COMMENT

A MISSED OPPORTUNITY FOR WHOOPING CRANES—AND WESTERN WATER AUTHORITIES—ON THE TEXAS GULF COAST

BY

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Throughout the American West, water diversions pursuant to vested rights are straining the region's limited freshwater supplies. Meanwhile, many Endangered Species Act (ESA)-listed species are dependent on minimum flows in these same depleted rivers and streams for survival. This places western water authorities in an unenviable position: they are under enormous pressure to honor existing water rights to the fullest extent possible, while also avoiding "take" of flow-dependent listed species. This predicament was central to Aransas Project v. Shaw*, a recent Fifth Circuit case brought in response to the deaths of twenty-three endangered whooping cranes on the Texas Gulf Coast. The cranes had died as a result of insufficient freshwater flowing into San Antonio Bay, where the only self-sustaining, non-captive flock of whooping cranes spends their winters. Plaintiffs alleged that officials of the Texas Commission of Environmental Quality, by failing to adequately manage freshwater flows in the two major river systems flowing into the bay, were liable for take of the cranes under section 9 of the ESA. The Fifth Circuit disagreed, finding a lack of proximate causation: according to the court, it was not reasonably foreseeable that the agency's management practices would cause the crane deaths.*

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This Comment first argues that the court's proximate causation analysis was flawed and inconsistent with that of other courts who have addressed the issue of section 9 liability for regulatory entities. Further, the case illustrates how little guidance lower courts have received from the Supreme Court as to what is "reasonably foreseeable" in this context, allowing different courts (with varying dispositions towards the ESA) to reach opposite results on similar facts. The decision is especially unfortunate because the plaintiff's requested relief—that defendants develop a Habitat Conservation Plan (HCP) for whooping cranes and apply for an incidental take permit—is a reasonable and appropriate solution for the problem facing water authorities across the West. An HCP for whooping cranes could have served as a model for regulators struggling to balance their obligations under the ESA with the realities of their states' water permitting schemes. The Comment provides some thoughts about what such an HCP might look like, and expresses hope that—with or without court orders—these plans will begin to be developed and implemented for listed riparian species.

I. INTRODUCTION

There is a fundamental tension in the American West between the prior appropriation doctrine and the Endangered Species Act (ESA or Act).[1] As demand has increased for the region's limited water supplies, and more

[1] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2001).

species have been listed as threatened and endangered under the ESA, diversions pursuant to vested water rights have inevitably led to the deaths of listed species dependent on minimum stream flows for survival.[2] This dynamic creates obvious difficulties for state water authorities who wish to honor existing water rights to the fullest extent possible, while avoiding liability for "take" under section 9 of the ESA.

This conflict between the ESA's take restrictions and current systems of water allocation took center stage in a recent Fifth Circuit decision. In *Aransas Project v. Shaw*,[3] the court found that the Texas Commission on Environmental Quality (TCEQ) was not liable for the deaths of twenty-three endangered whooping cranes.[4] The cranes had died as an indirect result of insufficient freshwater flowing into San Antonio Bay, which receives water from two major river systems regulated by TCEQ.[5] Despite the agency's regulatory control over the waters feeding the bay, the Fifth Circuit found that there was a lack of proximate causation: it was not reasonably foreseeable to the court that the agency's management practices would cause the deaths.[6]

This Comment argues that the Fifth Circuit's proximate causation analysis was flawed, and that its analysis and holding are inconsistent with that of other courts that have addressed the issue of section 9 liability for regulatory entities. Further, the case illustrates something troubling about this line of cases: because the lower courts have received such vague guidance from the Supreme Court as to what is "reasonably foreseeable" in this context, judges (with varying predispositions toward a specific case) are free to frame their causation analysis so as to reach a preferred result.

The *Aransas Project* decision is especially unfortunate because the plaintiff's requested relief—that TCEQ develop a Habitat Conservation Plan (HCP) for whooping cranes and apply for an incidental take permit (ITP)—is an eminently reasonable solution to alleviating some of the inherent tension between existing water rights and the ESA. A properly written and enforced HCP and ITP, particularly for an iconic species such as the whooping crane, could provide a valuable roadmap for other water regulatory agencies who wish to avoid take liability while respecting property interests in vested water rights.

This Comment proceeds in six Parts. Part II provides the relevant legal framework surrounding the ESA's prohibitions on "take" of listed species, and outlines Texas's system of water permitting and regulation. Part III provides a background to the *Aransas Project* litigation, and discusses the decisions and reasoning of the district court, which ruled for the plaintiffs, and the Fifth Circuit, which reversed and found that TCEQ was not liable.

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2 *E.g.*, Cori S. Parobek, *Of Farmers' Takes and Fishes' Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide*, 27 HARV. ENVTL. L. REV. 177, 186–87 (2003).

3 775 F.3d 641 (5th Cir. 2014) (per curiam).

4 *Id.*

5 *Id.* at 646–47.

6 *Id.* at 663.

