

# TEXAS WATER JOURNAL

Volume 5 Number 1  
2014



# TEXAS WATER JOURNAL

Volume 5, Number 1

2014

ISSN 2160-5319

*texaswaterjournal.org*

THE TEXAS WATER JOURNAL is an online, peer-reviewed journal devoted to the timely consideration of Texas water resources management and policy issues. The journal provides in-depth analysis of Texas water resources management and policies from a multidisciplinary perspective that integrates science, engineering, law, planning, and other disciplines. It also provides updates on key state legislation and policy changes by Texas administrative agencies.

For more information on TWJ as well as TWJ policies and submission guidelines, please visit *texaswaterjournal.org*.

## **Editor-in-Chief**

Todd H. Votteler, Ph.D.  
Guadalupe-Blanco River Authority

## **Editorial Board**

Kathy A. Alexander, Ph.D.

Robert Gulley, Ph.D.

Robert Mace, Ph.D.  
Texas Water Development Board

Ken Rainwater, Ph.D.  
Texas Tech University

Todd H. Votteler, Ph.D.  
Guadalupe-Blanco River Authority

Ralph A. Wurbs, Ph.D.  
Texas A&M University

## **Managing Editor**

Kathy Wythe  
Texas Water Resources Institute  
Texas A&M Institute of Renewable Natural Resources

## **Layout Editor**

Leslie Lee  
Texas Water Resources Institute  
Texas A&M Institute of Renewable Natural Resources

## **Website Editor**

Ross Anderson  
Texas Water Resources Institute  
Texas A&M Institute of Renewable Natural Resources

The Texas Water Journal is published in cooperation with the Texas Water Resources Institute, part of Texas A&M AgriLife Research, the Texas A&M AgriLife Extension Service, and the College of Agriculture and Life Sciences at Texas A&M University.



## Commentary: Fifth Circuit Decision in *The Aransas Project v. Shaw*: the Whooping Crane Case

Robert L. Gulley<sup>1</sup>

---

**Editor's Note:** The opinion expressed in this commentary is the opinion of the individual author and not the opinion of the Texas Water Journal or the Texas Water Resources Institute.

**Keywords:** Endangered Species Act, surface water, whooping crane

---

<sup>1</sup> Robert L. Gulley, J.D., Ph.D. is the former Program Manager for the Edwards Aquifer Recovery Implementation Program and former Senior Trial Attorney in the Wildlife and Marine Resources Section of the U.S. Department of Justice.

Citation: Gulley RL. 2014. Fifth Circuit Decision in the *The Aransas Project v. Shaw*: The Whooping Crane Case. Texas Water Journal. 5(1):55-58. Available from: <https://doi.org/10.21423/twj.v5i1.7010>.

© 2014 Robert L. Gulley. This work is licensed under the Creative Commons Attribution 4.0 International License. To view a copy of this license, visit <https://creativecommons.org/licenses/by/4.0/> or visit the TWJ [website](#).

## Terms used in paper

Short name or acronym	Descriptive name
ESA	Endangered Species Act
TCEQ	Texas Commission on Environmental Quality
TAP	The Aransas Project
USFWS	U.S. Fish and Wildlife Service

On June 30, 2014, the United States Court of Appeals for the Fifth Circuit issued its decision on the appeal in *The Aransas Project (TAP) v. Shaw*. The district court had found that the Texas Commission on Environmental Quality (TCEQ) had violated section 9 of the Endangered Species Act (ESA) by authorizing the diversion of water on the San Antonio and Guadalupe rivers that proximately caused the alleged take of whooping cranes during the 2008–2009 drought.<sup>1</sup> The Fifth Circuit reversed, holding that the district court had applied the wrong test for proximate causation and that, applying the proper standard, “only a fortuitous confluence of adverse factors caused the unexpected 2008–2009 die-off” of whooping cranes.<sup>2</sup> The Fifth Circuit concluded that, “Finding proximate causation 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.”<sup>3</sup>

The TAP case involves the question of “indirect” or “vicarious” liability under section 9 of the ESA. Section 9 of the ESA prohibits the “take” of listed endangered fish and wildlife.<sup>4</sup> “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct.”<sup>5</sup> “To establish a violation of section 9, the plaintiff must prove that the defendant was the proximate cause of the “take.”<sup>6</sup>

