

Does the Endangered Species Act Preempt State Water Law?

Robin Kundis Craig*

I. Introduction

In March 2013, the U.S. District Court for the Southern District of Texas announced, almost in passing, that the federal Endangered Species Act (“ESA”)¹ preempted state water law and the exercise of state water rights, concluding that the Texas Commission on Environmental Quality had effectuated a “taking”² of ESA-listed whooping cranes as a result of state-permitted diversions of fresh water.³ This case is currently on review before the U.S. Court of Appeals for the Fifth Circuit, but it raises a question likely to be increasingly important in state water law: When, and to what extent, does the federal ESA preempt state water law, including state-created water rights?

These materials examine the question of when federal ESA protections preempt state water law, including state water rights. Topics covered include the basic jurisprudence of federal preemption law, the ESA’s preemption provision, existing case law regarding the scope of ESA preemption, and the probable growth of conflict preemption cases in the waterways that ESA-listed species depend upon.

II. Fresh Water and ESA-Listed Species

Few waters in the United States—including groundwater aquifers—that are important sources of water supply do *not* contain ESA-listed species. In general, the connection is immediate and direct: the listed species depend on the same water humans want to consume for habitat.

Some of the many waterbodies legal conflicts have already arisen in connection with ESA-listed species include:

- The Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia, home to several listed species of mussels and the listed Gulf sturgeon.

* William H. Leary Professor of Law, University of Utah S.J. Quinney College of Law. My thanks to Jeffrey Mathis, J.D. candidate at the University of Utah College of Law, for his research assistance as my 2013-2014 Quinney Fellow.

¹ 16 U.S.C. §§ 1531-1544 (2012).

² The ESA prohibits takings of listed species through Section 9. 16 U.S.C. § 1538 (2012).

³ *The Aransas Project v. Shaw*, 2013 WL 943780, *4, *65-*67 (S.D. Tex. Mar. 11, 2013).

- The Central Valley Project in California, which affects the listed delta smelt and several species of listed salmon.
- The Chewuch River in Washington, home to listed steelhead trout and chinook salmon.
- The Columbia River dividing Oregon and Washington, home to several listed species of salmon and steelhead.
- The Edwards Aquifer in Texas, home to the listed fountain darter, San Marcos gambusia, San Marcos salamander, Texas blind salamander, and Texas wild rice.
- The Klamath River Basin straddling the border of California and Oregon, which is home to listed coho salmon, shortnose suckerfish, and Lost River suckerfish.
- Lake Mead and the Lower Colorado River in Arizona, which provide habitat for the listed Southwestern Willow Flycatcher.
- The Middle Rio Grande River in New Mexico, home of the listed silvery minnow.
- The multi-state Missouri River, home to the listed pallid sturgeon, least tern, and piping plover.
- Mono Lake in California, which acts as habitat for several protected species of birds and a listed brine shrimp.
- The San Carlos Reservoir in Arizona, which provides habitat and food for the listed bald eagle, willow flycatcher, and razorback sucker.
- The Trinity River in California, which is home to listed Chinook salmon, coho salmon, and steelhead trout.
- The Truckee River and Pyramid Lake in Nevada, home to the listed cui-ui fish and Lahontan cutthroat trout.
- Tulare Lake in California, home to listed delta smelt and winter-run Chinook salmon.
- The Upper Salmon River in Idaho, habitat of the listed bull trout.
- The Ventura River in California, home to listed West Coast steelhead.

Thus, conflicts between water use and the ESA are likely to continue into the future. Indeed, as drought, water shortages, and climate change continue and grow worse, these conflicts are only likely to escalate.

III. Federal Preemption Basics

Federal preemption derives from the U.S. Constitution's Supremacy Clause, which states that "[t]he Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding."⁴ As many courts have pointed out, "The Supremacy Clause of the Constitution . . . invalidates

⁴ U.S. CONST., art. VI, cl. 2.

state laws that ‘interfere with, or are contrary to,’ federal law.”⁵ However, out of respect for the states, the U.S. Supreme Court begins its preemption analyses with a presumption that Congress did *not* intend to preempt state law, particularly in areas—like wildlife regulation—that traditionally have been the states’ prerogative.⁶

Nevertheless, there are three main ways in which federal law can preempt state law. First, Congress can *expressly* preempt state law⁷—for example, by explicitly stating in a federal statute that certain kinds of state laws are preempted.⁸