Part IV argues that the Fifth Circuit's proximate cause reasoning was flawed and inconsistent, and that the decision highlights a fundamental problem, identified above, with ESA jurisprudence in this context. Next, Part V turns to the question of what a properly designed HCP for a species highly dependent on freshwater flows might look like. That Part begins by reviewing two high-profile HCPs that were developed in recent years in areas where permitted diversions have caused take of endangered riparian species. Concluding that these specific plans offer little guidance for a potential whooping crane HCP, the discussion then turns to another recent HCP developed to protect species dependent on Texas's Edwards Aquifer. Even though the Edwards Aquifer HCP was developed to manage groundwater withdrawals, it includes two intelligent measures that could serve as an excellent starting point for an HCP concerning a surface water-dependent species like the whooping crane. Part VI concludes with some brief thoughts on the potential value of such an HCP for water authorities across the western United States, and expresses hope that these plans will begin to be developed and implemented for listed flow-dependent species.

II. LEGAL FRAMEWORK

In *Aransas Project*, the Fifth Circuit grappled with a scenario where the ESA's prohibition on "take" intersected with Texas's regulatory scheme for permitting water use. An overview of the relevant legal background in the case illustrates the tension between western water authorities' management of decreasing water supplies and their legal obligation to avoid harming endangered species.

A. The Endangered Species Act

The ESA was passed in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species."[7] Described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,"[8] the Act provides strong protections for more than 2,000 species of plants and animals that have been listed by the federal government as "endangered" or "threatened."[9] As such, it has proved to be a "powerful tool" for environmental organizations wishing to challenge activities that may harm listed species.[10]

7 16 U.S.C. § 1531(b) (2012).

8 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

9 U.S. Fish & Wildlife Serv., *Summary of Listed Species Listed Populations and Recovery Plans*, http://ecos.fws.gov/tess_public/pub/boxScore.jsp (last visited Nov. 21, 2015).

10 *See* BARTON H. THOMPSON, JR. ET AL, LEGAL CONTROL OF WATER RESOURCES 695 (5th ed. 2013).

The ESA is administered by the United States Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).[11] To be eligible for the protections of the ESA, a species must first be listed as either threatened or endangered by one of the two agencies.[12] An "endangered species" is defined in the Act as one that is "in danger of extinction throughout all or a significant portion of its range," and a "threatened species" is one that is likely to become endangered "within the foreseeable future."[13]

Once a species is listed under the ESA, section 9 of the Act provides a series of "[p]rohibited acts" that includes, most significantly, the prohibition on "take" of any listed species.[14] "Take" is defined in the ESA to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[15] Importantly, this prohibition on take—along with the rest of the section 9 prohibitions—applies to "any person,"[16] which is defined broadly to include not only individuals and private entities, but also "any State" and "any officer, employee, agent, department, or instrumentality of the Federal Government [and] of any State."[17] The section 9 prohibitions thus extend to regulatory entities, and courts have found such entities liable when they authorized or otherwise permitted activities resulting in take.[18]

The term "harm" in the definition of take has been interpreted by FWS regulation to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[19] This interpretation was affirmed by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (*Sweet Home*).[20] However, in upholding the regulation's broad definition of harm, the Court noted that enforcement of the ESA's take prohibitions will involve "difficult questions of proximity and degree."[21] In a concurring opinion, Justice O'Connor stressed that application of this broad definition was "limited by ordinary

11 U.S. FISH & WILDLIFE SERVICE, ESA BASICS; 40 YEARS OF CONSERVING ENDANGERED SPECIES 1 (2013), *available at* http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf (identifying the FWS and NMFS as the agencies responsible for implementing the ESA); 16 U.S.C. § 1532(15) (2012) (defining "Secretary" as used in the ESA). The FWS, part of the U.S. Department of the Interior, is responsible for most species, including freshwater fish and all terrestrial and avian species. U.S. FISH & WILDLIFE SERVICE, *supra*. NMFS, part of the National Oceanic and Atmospheric Administration, is responsible for marine species, including anadromous fish. *Id.*

12 *See* 16 U.S.C. § 1533 (2012) (listing eligibility criteria).

13 *Id.* §§ 1532(6), 1532(20).

14 *Id.* § 1538(a)(1)(B).

15 *Id.* § 1532(19).

16 *Id.* § 1538.

17 *Id.* § 1532(13). The prohibitions also apply to individuals, corporations, other private entities, officers and agencies of the Federal Government, "or any other entity subject to the jurisdiction of the United States." *Id.*

18 *See infra* Part IV.

19 50 C.F.R. § 17.3 (2013).

20 515 U.S. 687, 708 (1995).

