UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE ARANSAS PROJECT, et al,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 2:10-CV-75
	§	
BRYAN SHAW, *et al*,	§	
	§	
Defendant.	§	

STATE DEFENDANTS' MOTION TO STAY FINAL JUDGMENT PENDING APPEAL

Defendants Bryan Shaw, Toby Baker, Carlos Rubinstein, Zak Covar, and Esteban Ramos respectfully ask this Court to stay pending appeal its order of March 11, 2013, and its final judgment of March 12, 2013 (Doc. 354 and 355).

ARGUMENT AND AUTHORITIES

A court should stay its judgment pending appeal where the moving party can demonstrate that: (1) it is likely to succeed on the merits; (2) it would suffer irreparable injury if the stay were not granted; (3) granting the stay would not substantially harm the other parties; and (4) granting the stay would serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This test is flexible and allows a movant to obtain a stay pending appeal by showing "a substantial case on the merits when a serious legal question is involved" and that "the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 556 (5th Cir. 1981); *see also Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002)

("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay."). The State Defendants satisfy all four prongs of this test.

I. State Defendants Are Likely To Prevail on the Merits in the Court of Appeals.

Although the State respects this Court and its decision, the State Defendants nevertheless believe that the court of appeals is likely to disagree with this Court's judgment on several independent grounds.

A. State Officials Do Not Violate The Endangered Species Act By Allowing Water Withdrawals To Occur Without Imposing State-Law Penalties.

The Memorandum Opinion issued by this Court found that TCEQ officials "take" an endangered species whenever they issue permits allowing water to be withdrawn from the Guadalupe or San Antonio Rivers. This conclusion is mistaken—even if one accepts the plaintiff's claims that water diversion from those rivers is harming whooping cranes in the Aransas National Wildlife Refuge.

The act of issuing a permit does not "take" an endangered species, nor does it "authorize" the permit holder to take an endangered species in violation of federal law. A TCEQ permit merely absolves the permit holder of *state-law penalties* for drawing water from the Guadalupe or San Antonio Rivers. *See* TEX. WATER CODE § 11.081. The permit holder remains under an obligation to comply with his federal legal obligations, and nothing in a TCEQ permit purports to legalize action prohibited by the federal government or immunize the permit holder from federal penalties for violating the Endangered Species Act. *See, e.g.*, 16 U.S.C. § 1540. If a

TCEQ permit *compelled* the permit holder to draw water from the Guadalupe or San Antonio Rivers in violation of the Endangered Species Act, then the State's permitting system could be deemed "preempted" and enjoined under 16 U.S.C. § 1540(g)(1)(A). But a permit does no such thing; it merely immunizes the permit holder from state-law penalties. The permit holder must then decide whether he will draw water from the rivers; if the plaintiff believes this would violate federal law then it must seek an injunction against the permit holder, not the state officials who issue the permit.

The Memorandum Opinion of this Court interprets the Endangered Species Act to require state officials to impose *state-law penalties* whenever water usage harms an endangered species, as it holds that permits must be denied and state-law prohibitions on water use maintained whenever water is used in a manner that violates the Endangered Species Act. This approach contradicts basic principles of federalism. A State may choose to refrain from imposing state-law consequences on behavior that federal law forbids. Colorado did not violate the Supremacy Clause when it repealed its state-law penalties for marijuana use (regardless of what one may think about that decision as a matter of policy). And a local district attorney does not violate federal law by refusing, as a matter of policy, to bring state-law charges against persons who violate federal gun-control statutes. Just as States may refrain from imposing state-law penalties on conduct that violates the federal Controlled Substances Act or the federal Gun Control Act of 1968, so too may TCEQ officials decline to enforce state-law prohibitions on water usage that might violate

the Endangered Species Act. Indeed, any regime that compels state officials to enforce federal law with state-law prohibitions and penalties would violate the Constitution's prohibition on commandeering the State's executive. *See Printz v. United States*, 521 U.S. 898 (1997). State law may permit what federal law forbids.

Finally, even if permit holders "take" an endangered species by withdrawing water from the Guadalupe and San Antonio Rivers, the State's officials have not "caused" the taking by absolving the permit holders from state-law penalties for their acts. *See* 16 U.S.C. § 1538(g). A permit holder that chooses to use water in violation of federal law does so of his own free will; a State does not "cause" that violation of federal law, or assume legal responsibility for it, by declining to impose independent state-law penalties on that unlawful act. Suppose that Texas left the Guadalupe and San Antonio Rivers completely unregulated, and did not establish any type of permitting regime. Under this Court's reasoning, the mere absence of a state regulatory regime would allow private plaintiffs to sue the State's officials for "caus[ing]" a "taking" of an endangered species—based solely on their failure to proscribe and punish water usage that constitutes a "take." This logic would make state officials legally responsible for *every* action undertaken by one of their residents.