Second, Congress can *implicitly* preempt state law. Implicit preemption analysis is the most complex kind of preemption analysis in the federal courts because the U.S. Supreme Court has recognized several different kinds of implicit preemption. Most sweeping is *field preemption*, where “[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”—*i.e.*, that Congress “occupies the field.”⁹ For example, the Supreme Court has held that the Natural Gas Act of 1948 occupies the field of interstate natural gas regulation because it is a “comprehensive scheme” of federal regulation that gives “exclusive jurisdiction” to the Federal Energy Regulatory Commission.¹⁰ Similarly, when federal interests dominate over state interests, the courts will often hold that federal law implicitly preempts state law.¹¹ Finally, courts will find implicit federal preemption of state law if the state law gets in the way of the federal law—or, more specifically, if “the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal” Congress’s intent to preempt state law.¹²

⁵ *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 851 (9th Cir. 2002) (citing *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824))).

⁶ *E.g.*, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

⁷ *Ray*, 435 U.S. at 157; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

⁸ *See, e.g.*, Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (2012) (providing that “a State or political subdivision of a State may not establish, continue in effect or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under” the Act).

⁹ *Rice v. Santa Fe Elevator*, 331 U.S. at 230 (citing *Pennsylvania R.R. Co. v. Public Service Commission*, 250 U.S. 566, 569 (1919); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942)); *Ray*, 435 U.S. at 157.

¹⁰ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-04 (1988).

¹¹ *Buckman Co. v. Plaintiffs’ Legal Commission*, 531 U.S. 341, 347-48 (2001).

¹² *Rice*, 331 U.S. at 230 (citing *Southern R.R. Co. v. Railroad Commission*, 236 U.S. 439, 446 (1915); *Charleston & W.C. R.R. Co. v. Varnville Co.*, 237 U.S. 597, 601-04

Finally, the courts have recognized *conflict preemption* as the third and irreducible form of federal preemption. Under conflict preemption, “[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute.”¹³ Importantly, “neither an express preemption provision nor a savings clause ‘bar[s] the ordinary working of conflict preemption principles.’”¹⁴

Nevertheless, conflict preemption does create the issue of how to identify an “actual conflict” between state and federal law. Federal courts find that such conflicts exist primarily in two situations. First, a conflict exists “where compliance with both federal and state regulations is a physical impossibility”¹⁵ Second, a conflict between state and federal law exists if the state “law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶ Courts enjoy considerable discretion in discerning such “obstacles,”¹⁷ but some are fairly obvious.

IV. The ESA’s Preemption of State Law

A. The ESA’s Express Preemption Provision

The ESA expressly preempts state law in certain circumstances. Specifically, Section 6(f) of the Act states that:

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this

(1915); *New York Central R.R. Co. v. Winfield*, 244 U.S. 147, 148 (1917); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926)); *Ray*, 435 U.S. at 157-58.

¹³ *Ray*, 435 U.S. at 158; *see also Lorillard Tobacco*, 533 U.S. at 541 (noting that “State action may be foreclosed . . . by implication because of a conflict with a congressional enactment . . .”).

¹⁴ *Buckman Co.*, 531 U.S. at 352 (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000)).

¹⁵ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-43 (1963); *Ray*, 435 U.S. at 158.

¹⁶ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1947); *see also Ray*, 435 U.S. at 158; *Jones v. Rath Packing*, 430 U.S. at 526; *De Canas v. Bica*, 424 U.S. 351, 363 (1976).

¹⁷ *See Crosby v. National Foreign Trade Council*, 330 U.S. 363, 373 (2000) (“What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . .”).

chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.¹⁸

Courts have indicated that this section constitutes an express declaration of congressional intent that the ESA preempts state law.¹⁹ Although the provision expressly allows states to continue to regulate, states cannot “relax requirements of federal law or contravene terms of federal permit or exemption.”²⁰

B. Express Preemption under the ESA: Case Law

Most of the case law involving the ESA’s express preemption provision have involved state laws governing hunting, trapping, fishing, and international trade in fish and wildlife—subjects, in other words, to which the ESA directly speaks. For example, the U.S. Court of Appeals for the Ninth Circuit held that the ESA and regulations promulgated thereunder expressly preempted a California statute²¹ prohibiting trade of any elephant products because the ESA regulations allowed for limited trade in African elephant products under special federal permits.²² An importer of African elephant ivory with a federal permit brought suit seeking declaratory relief that federal law preempted the state statute.²³ In determining congressional intent, the Ninth Circuit noted that the ESA allows for state regulation of trade in species so long as the statute does not prohibit what the ESA and its implementing regulations permit. However, when the African elephant was added to the endangered species list, an accompanying regulation allowed for a special

¹⁸ 16 U.S.C. § 1535(f) (2012).