21 *Id.*

principles of proximate causation, which introduce notions of foreseeability."[22] This language indicates that, for an action modifying or degrading habitat to qualify as take, plaintiffs must show a sufficient causal link between the death or injury and the complained-of activity. In other words, take is only prohibited by the ESA when it is "foreseeable rather than merely accidental."[23]

Finally, section 10 of the ESA provides an important exception to the Act's strict prohibition of take. In recognition of the fact that "some human activities will necessarily encroach upon . . . endangered species,"[24] section 10 authorizes FWS or NMFS to issue a permit allowing take if it determines the take "is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[25] Before such an ITP may be issued, the applicant must develop and submit an HCP.[26] The HCP must identify impacts likely to result from any taking and measures the applicant will take to "minimize and mitigate" those impacts.[27] An ITP cannot be issued if the agency determines the taking will "appreciably reduce the likelihood of the survival and recovery of the species."[28]

B. Water Allocation in Texas

Texas's system of allocating and permitting surface water has much in common with that of other states in the arid American West, where there is intense competition for limited water supplies.[29] Like other "prior appropriation" states, Texas has developed a permitting scheme for the diversion and use of state waters. This Section outlines the relevant components of Texas's scheme and various powers granted to the state water regulatory authority. While the details of permitting and allocation systems vary somewhat between the western states, the fundamentals of the various permitting schemes are quite similar to the principles described below.

Surface waters within Texas are the property of the state.[30] The waters are held in trust for the public, who may only appropriate water by obtaining a permit.[31] The Texas Commission on Environmental Quality (TCEQ) is the

22 *Id.* at 709 (O'Connor, J., concurring).

23 *Id.* at 700.

24 Aransas Project v. Shaw, 930 F. Supp. 2d 716, 727 (S.D. Tex. 2013).

25 Endangered Species Act of 1973, 16 U.S.C. § 1539(a)(1)(B) (2012).

26 *Id.* § 1539(a)(2)(A).

27 *Id.* § 1539(a)(2)(A)(i)–(ii).

28 *Id.* § 1539(a)(2)(B)(iv).

29 *Compare*, TEX. WATER CODE ANN. § 5.013 (West 2008 & Supp. 2014) (granting permitting authority over surface water to an administrative body), *with* OKLA. STAT. ANN. tit. 82, § 105.13 (2015) (same).

30 TEX. WATER CODE ANN. § 11.021 (West 2008).

31 *Id.* §§ 11.0235, 11.121. On riparian property, appropriation of up to 200 acre-feet for domestic and livestock uses is exempted from the permit requirements. *Id.* § 11.142.

state agency charged with the issuance of water rights permits, as well as the adjudication, cancellation, and enforcement of water rights.[32]

To obtain a permit, a party must submit an application to TCEQ identifying the appropriator's intentions, including the amount of water to be appropriated, the place of use, and the purpose of the use.[33] If the application is approved, the applicant must then demonstrate that the water has been beneficially used for the purpose identified in the permit.[34] Once a water right has been "perfected," it is given a priority date.[35] An appropriator with a more senior priority right is entitled to all of the water allocated under his permit before the next junior water right holder receives any water.[36] Thus, in times of scarcity, diversions pursuant to junior water rights will be curtailed before those of more senior water rights. In several river basins, TCEQ operates a "watermaster" program to "manage, monitor, archive, and enforce surface water rights based on priority."[37]

Historically, once a water right in Texas was perfected, it "constituted a vested right to the use of the water appropriated."[38] So long as the permitted quantity of water continued to be put to beneficial use, the right could not be diminished or taken away.[39] This is still the case for permits that were issued prior to September 1, 2007.[40] However, permits issued or amended after that date must include a provision allowing TCEQ to adjust permit conditions to "provide for protection of instream flows or freshwater inflows."[41] In addition, for post-2007 permits issued within 200 miles of the coast, TCEQ is required to include "conditions considered necessary to maintain beneficial inflows to any affected bay and estuary system."[42] It was further established in the *Aransas Project* litigation that, in times of emergencies, TCEQ has broad authority to "modify or amend existing water rights, . . . access and evaluate [riparian domestic and livestock] usage, and take any other action necessary in times of emergencies" to ensure sufficient freshwater flows.[43]

Thus, TCEQ and other similarly situated regulatory entities are obligated to avoid authorizing take of listed riparian species under the ESA, while continuing to honor perfected water rights to the fullest extent

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32 *Id.* § 5.013.

33 TEX. COMM'N ON ENVTL. QUALITY, APPLICATION FOR A PERMIT TO APPROPRIATE PUBLIC WATER 2–4, *available at* http://www.tceq.state.tx.us/assets/public/permitting/forms/10214.pdf.

34 *See* TEX. WATER CODE ANN. § 11.026 (West 2008).

35 Tex. Comm'n of Envtl. Quality, *What Your Water Right Means*, https://www.tceq.texas.gov/response/drought/diversionrights.html (last visited Nov. 21, 2015).

36 *See* TEX. WATER CODE ANN. § 11.027 (West 2008) ("As between appropriators, the first in time is the first in right.").

37 Aransas Project v. Shaw, 930 F. Supp. 2d 716, 739 (S.D. Tex. 2013); TEX. WATER CODE ANN. § 11.326 (West 2008 & Supp. 2014).

38 Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 647 (Tex. 1971).

39 *See id.*

40 TEX. WATER CODE ANN. § 11.147(e-1) (West 2008).

41 *Id.*

42 *Id.* § 11.147(b). In 2011, two years after the events at issue in the *Aransas Project* litigation, TCEQ was also granted authority to temporarily suspend or adjust permitted diversions "during a period of drought or other emergency shortage." *Id.* § 11.053.