B. The Causal Link Between The Issuance Of Water Withdrawal Permits And Any Effects On The Whooping Cranes Is Too Remote And Unforeseeable To Qualify As A "Take" Under The Endangered Species Act.

But-for causation between issuing permits for water withdrawals and harm to endangered species is insufficient to qualify as a "take" under the Endangered

Species Act. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 700 n.13 (1995). Instead, the prohibitions in the Endangered Species Act are "subject to the . . . ordinary requirements of proximate causation and foreseeability." *Id.* There is no liability under the Endangered Species Act for remote or unforeseeable harms to animals. A farmer does not "take" an endangered species if a tornado blows his fertilizer into a wildlife refuge—even if his farming represents the but-for cause of harm that befalls an endangered species. *Id.*; *id.* at 709 (O'Connor, J., concurring). This Court's memorandum opinion does not acknowledge the "foreseeability" requirement of *Sweet Home*, nor does it explain how the plaintiff in this case has demonstrated the "proximate causation" and "foreseeability" required by that decision.

The Court's findings of fact show at most a but-for causal link between the issuance of permits authorizing water usage and the alleged harms to whooping cranes. But the Endangered Species Act requires more. If it is not reasonably foreseeable that the issuance of permits for withdrawing water from the Guadalupe and San Antonio rivers will harm endangered species, then the permitting authorities cannot be liable for a "take." *Sweet Home*, 515 U.S. at 700 n.13. "Foreseeability" and "proximate causation" are not established by presenting expert testimony of but-for causation.

There are simply too many links in the chain between the TCEQ's permitting decisions and the alleged harm to the whooping cranes—and too many intervening acts and events that affect the whooping crane population—for this to establish a

"take" under the Endangered Species Act. After TCEQ issues a permit, the permit holder decides whether to use water from the rivers. While this Court found that the withdrawal of water from the Guadalupe and San Antonio Rivers may affect the saline content of the downstream water, it also acknowledged the influence of many other factors (such as rainfall, tides, and climate) beyond the control of TCEQ or the permit holders. (There was, for example, a severe drought in the winter that preceded the alleged decrease in whooping-crane population). And even if no water at all had been diverted from the rivers, the salinity levels would have varied on average by only one part per thousand from the salinity levels actually recorded in the San Antonio Bay that years; that impact on salinity is much smaller than the natural variability of salinity in the bay. *See* Tr. Day 7 pp. 135-136 (Ward). The plaintiff also contended that the saline content of the water may affect the blue-crab population, but so do many other factors. The causal link in this case is extremely attenuated, and the Court's opinion does not acknowledge or explain the point at which but-for causation becomes too remote to satisfy the proximate-causation and foreseeability requirements of *Sweet Home*. If this case does not fall on the "too remote" side of the line, it is hard to imagine a case that would.

C. Federal Courts Have No Authority To Order State Officials To Apply For An Incidental Take Permit.

This Court's memorandum opinion orders state officials to seek an Incidental Take Permit. *See* Opinion at 133. That is not a lawful remedy under the Endangered Species Act. The statute allows this Court to enjoin persons from

"tak[ing]" an endangered species, *see* 16 U.S.C. § 1540(g)(1)(A), but the courts cannot force a person to seek an Incidental Take Permit if he does not wish to do so.

An Incidental Take Permit allows the Secretary of the Interior to authorize a "taking" of an endangered species in certain limited situations. *See* 16 U.S.C. § 1539(a). This is meant to provide an escape valve for the absolute and cost-blind edicts that appear elsewhere in the Endangered Species Act. *See* 16 U.S.C. § 1538(a)(1). If a person's proposed course of action will "take" an endangered species, he may choose whether to seek an Incidental Take Permit from the Secretary or give up on his plans. That decision, however, rests entirely with the person who encounters a roadblock from the Endangered Species Act; a federal court cannot make that decision for him. Finally, it is not a violation of federal law to decline to seek an Incidental Take Permit from the Secretary, and under the Supreme Court's Eleventh Amendment doctrine, a state official may be enjoined in his official capacity only to "end a continuing violation of federal law." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 73 (1996) (quoting *Green v. Mansour,* 474 U.S. 64, 68 (1985)).[1] This Court's order therefore falls outside the scope of the *Ex Parte Young* exception and violates the Eleventh Amendment.