¹⁹ *E.g.*, *H.J. Justin & Sons, Inc. v. Brown*, 519 F. Supp. 1383, 1387 (E.D. Cal. 1981), *aff’d in part, rev’d in part on other grounds*, 702 F.2d 758 (9th Cir. 1983), *cert. denied*, 464 U.S. 823 (1983).

²⁰ *Id.*

²¹ CAL. PENAL CODE § 653o(a) (West 1983) (“It is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or any part or product thereof, of any polar bear, leopard, ocelot, tiger, cheetah, jaguar, sable antelope, wolf (*Canis lupus*), zebra, whale, cobra, python, sea turtle, colobus monkey, kangaroo, vicuna, sea otter, free-roaming feral horse, dolphin or porpoise (*Delphinidae*), Spanish lynx, or elephant.”).

²² 50 C.F.R. § 17.40(e) (1981) (allowing trade in African elephant products under special federal permits).

²³ *Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760, 761 (9th Cir. 1983).

purpose permit “authorizing any activity otherwise prohibited.”²⁴ California’s outright ban on elephant products therefore prohibited what the ESA allowed and hence was expressly preempted.²⁵

Courts have also repeatedly found that the ESA preempts state law protections for endangered and threatened species when the state law is less protective than the ESA. For example, the U.S. District Court for the District of Montana concluded that the ESA expressly preempted Montana’s definition of a “taking,” which did not include “habitat modifications,” even though Montana was a party to a “full-authority comparative agreement” under the ESA.²⁶ The court reasoned that:

the clear language of § 6(f) of the ESA combined with the overwhelming priority Congress has given to the preservation of threatened and endangered species, [means] the court must conclude that the less restrictive takings provisions under Montana law are preempted by the ESA and that the definition of “take” under the ESA which includes “harm” and “significant habitat modification” is controlling in this case.²⁷

Following this logic, cases involving water management can invoke the ESA’s express preemption provision, but generally only if the relevant state law relates directly to the protection of species. For example, in *United States v. Glenn-Colusa Irrigation District*,²⁸ the U.S. District Court for the Eastern District of California confronted a situation in which the irrigation district had a well-documented history of causing harm to the ESA-listed Sacramento River winter-run chinook salmon because of its diversions of water from the Sacramento River, because salmon were killed or injured in its pumps. Starting in 1920, courts ordered the irrigation district to install fish screens to protect fish from being drawn into pumps.²⁹ The district’s failure to regularly maintain the screens resulted in periodic litigation, and the California Department of Fish and Game ended up installing the fish screens at issue

²⁴ 50 C.F.R. § 17.40(e)(3) (1981) (“A special purpose permit may be issued in accordance with the provisions of § 17.32 authorizing any activity otherwise prohibited with regard to such wildlife, upon submission of proof that such wildlife was already in the United States on June 11, 1978 or that such wildlife was imported into the United States in accordance with paragraph (e)(2) of this section.”).

²⁵ *Man Hing Ivory*, 702 F.2d at 765 (“We affirm the district court’s well-considered judgment that section 6(f) (*sic*) of the Endangered Species Act, together with 50 C.F.R. § 17.40(e), preempts California’s statutory prohibition on trade in African elephant products by a trader who has secured all necessary federal permits.”).

²⁶ *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992) (internal quotations marks omitted).

²⁷ *Id.* at 939.

²⁸ 788 F. Supp. 1126 (E.D. Cal. 1992).