43 Aransas Project v. Shaw, 930 F. Supp. 2d 716, 741 (S.D. Tex. 2013).

possible under the state water code. As water supplies in the West become more limited, these dual obligations have more frequently been at odds.

III. *ARANSAS PROJECT V. SHAW* LITIGATION

In *Aransas Project v. Shaw,* the conflict between TCEQ's obligations under the ESA and its responsibilities under the state's water permitting system came into sharp focus. This Part provides a brief background of the events leading up to the *Aransas Project* litigation, and then explains the decisions and reasoning of the district court and the subsequent Fifth Circuit panel.

A. Background

The whooping crane is a spectacular bird that can reach heights of five feet tall.[44] At one point there were only twenty-one whooping cranes in existence but, through a series of conservation efforts, by 2011 the population had risen to nearly 600, with around 440 living in the wild.[45] The cranes were listed as endangered in 1970[46] and were grandfathered into the protections of the ESA when it was passed in 1973. The only self-sustaining, non-captive flock of whooping cranes spends its winters at the Aransas National Wildlife Refuge on the Texas Gulf Coast.[47] The refuge is situated at an estuary known as San Antonio Bay, which receives freshwater inflows from the Guadalupe and San Antonio Rivers, which join together about a mile before flowing into the bay.[48]

In the winter of 2008–2009, southern Texas experienced a severe drought. This drought resulted in a dramatic reduction in freshwater flowing into San Antonio Bay, which in turn caused water across the refuge to become hypersaline.[49] This increased salinity led to a sharp decrease in blue crabs and wolfberries—the chief food sources for whooping cranes.[50] Biologists studying the birds began to notice "alarming" stress behavior, and ultimately twenty-three cranes died over the winter due to malnutrition.[51]

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44 National Wildlife Federation, *Whooping Crane*, https://www.nwf.org/Wildlife/Wildlife-Library/Birds/Whooping-Crane.aspx (last visited Nov. 21, 2015).

45 *See* INT'L CRANE FOUND., HISTORIC WHOOPING CRANE NUMBERS (2011), *available at* https://www.savingcranes.org/images/stories/site_images/conservation/whooping_crane/pdfs/historic_wc_numbers.pdf.

46 35 Fed. Reg. 16,047 (Oct. 13, 1970).

47 *Aransas Project*, 930 F. Supp. 2d at 722–23.

48 *Id.* at 723.

49 *Id.* at 724.

50 *Id.*

51 *Id.*

B. The Litigation

In March 2010, The Aransas Project (TAP), a non-profit corporation formed by environmentalists and local business owners, filed a complaint in the Southern District of Texas against various TCEQ officials.[52] Plaintiffs alleged that the TCEQ defendants were liable under ESA's section 9 for take of the twenty-three endangered cranes, because of their actions and failures to act "in managing freshwater uses and flows on the Guadalupe and San Antonio Rivers."[53] Plaintiffs sought injunctive relief "to compel TCEQ officials to take appropriate steps to protect" the cranes from the impacts of water diversions in the two river systems.[54] A central element in this request was that TCEQ apply for an ITP for the birds, which would include development of an HCP for the two river basins and San Antonio Bay.[55]

The district court agreed with the TAP plaintiffs.[56] In a detailed, seventy-five page opinion, the court found that "the actions, inactions and refusal to act by the TCEQ defendants proximately caused an unlawful 'take'" of the cranes.[57] In reiterating that causation had been established, the court explained that in the winter of 2008–2009:

> (1) the TCEQ defendants diverted freshwater flow, caused higher salinity in the San Antonio Bay ecosystem; (2) higher salinities resulted in decreased freshwater availability, along with decreased blue crab and wolfberry abundance; (3) Whooping Cranes require freshwater, wolfberry and blue crab to survive; (4) the AWB flock suffered increased mortality as a direct result of diverted freshwater, leading to the deaths of at least twenty-three (23) cranes in total; (5) TCEQ defendants' water management practices altered the salinity of San Antonio Bay and the designated critical habitat of the AWB flock.[58]

In response to Defendants' arguments that TCEQ had little power to protect the cranes due to the priority water system in Texas, the court highlighted several authorities available to the agency to do so, including the authority "to regulate diversions, to oversee riparian withdrawals, to secure returns, [and] to release water from reservoirs," as well as an "emergency authority to do anything that is necessary or appropriate to carry out duties and responsibilities."[59] The court enjoined TCEQ from approving new water permits in either of the two river basins without assurances that those permits would not harm cranes and ordered TCEQ to apply for an ITP,[60] with

52 Complaint, *Aransas Project*, 930 F. Supp. 2d 716 (No. 2:10-cv-075), 2010 WL 2003720 (S.D. Tex. 2010).

53 *Id.* at 1–2.

54 *Id.* at 3.

55 *Id.* at 33.

56 *Aransas Project*, 930 F. Supp. 2d at 788–89.

57 *Id.* at 780.