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[1] The Court in *Animal Welfare Institute v. Martin*, 623 F.3d 19 (1st Cir. 2010), did not "order" an ITP; rather the parties entered into a consent decree that they agreed would remain in effect until the State's application for an Incidental Take Permit was approved. *Id.* at 23. *Martin* offers no support for the proposition that a federal court may order a state official to apply for an ITP. The opinion in *Strahan v. Coxe*, 127 F.3d 155 (1st. Cir 1997), contains no discussion or analysis of how a judicial order to seek an Incidental Take Permit could be a lawful remedy in an Endangered Species Act case. Decisions from courts of appeals outside of the Fifth Circuit have weight only to the extent they offer persuasive reasons for their decision; the *Strahan* opinion provides no reasoning at all.

D. The Court's Ruling Violates the Eleventh Amendment By Purporting to Direct An Injunction Toward a State Agency That Was Not Named as a Party to this Case.

This Court's memorandum opinion purports to enter declaratory and injunctive relief against "TCEQ"; it says that it enjoins "TCEQ, its Chairman, and its Executive Director" from granting new water permits and orders "TCEQ" to apply for an Incidental Take Permit. Mem. Opinion (Doc. 354) at 122. Yet TCEQ was not named as a defendant in this case, and for good reason: State agencies cannot be sued in federal court absent their consent or a valid abrogation of state immunity. *See Seminole Tribe,* 517 U.S 44. This Court's memorandum opinion violates principles of federal-court practice by entering declaratory and injunctive relief against a non-party, and it further violates the Eleventh Amendment by entering this relief against a non-consenting state entity.

E. Neither the Declaratory Judgment Act nor the Endangered Species Act Authorizes the Declaratory Relief that this Court Issued.

This Court's memorandum opinion issues two forms of declaratory relief. First, it declares that "TCEQ, its Chairman, and its Executive Director have violated section 9 of the ESA" by failing to use their state-law powers to protect endangered whooping cranes. Second, it declares that the States "water diversion regulations" are "preempted by federal law when they purport to authorize water diversions that result in a taking of whooping cranes." Mem. Opinion (Doc. 354) at 122. Neither of these purported declaratory judgments is authorized by 28 U.S.C. §§ 2201-2202 or the Endangered Species Act.

The text of the Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the *rights and other legal relations of any interested party seeking such declaration*, whether or not further relief is or could be sought.

28 U.S.C. § 2201. This statute provides a limited cause of action, one that allows litigants to seek a declaration of only *their own* "rights" and "legal relations." *See generally* David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45-46. It does not authorize a court to declare the behavior of a defendant to be unlawful, absent a violation (or potential violation) of the "rights" or "legal relations" of the plaintiff who seeks declaratory relief.

Neither of the declaratory judgments entered by the district court says anything about the plaintiff's "rights" and "legal relations." Indeed, the plaintiff is not even seeking a declaration of its "rights" or "legal relations." The plaintiff is acting as a private attorney general, and the Endangered Species Act does not create substantive legal rights for birdwatchers, nature lovers, or others with interests in the survival of endangered species. The Declaratory Judgment Act is inapplicable to this case because the plaintiff is not seeking an adjudication of any "rights" or "legal relations" *belonging to the plaintiff*, and this Court therefore has no authority to enter declaratory relief under 28 U.S.C. § 2201. Nor does the Endangered Species Act supply an alternative source of authority for the declaratory relief issued by this Court. The citizen-suit provision used by the plaintiff in this case says only that federal courts may "*enjoin* any person" in violation of the Endangered Species Act; it does not purport to authorize declaratory relief that would not otherwise be available under 28 U.S.C. § 2201.

The declaratory relief issued by this Court not only exceeds the Court's limited authority to declare the "rights" and "legal relations" of the party seeking declaratory relief, it also appears to require state officials to "monitor" domestic and livestock users and "exercise emergency powers available to protect the endangered whooping cranes." *See* Mem. Opinion (Doc. 354) at 122 ("The TCEQ, its Chairman, and its Executive Director have violated section 9 of the ESA, and continue to do so through their water management practices which include the decision to not monitor D&L users or to exercise emergency powers available to protect the endangered whooping cranes."). If the Court is intending to impose this as a court-ordered duty on state officials, then it is improperly issuing injunctive relief under the guise of the Declaratory Judgment Act. Relief under 28 U.S.C. §§ 2201-2202 can be triggered only by a declaration of the "rights" and "legal relations" of the *person seeking relief*; the Declaratory Judgment Act does not allow a mere finding of illegal activity by the defendant to trigger the institutional-reform relief envisioned by this Court's memorandum opinion.