²⁹ *Id.* at 1129.

in 1972.³⁰ The main issue for the Eastern District of California was who was responsible for the taking of the listed salmon—the irrigation district because of its pumping, or California because of the screens that it installed. The court found the irrigation district liable because the screens presented no hazard in absence of the pumping.³¹ Along the way, however, the district court effectively found that federal definitions of causation and “take” had to apply because “to the extent that California’s law . . . is less protective than the Endangered Species Act, it is preempted.”³² As a result, the district court rejected California’s definition of proximate cause, which uses a “substantial factor” test and “taking” of species, which was less protective than the federal definition.³³

C. Implied Field Preemption by the ESA

As noted, courts occasionally deem Congress to have “occupied the field” through federal regulation, excluding states from regulating on the same subject. However, because the ESA’s express preemption provision allows states to regulate more stringently (*i.e.*, to be more protective of species) than the ESA itself requires, courts have held that the ESA generally does *not* occupy the field of species protection.³⁴

On occasion, however, the ESA *in combination with other federal statutes* has been held to occupy the field with respect to particular species. For example, in *In Defense of Animals v. Cleveland Metroparks Zoo*,³⁵ plaintiffs challenged the planned move of a male lowland gorilla from Ohio to the Bronx Zoo for mating purposes. The U.S. District Court for the Northern District of Ohio held that the plaintiffs’ state law claims had to be dismissed because the ESA’s preemption provisions, regulations implementing the ESA, and the federal Animal Welfare Act of 1970³⁶ together wholly occupy the field of law regulations the transportation of ESA-listed lowland gorillas across state lines.³⁷

D. Case Law on Conflict Preemption under the ESA

Conflict preemption, as noted above, is the minimum constitutional import of the Supremacy Clause. Thus, to the extent that state law actually conflicts with

³⁰ *Id.*

³¹ *Id.* at 1133.

³² *Id.* at 1134.

³³ *Id.*

³⁴ *H.J. Justin & Sons*, 519 F. Supp. at 1389.

³⁵ 785 F. Supp. 100 (N.D. Ohio 1991).

³⁶ 7 U.S.C. § 2131 et seq. (2012).

³⁷ *In Defense of Animals*, 785 F. Supp. at 102. *But compare* *Viva Int’l v. Adidas Promotional Retail Operations Inc.*, 162 P.3d 569, 577 (Cal. 2007) (holding that the ESA does *not* occupy the field with respect to the importation and sale of kangaroos).

federal law, either generally or in a specific application, the state law will be preempted.

As a result, the ESA can preempt conflicting state laws as applied even when it does not expressly preempt those state laws.³⁸ For example, when fishing regulations in Massachusetts that governed non-listed species allowed fishers to set lobster traps in ways that caused “takes” of listed and endangered Northern right whales, the U.S. Court of Appeals for the First Circuit held that the ESA preempted the state licensing rules.³⁹ Specifically, by creating a situation where lines and fishing gear would be placed in the whales’ paths, promoting entanglements and harm to (or even deaths of) those whales, the Massachusetts fishing licenses posed an obstacle to the ESA’s objective of protecting the Northern right whale from harm.

Similarly, in 1998, California voters passed an initiative that made it illegal (and criminal) to use certain animal traps and poisons, including steel-jawed leghold traps. Federal agencies, however, used such traps to protect threatened and endangered species.⁴⁰ The Ninth Circuit held the ESA preempted California’s complete ban on the use of these traps because the ban prohibited any person, including federal agencies, from using traps and poisons for any reason.⁴¹ Because there was no exception for endangered species, the California initiative precluded federal agencies from protecting endangered species under the ESA as the ESA requires, creating a conflict between federal and state law.⁴²

Conflict preemption is likely to be the most important form of ESA preemption in the water resource and water rights contexts. Unlike state fish and game laws, state laws regarding water rights and water management generally do not directly regulate species; moreover, to the extent that these laws address species or biodiversity, they generally act to *preserve* aquatic species. As a result, the ESA’s express preemption provision is unlikely to be relevant. Nevertheless, because implementation of water rights and water management measures can directly affect

³⁸ *Strahan v. Coxe*, 127 F.3d 155, 168 (1st Cir. 1997) (“By including the states in the group of actors subject to the Act’s prohibitions, Congress implicitly intended to preempt any action of a state inconsistent with and in violation of the ESA.”); *The Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 783 (S.D. Tex. 2013) (“State agency regulations, to the extent they conflict with the ESA, are preempted, pursuant to the Supremacy Clause.”).

³⁹ *Strahan v. Coxe*, 127 F.3d at 168.

⁴⁰ *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 844, *opinion amended on denial of reh’g*, 312 F.3d 416 (9th Cir. 2002).