58 *Id.*

59 *Id.* at 781. The Court also pointed out that TCEQ "does not cancel unused water rights," and "does not monitor D[omestic] & L[ivestock] water use, nor does it even have a registry of such riparian rights . . ." *Id.*

60 *Id.* at 789.

an HCP "includ[ing] a provision to provide a higher volume of inflows to the estuary with monitoring of salinities at the bays."[61]

The district court's injunction was stayed on appeal, and the Fifth Circuit reversed.[62] In a per curiam decision, the court dramatically reframed TCEQ's connection to the crane deaths, stating that the lower court had erred in holding the defendants "responsible for remote, attenuated, and fortuitous events following their issuance of water permits."[63] The court saw a long line of causation between TCEQ's management activities and the deaths, such that the resulting starvation of the cranes was not reasonably foreseeable.[64]

To support its decision, the appellate court identified several contingencies outside the defendants' control that made the crane deaths unforeseeable and uncontrollable. For example, the court pointed out that riparian landowners may divert some water for domestic and livestock purposes without a permit.[65] And while water permits authorize diversion, permit holders are not required to divert the full permitted amount.[66] Further, natural conditions such as rainfall and temperature also affect the amount of freshwater flowing into the bay, and blue crab populations had already been depleted by overfishing.[67] Because of these factors outside TCEQ's control, the Fifth Circuit concluded that "[f]inding proximate cause and imposing liability on the State defendants in the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes' estuary environment goes too far."[68]

IV. THE FIFTH CIRCUIT'S REASONING IN *ARANSAS PROJECT* IS INCONSISTENT WITH PREVIOUS DECISIONS FINDING REGULATORY ENTITIES LIABLE FOR TAKE

Several courts have held that the ESA take prohibitions extend to government agencies that permit or otherwise approve actions by third parties that result in take. In so holding, these courts have explicitly or implicitly found a sufficient causal link between the regulation (or lack thereof) and the complained-of harm. This Part argues that the Fifth Circuit's framing and analysis of the proximate cause issue in *Aransas Project* was inconsistent with these previous decisions and ignores or misinterprets TCEQ's obligations under the Texas Water Code. This inconsistency highlights a serious problem with post-*Sweet Home* ESA jurisprudence: different judges, with different predispositions and different ideas of foreseeability, can frame the same set of facts differently so as to reach opposite conclusions.

61 *Id.* at 778.
62 Aransas Project v. Shaw, 775 F.3d 641 (5th Cir. 2014) (per curiam).
63 *Id.* at 656.
64 *Id.* at 660.
65 *Id.* at 662.
66 *Id.*
67 *Id.*
68 *Id.* at 663.

A. Previous Decisions Addressing Liability of Regulatory Entities for Take

Every court that has addressed the issue has found that state and federal agencies may be liable under section 9 when they authorize activities causing take.[69] In *Defenders of Wildlife v. EPA*, for example, the Eighth Circuit held that EPA's "continued registrations" of strychnine, a pesticide that was killing endangered ferrets, was a violation of the take prohibition.[70] Similarly, the Fifth Circuit held that the U.S. Forest Service was liable for take when its management of timber stands resulted in take of endangered red-cockaded woodpecker.[71] And an Eleventh Circuit panel held that citizens could challenge under section 9 a Florida county's refusal to ban beach driving and artificial light sources that adversely impacted listed turtles.[72] In these and other cases that have addressed the issue, courts have found the regulatory entity liable—and thus, proximate causation satisfied—when it allowed the use of certain resources over which it had significant regulatory control and the subsequent use of those resources resulted in take.

Of these cases, the most complete proximate cause analysis appears in *Strahan v. Coxe*, a 1997 case from the First Circuit.[73] In that case, the court held that Massachusetts state officers had violated section 9 by issuing licenses and permits authorizing gillnets and lobster fishing that harmed the endangered Northern Right whale.[74] With regard to causation, the court stated that, "while indirect," the causal link between the licensing and harm was "not so removed that it extends outside the realm of causation as it is understood in the common law."[75] Defendants in *Strahan* had argued that their licensing of fishing equipment did "not cause the taking any more than its licensure of automobiles and drivers solicits or causes federal crimes, even though automobiles it licenses are surely used to violate" various federal laws.[76] In response, the court explained the crucial difference between the two scenarios: while a licensed driver could drive a car in a

69 *See* Defs. of Wildlife v. U.S. Envtl. Prot. Agency, 882 F.2d 1294, 1301 (8th Cir. 1989); Sierra Club v. Yeutter, 926 F.2d 429, 438–39 (5th Cir. 1991); Strahan v. Coxe, 127 F.3d 155, 163–64 & n.2 (1st Cir. 1997); Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla., 148 F.3d 1231, 1249 (11th Cir. 1998); United States v. Town of Plymouth, 6 F. Supp. 2d 81, 91 (D. Mass. 1998) (holding the town of Plymouth liable for the take of piping plovers when it allowed off-road vehicles access to the birds' beach habitat); Seattle Audubon Soc'y v. Sutherland, No. CV06-1608MJP, 2007 WL 1300964, at *1, *8–9 (W.D. Wash. May 2, 2007) (concluding that the "plain language of the ESA" supports the assertion that Washington state officials can be held liable for take by approving the logging of endangered spotted owl habitat); Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 99–100 (D. Me. 2008) (holding the state of Maine liable for take of Canada lynx by failing to prevent continued trapping of the threatened species); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1078–79, 1081 (D. Minn. 2008) (holding the Commissioner of the Minnesota Department of Natural Resources liable for take after authorizing trapping and snaring within the range of the threatened Canada lynx).

