expert testimony that establish causation take up the bulk of the opinion, Judge Jack made other conclusions of law that have implications in many ESA-related contexts. The court held that "the ESA prohibitions apply to actions by state agencies where their regulatory programs approve actions by third parties that contribute to causing take." *TAP v. Shaw* at 12. Furthermore, when deciding whether TAP had standing to sue, the court found that TAP had satisfied the causation element because it established a causal relationship between TCEQ's water management practices and freshwater inflows to the Refuge. Citing numerous other cases, the court explained that "the federal courts have found causation where there has been a direct relationship between the challenged government regulation and the resulting 'take.'" *Id.* at 19.

The court granted TAP injunctive relief and enjoined TCEQ from approving or granting new water permits affecting the Guadalupe or San Antonio Rivers until "the State of Texas provides reasonable assurances to the Court that such permits will not take Whooping Cranes in violation of the ESA." *Id.* at 122. The court also ordered TCEQ to seek a Habitat Conservation Plan that may lead to an ESA Section 10(a) incidental take permit.

Next Steps

On March 20, 2013, the Texas Attorney General filed a Motion for Emergency Stay of Final Judgment Pending Appeal with the Fifth Circuit Court of Appeals. The motion listed more than 40 other entities that "have an interest in the outcome of the case." The Fifth Circuit granted the motion on March 26, 2013 and also ordered an expedited appeal. The case will be placed on the Fifth Circuit's August oral argument calendar with final reply briefs due by June 10, 2013.

Implications

In addition to holding regulators vicariously liable under the ESA, the *TAP v. Shaw* decision portends significant implications for any entity that obtains water under an appropriative water rights system. This would include river authorities, water authorities and even municipal water utilities. Any entity affecting a river's ultimate yield into a bay or estuary could be impacted. But the impact may not end there. Although the court's decision involved surface water, the court's rationale could extend to groundwater conservation districts that issue drilling permits for groundwater. If the wells draw down aquifer levels enough to reduce the flow of surface water, those entities too could be vicariously liable under the court's rationale. Clearly, if the court's ruling stands, the implications for water usage are quite daunting.

Alan Glen has widely-recognized expertise in various areas of federal environmental law, including the Endangered Species Act, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, the Clean Water Act, the National Environmental Policy Act, and the National Historic Preservation Act. He also has extensive experience in Texas environmental and land use laws. Mr. Glen represents both public and private entities across the country and has successfully handled dozens of permits and consultations under the Endangered Species Act.

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Laura Evans focuses her practice on various areas of environmental law, including the Endangered Species Act, Clean Water Act, the National Environmental Policy Act, and compliance with state and local environmental and land use regulations. She also works on administrative proceedings and litigation involving federal and state environmental law.