⁴¹ *Id.* at 859.

⁴² *See also* *Pacific Northwest Venison Producers v. Smitch*, 1992 WL 613294, at *7 (W.D. Wash. Sept. 2, 1992) *aff’d in part*, 20 F.3d 1008 (9th Cir. 1994) (holding that the ESA expressly preempted a Washington state law that would have prohibited propagation of the ESA-listed sika

aquatic species' habitat and food supplies, they can become obstacles to the protection and recovery of particular listed species.

The U.S. District Court for the Southern District of Texas's March 2013 decision in *The Aransas Project v. Shaw*⁴³ exemplifies the potential importance of conflict preemption when water management interferes with ESA-listed species. The case involved the whooping crane population that winters at the Aransas National Wildlife Refuge in southern Texas ("the AWB flock") and the Texas Commission on Environmental Quality's (TCEQ's) assignment of water resources. The whooping crane was listed for protection under federal endangered species legislation that preceded the current ESA—as threatened in 1967⁴⁴ and as endangered in 1970.⁴⁵ The Aransas National Wildlife Refuge abuts the Guadalupe estuary, also known as San Antonio Bay,⁴⁶ which in turn depends on the flows of the San Antonio and Guadalupe Rivers.⁴⁷

During the winter of 2008-2009, this area was experiencing severe drought. By the end of the winter, according to the court, 23 AWB whooping cranes had died, and another 34 that left the area in the spring failed to return in the fall.⁴⁸ According to the court, the culprit, legally and factually, was the TCEQ.

As the district court explained, "The State of Texas owns its surface water, and this includes the water in the Guadalupe and the San Antonio River systems. Under Texas law, freshwater capture and use is regulated by the Texas Commission on Environmental Quality (TCEQ), a State agency. Through its permit process and regulatory powers, the TCEQ can affect the availability of freshwater to users along the river system."⁴⁹ After the TCEQ refused The Aransas Project's request that it dedicate sufficient instream flow in the San Antonio and Guadalupe Rivers to protect the whooping cranes' habitat, The Aransas project sued, arguing that the TCEQ's water management decisions had effectuated a "take" of the whooping cranes in violation of Section 9 of the ESA.⁵⁰

The district court agreed. First, it "conclude[d] that TAP has established by a preponderance of the evidence, that the TCEQ defendants have the authority, power, and responsibility to manage water diversions, and the ESA requires that such management take into account the health and survival of the AWB whooping cranes. The Court finds further that TCEQ has refused to issue a permit to permit freshwater

⁴³ 930 F. Supp. 2d 716 (S.D. Tex. 2013).

⁴⁴ 32 Fed. Reg. 4001 (Mar. 11, 1967).

⁴⁵ 35 Fed. Reg. 16047 (Oct. 13, 1970).

⁴⁶ *The Aransas Project*, 930 F. Supp. 2d at 723.

⁴⁷ *Id.*

⁴⁸ *Id.* at 724.

⁴⁹ *Id.* at 725. *See also id.* at 737-44 (discussing TCEQ's legal authority under Texas water law).

⁵⁰ *Id.* at 725 (citing 15 U.S.C. § 1538).

inflow for the protection of the AWB habitat and that S.B.3 either by definition or application will not protect the winter habitat of the AWB.”⁵¹ Second, the court upheld The Aransas Project’s theories of factual and proximate (legal) causation⁵²—specifically, that:

[L]ower freshwater inflows to the Refuge from the San Antonio and Guadalupe river systems result in higher bay/estuary salinities, and that the water practices of the TCEQ defendants cause those lower freshwater inflows to the Refuge. For 2008–2009, TAP maintains that those water practices caused the death of at least 23 Whooping Cranes. The fact that those diversions were “lawful water diversions under preexisting permits” is irrelevant in the context of this case because, as previously discussed, the ESA preempts state law to the extent it authorizes activities that cause a prohibited take of a listed species.⁵³

Thus, in the face of the court’s finding that there was an actual conflict between the implementation of Texas water law (issuance of prior appropriation rights and refusal to curtail those rights in the face of drought) and the ESA (the whooping cranes’ need for viable habitat and food supplies), federal preemption dictated the outcome of the case.

⁵¹ *Id.* at 743.

⁵² *Id.* at 745-775.

⁵³ *Id.* at 745.