70 *Defs. of Wildlife*, 882 F.2d at 1300–01.

71 *Sierra Club*, 926 F.2d at 438–39.

72 *Loggerhead Turtle*,148 F.3d at 1255.

73 127 F.3d 155.

74 *Strahan,* 127 F.3d at 163.

75 *Id.* at 164.

76 *Id.* at 163–64.

"manner that does not risk" violating the law, "it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking."[77] For the state's licensing scheme to *not* qualify as a taking, explained the court, there would have to be an "intervening independent actor" making a "conscious and independent decision" to disregard the purposes and restrictions of the license so as to violate federal law.[78]

B. Inconsistency in the Aransas Project *Decision*

The "no intervening independent actor" reasoning employed by the First Circuit in *Strahan* would seem to readily apply to the *Aransas Project* facts as well. The water diversions from the Guadalupe and San Antonio river basins in 2008–2009 were, presumably, done pursuant to the terms of TCEQ-issued permits, along with other allocation decisions made by the agency that winter. In other words, the extremely low freshwater inflows—and subsequent crane deaths—were not dependent on the water users in the basin making independent decisions to "disregard the purposes and restrictions" of their permits. As with the use of gillnets and lobster pots in *Strahan*, it simply was not possible for the *Aransas Project* water users to divert the water that winter, pursuant to the timing and quantity authorized by TCEQ, without risk of a taking.

The Fifth Circuit, however, seemed determined to find that the intervening, independent actor, missing in *Strahan*, was present in *Aransas Project*. In a somewhat strained analysis, the court explained that "[w]hile [TCEQ-issued] permits authorize usage, . . . they do not compel it."[79] Further, the court pointed out that riparian owners need not obtain permits for domestic and livestock purposes, and "independent choices of water users are also affected by the availability" of other water sources.[80] Because of these factors, the court concluded, TCEQ "cannot control the amount of water that will be diverted from the rivers."[81] TCEQ's actions were not the proximate cause of the takes, then, because of what the court saw as the many intervening, independent actions of water users in the two basins.

This analysis from the *Aransas Project* decision seems to willfully gloss over or even ignore certain realities of water use in southern Texas. First, while it is true that a permit does not compel the permittee to withdraw his full allocated quantity, it is unrealistic to imagine that a permittee will simply decide not to divert the full amount, particularly in a drought year. Further, it was established at trial that TCEQ's responsibilities with respect to the various permits do not end after the permits have been issued; rather, they have an ongoing obligation—and various tools granted by the legislature—to

77 *Id.* at 164.
78 *Id.*
79 Aransas Project v. Shaw, 775 F.3d 641, 662 (5th Cir. 2014).
80 *Id.*
81 *Id.*

manage diversions so as not to violate the ESA and other state and federal laws.[82] This includes the obligation to "maintain beneficial inflows to any affected bay and estuary system."[83] To meet these ongoing responsibilities, TCEQ must continue to monitor conditions in the basin and, using the watermaster program and other tools, make decisions that will ensure the laws are not violated. Unpermitted riparian diversions and the availability of water from other sources are not independent factors whose existence eliminates TCEQ's responsibility to follow relevant laws. Rather, they are factors that must be included when the agency makes water management decisions, including when to allow diversions pursuant to lawful permits.

*C. Problem with Post-*Sweet Home *Jurisprudence*

The above discussion helps illustrate something troublesome about this line of ESA take cases brought against regulatory agencies. Because the Supreme Court has provided only vague guidance on what is sufficiently foreseeable in the context of section 9 take, courts are free to frame the set of facts before them any way they like. If a judge happens to be predisposed toward protecting the environment, she can easily identify a chain of causation with few links, as the district court judge did in *Aransas Project*. Likewise, if judges are predisposed against environmental plaintiffs, they will usually be able to identify—on the same set of facts—a series of contingencies and independent causes for the harm, so that the causal chain between regulation and harm is long and complex. This, of course, is what the Fifth Circuit judges in *Aransas Project* were able to do. Thus, two judges, or panels of judges, can examine the same case and justify dramatically different conclusions.

It seems unlikely that the Supreme Court will be offering any help with this predicament in the near future. To be sure, the Fifth Circuit's proximate cause analysis—and ultimate holding—in *Aransas Project* appears inconsistent with previous decisions from various appellate courts, including the Fifth Circuit itself. However, because the facts in each of these cases are distinguishable, it is unlikely the Supreme Court would view the *Aransas Project* decision as creating a circuit split requiring review in that Court. Thus, so long as an appellate panel can reasonably frame the foreseeability issue to support its conclusion, that conclusion will likely stand. Indeed, given this dynamic, environmental plaintiffs may be fortunate that more of these cases haven't gone against them.