II. STATE DEFENDANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

This Court's Memorandum Opinion prohibits State officials from issuing *any* new water permits affecting the Guadalupe or San Antonio Rivers and compels the State to seek an Incidental Take Permit within 30 days. The Court's Memorandum Opinion would even prohibit TCEQ from granting emergency permits under Texas Water Code § 11.139 to address an imminent threat to the public health and safety. Just last month, the TCEQ approved an emergency order allowing the Lower

Colorado River Authority to amend its 2010 Water Management Plan in response to severe drought conditions. *See* Docket number 2013-0225-WR; Permit No. 5838 (attached as an appendix to this motion). This Court's Memorandum Opinion forbids this relief at a time when most of Texas is classified as in exceptional or extreme drought.

This astounding and far-reaching injunctive relief will impose irreparable harm on the State's economy and its drought-affected residents, and will force state officials to prepare and submit an Incidental Take Permit application that will prove unnecessary if the court of appeals agrees with the State's arguments. The State respectfully submits that it should be allowed to obtain appellate review before these obligations are imposed. The harms imposed on the State are irreparable because they cannot be undone by a favorable ruling on appeal. Water that is needed urgently for irrigation and other municipal, industrial, and agricultural uses cannot be retroactively provided if an appellate court reverses this Court's judgment. In addition, there is no way for the court of appeals to rule on this appeal within 30 days, so State officials will be compelled to spend countless hours and devote scarce agency resources toward preparing an Incidental Take Permit application—regardless of the outcome of the State's appeal.

III. THE STATE DEFENDANTS' IRREPARABLE INJURIES STRONGLY OUTWEIGH ANY HARM TO THE PLAINTIFF.

No harm will befall the plaintiff if this Court's judgment is stayed pending appeal. No one has alleged that the whooping-crane population will decrease dramatically in the next 30 days before they migrate to Wood Buffalo Canada until

next fall; hence, the opportunities for the plaintiff's members to observe the whooping crane will not be adversely affected by the issuance of a stay.[2] Indeed, the plaintiff never even moved for a preliminary injunction in this case, even though it filed this lawsuit more than three years ago, so the plaintiff has not litigated its case in a manner that urgently calls for the federal courts' immediate relief. If the plaintiff now wants to insist that delay will cause irreparable harm to its members, it needs to explain why it never thought it necessary to seek preliminary injunctive relief when the district-court proceedings in this case lasted more than three years.

IV. A STAY PENDING APPEAL IS IN THE PUBLIC INTEREST.

This Court's Memorandum Opinion seeks to protect the whooping crane without any regard to countervailing considerations—human health and safety, the State's agricultural and industrial needs, and the need for rational policymaking that weighs interests in species preservation against other important considerations. The public interest involves more than a blinkered determination to protect an endangered species without regard to costs. Prohibiting TCEQ from issuing any new permits to persons seeking to use water from the Guadalupe and San Antonio rivers is an extreme response that requires the interests of whooping cranes to prevail over everyone else in Texas who needs to use the Guadalupe and San Antonio rivers. The "public interest" is best reflected by the fact that the

[2] The whooping cranes start arriving in Texas in October. Tr. Day 2, 302:17-20 (Stehn). They are all in Texas from late-December through mid-March, and the last cranes depart in late March or early April. Tr. Day 1, 298:10-11 (Chavez-Ramirez). No one has alleged that the whooping crane population will decrease dramatically in the next 30 days before the they migrate to Wood Buffalo in Canada, where they will remain until next fall.

Secretary of the Interior, a politically accountable actor who serves at the pleasure of the President, declined to bring an enforcement action under 16 U.S.C. § 1540(a) after receiving notice from the plaintiff in this case of these alleged violations.

CONCLUSION

The State Defendants respectfully request that this Court stay its order and final judgment pending appeal.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on March 15, 2013, the above and foregoing document was served on counsel for the plaintiff via the Court's CM/ECF Document Filing System.

/s/ Jonathan F. Mitchell
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