V. CREATING A MODEL HABITAT CONSERVATION PLAN

The Fifth Circuit's holding in *Aransas Project* is particularly unfortunate because the plaintiff's requested relief in the case—that TCEQ apply for an

82 Aransas Project v. Shaw, 930 F. Supp. 2d 716, 741–42 (S.D. Tex. 2013). *See also supra* notes 40–42 and accompanying text.

83 TEX. WATER CODE ANN. § 11.147(b) (West 2008).

ITP, including the required preparation of an HCP—is a reasonable and appropriate method of protecting the endangered cranes while allowing irrigation and other withdrawals to continue. In fact, an HCP for whooping cranes could have served as a model for water regulatory agencies around the country that are struggling to balance their obligations under the ESA with their state water permitting scheme.

As discussed above, an ITP allows a regulated party to avoid liability under section 9 when take occurs that is incidental to the party's otherwise lawful activity.[84] The HCP is a critically important part of the ITP application process: in particular, the HCP helps identify how the applicant will minimize and mitigate impacts to the species, and ensures that all such measures will be adequately funded.[85] The ITP process "is designed to provide some balance between the often conflicting interests of property owners, developers, and conservationists."[86] Because of this balance created by a properly developed and implemented ITP, the ITP and HCP process may offer a way to resolve the tension between the conflicting duties of western water regulators. Further, an HCP for an iconic species like the whooping crane could provide invaluable guidance for water authorities across the West.

But what would such an HCP look like? This Part first examines two recent high-profile HCPs for endangered riparian species, and concludes that they offer little guidance for protecting species highly dependent on freshwater flows. The discussion then turns to another HCP—this one developed to manage groundwater withdrawals—that contains two measures that could easily be incorporated into an HCP for surface water-dependent species like the whooping crane.

A. The Bay Delta and Lower Colorado River HCPs

In recent years, two high-profile HCPs have been developed in an effort to avoid liability for take of ESA-listed riparian species as a result of surface water diversions. In 2004, a partnership of FWS and various state agencies from Nevada, Arizona, and California submitted the Lower Colorado River (LCR) HCP.[87] The Colorado River provides water and electricity for millions of people in the southwestern United States, and the HCP provides conservation measures for eight species that are either currently listed under the ESA or are candidates for listing, all of whom are affected by water consumption on the lower Colorado.[88]

Similarly, the Bay Delta Conservation Plan (BDCP), an HCP developed by California state agencies and other stakeholders, was recently submitted

84 *See supra* Part II.A.

85 ESA, 16 U.S.C. § 1539(a)(2)(A) (2012).

86 *Aransas Project*, 930 F. Supp. 2d at 776.

87 LOWER COLORADO RIVER MULTI-SPECIES CONSERVATION PROGRAM, FINAL HABITAT CONSERVATION PLAN 1-5 tbl. 1–1 (2004) [hereinafter LCR HCP], *available at* http://www.lcrmscp.gov/publications/hcp_volii_dec04.pdf.

88 *Id.* at 1-10 to 1-11 tbl. 1-2.

for public comment after years of preparation.[89] The BDCP was developed to provide protections for ESA-listed species dependent on freshwater flows into the Sacramento-San Joaquin Delta, including Delta Smelt and several salmon runs.[90] These flows have been dramatically altered by the operation of the State Water Project and Central Valley Project, massive feats of engineering that provide water to municipalities and irrigators in central and southern California.[91]

Both the LCR HCP and the BDCP are necessary because, like the situation in *Aransas Project*, permitted diversions of fresh water have caused or are causing harm to ESA-listed species. However, these two recent HCPs offer little guidance for preparation of an HCP for a species critically dependent on a certain amount of freshwater flow. This is because the applicant agencies in both situations have not focused their attention on reducing the amount of water diverted. Instead, the plans focus on the creation and restoration of habitat for the listed species, measures to improve water quality, and, in the case of LCR, "population enhancement" measures.[92] In neither document does there appear to be any intent to reduce water use, re-examine permitted water rights, or work to maintain minimum flows.

This discussion is not meant to criticize the many years of work put into the BDCP and LCR HCP. It is quite possible that the habitat restoration and water quality efforts in the agencies' plans will provide great benefits for the listed species in each region. Instead, this discussion is meant to highlight the difference between these situations and that facing the whooping crane and other listed species highly dependent on a certain amount of freshwater flow. For such species, a different type of HCP is required: one that actually provides means for water in heavily allocated river systems to *remain in the river*. Unfortunately, an opportunity to fashion such a plan was lost when the Fifth Circuit reversed the district court's *Aransas Project* ruling. But the opportunity may arise again, for the whooping crane or another similarly situated species. If it does, a different HCP, created by Texas authorities to regulate groundwater pumping, could provide valuable guidance.

89 BAY DELTA CONSERVATION PLAN EXECUTIVE SUMMARY (2013), *available at* http://baydeltaconservationplan.com/libraries/dynamic_document_library/public_draft_bdcp_executive_summary.sflb.ashx.

90 *Id.* at 1, 5.

91 *See* Bay Delta Conservation Plan, *About the Delta*, http://baydeltaconservationplan.com/AboutTheDelta/AbouttheDelta.aspx (last visited Nov. 21, 2015) (describing the flow of the freshwater from the Sierra Nevada mountains and the critical role this water plays in providing drinking water and irrigation).

92 *See* LCR HCP, *supra* note 87, at 5–6; BAY DELTA CONSERVATION PLAN EXECUTIVE SUMMARY, *supra* note 89, at 1.

B. The Edwards Aquifer HCP

The Edwards Aquifer underlies approximately 3,600 square miles in south central Texas.[93] The aquifer is the primary drinking water source for over 2 million people and also serves many irrigators in the area.[94] It is also the source of Comal and San Marcos Springs, the two largest springs remaining in the state.[95] Those springs are the only known habitat for eight ESA-listed species, whose primary threat is the loss of habitat resulting from decreased flows caused by regional drawdown of the aquifer.[96]

As a response to litigation surrounding these listed species, the Texas legislature created the Edwards Aquifer Authority (EAA), which was tasked with managing withdrawals from the aquifer and implementing measures "to ensure that the continuous minimum springflows of the Comal Springs and the San Marcos Springs are maintained to protect [listed] species to the extent required by federal law."[97] In 2007, the legislature further mandated that EAA work with several state agencies (including TCEQ) to create an HCP for the listed species.[98]

The completed Edwards Aquifer HCP contains two measures that, although they were developed for groundwater withdrawals, could provide inspiration for developers of an HCP for species dependent on surface water flows. First, the HCP creates a Voluntary Irrigation Suspension Program Option, under which irrigation permit-holders in several counties can volunteer to suspend pumping in times of drought in return for compensation.[99] Based on irrigator responses to inquiries from the preparing agencies, it is anticipated that over 40,000 acre-feet will be enrolled in the program each year.[100]

Next, the Edwards Aquifer HCP provides for the creation of a Regional Water Conservation Program.[101] Under this program, the EAA will provide technical assistance and incentives for implementing various conservation measures to municipalities and industries in the region.[102] In exchange for this assistance, half of the conserved water will remain in the aquifer, while the other half remains available to the participating entity.[103] The goal of this

93 Edwards Aquifer Authority, *About the Edwards Aquifer*, http://edwardsaquifer.org/scientific-research-and-reports/edwards-aquifer-overview (last visited Nov. 21, 2014).

94 EDWARDS AQUIFER RECOVERY IMPLEMENTATION PROGRAM, HABITAT CONSERVATION PLAN 3-31 (2012), *available at* http://www.eahcp.org/documents/Final%20HCP%20November%202012.pdf.

95 *Id.* at 3-24.

96 *Id.* at 1-2, 3-55.

97 *Id.* at 1-2 (quoting Act of May 30, 1993, ch. 626, § 1.14, 1993 Tex. Gen. Laws 2350, 2360).

98 Courtney Smith, *Developing Conservation Plans for Edwards Aquifer*, TEX. WATER RES. INST., 2012, http://twri.tamu.edu/publications/txh2o/fall-2012/developing-conservation-plan-for-edwards-aquifer/ (last visited Nov. 21, 2015).

99 EDWARDS AQUIFER IMPLEMENTATION PROGRAM, *supra* note 94, at 5-3 to 5-4.

100 *Id.* at 5-4 to 5-5.

101 *Id.* at 5-5 to 5-6.

102 *Id.* at 5-6.

103 *Id.*

program is to conserve another 10,000 acre-feet per year of permitted withdrawals.[104]

These two measures from the Edwards Aquifer HCP, developed to apply to groundwater pumping, could easily be translated to apply to surface water diversions. This would provide an excellent starting point for an agency developing an HCP for a surface flow dependent species like the whooping crane. Further measures could include agency investment in efficient technology for irrigators in the region, or in more thorough monitoring of water use throughout the applicable river basin. Emergency rationing measures could be developed and implemented when flows drop below a certain level, or in the case of the whooping cranes, when salinity levels in the bay reach a dangerous level. These and other creative ideas are available to conserve the flows endangered riparian species depend on, while minimizing impacts to permitted water rights. The sensible place for these ideas to be developed and implemented is in an HCP.

VI. CONCLUSION

When the Fifth Circuit reversed the district court's holding and injunction in *Aransas Project*, the flock of whooping cranes wintering in southern Texas was denied the benefits of a carefully crafted HCP. This is unfortunate, both because the decision came as a result of questionable reasoning, and because it denied western water authorities the opportunity to see such an HCP in action. But with water supplies becoming scarcer, and more riparian species being listed, it is certain that the tension between permitted water rights and the ESA will continue to build. An ITP for a listed species dependent on minimum stream flows could allow permitted withdrawals to continue, while protecting species and shielding water authorities from take liability. This balance and legal security is something that all state water agencies should desire. A court order is not necessary for an HCP to be developed and implemented, but it may ultimately take such an order from a court that has connected the causal chain between a water authority's management decisions and subsequent harm to a species. As litigation over listed riparian species continues, there will be more opportunities for a court to make the connection.

104 *Id.*