In reversing the district court decision, the Fifth Circuit did not find that the issuance of a permit could never constitute a “take”—only that the requisite proximate causation had not been established in the case before it.<sup>7</sup> Although the Fifth Circuit expressly left the issue open, it appeared that it

might be prepared in a subsequent case to hold that a state agency’s authorizing an action, such as through the issuance of a permit, may not, as a matter of law, constitute a “take.” Such a decision would create a conflict between federal courts of appeals that could result in subsequent review by the Supreme Court.<sup>8</sup>

In the TAP case, the plaintiff alleged that TCEQ, in administering permits for the diversion of water from the Guadalupe and San Antonio rivers, foreseeably and proximately caused the deaths of whooping cranes in the winter of 2008–2009.<sup>9</sup> The Court found that the district court had not explained “why the remote connection between water licensing, decisions to draw water by hundreds of users, whooping crane habitat, and crane deaths that occurred during a year of extraordinary drought compels ESA liability.”<sup>10</sup> The Fifth Circuit concluded that the district court either “misunderstood the relevant liability test or misapplied proximate cause when it held the defendants responsible for the remote, attenuated, and fortuitous events following their issuance of water permits.”<sup>11</sup> Based on this conclusion, the Fifth Circuit made its own independent determination regarding liability.<sup>12</sup>

The practical importance of the case, for now, lies in the Fifth Circuit’s explanation of the requisite showing for establishing proximate causation. The Court explained, quoting from a recent Supreme Court case, that “a requirement of proximate cause thus serves ... to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.”<sup>13</sup> The Court further explained that in the context of the

<sup>8</sup> See *Strahan v. Cox*, 127 F.3d 155 (1<sup>st</sup> Cir. 1997).

<sup>9</sup> *Id.* at 21. The permits at issue had been issued many years prior to the alleged “take.”

<sup>10</sup> *Id.* at 24.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 23 (citing *Paroline v. United States*, 134 S. Ct. 170 (2014)).

<sup>1</sup> See *The Aransas Project v. Shaw*, 930 F. Supp. 2d 716 (S.D. Tex. 2013).

<sup>2</sup> *The Aransas Project v. Shaw*, slip op. at 31 (5th Cir. June 30, 2014).

<sup>3</sup> *Id.*

<sup>4</sup> 16 U.S.C. § 1538(a)(1).

<sup>5</sup> 16 U.S.C. § 1532(19).

<sup>6</sup> *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, 515 U.S. 687 (1995).

<sup>7</sup> *The Aransas Project v. Shaw*, slip op. at 21, n. 9.

ESA “liability may be based neither on the “butterfly effect”<sup>14</sup> nor on remote actors in a vast and complex ecosystem.”<sup>15</sup> “The causal factors and the result must be reasonably foreseeable.”<sup>16</sup>

Proximate causation and foreseeability are concepts well-grounded in tort law and well-understood by courts. In that context, the Fifth Circuit’s determination of the requisite proof for establishing proximate causation was not remarkable. How that burden can be met in a “vast and complex ecosystem” is what remains to be worked out in subsequent cases. In TAP, the Fifth Circuit focused both on the “number of contingencies affecting the chain of causation from licensing to crane deaths” and the fact that all of the contingencies were “outside the state’s control and often outside human control.”<sup>17</sup> The Court, however, *in dicta*, also provided its views on the possible boundaries for meeting that burden in the Fifth Circuit: “a landowner who knowingly drained a pond that housed endangered species” would not avoid ESA liability but a farmer who “tills his field, causes erosion that makes silt run into a nearby river, which depletes oxygen in the water, and thereby injures protected fish might avoid liability.”<sup>18</sup> What does seem clear is that all of the contributing causes will have to be considered and weighed by the courts in making the liability determination. The number and complexity of the contributing causes of “take” with respect to some listed species, such as mussels, may make it difficult to establish liability in section 9 cases. In many instances, it will make the already costly litigation more expensive and time consuming.

The Fifth Circuit addressed another issue that has loomed over threatened section 9 cases since the Court’s decision in the *Sierra Club v. City of San Antonio* case in 1997.<sup>19</sup> The *City of San Antonio* case involved a challenge to a preliminary injunction against the users of the Edwards Aquifer to protect springflow during a severe drought to protect eight listed species at the Comal and San Marcos springs. In that case, also brought under section 9 of the ESA, the Fifth Circuit found that the district court abused its discretion in not abstaining under the Burford abstention doctrine to avoid entangling federal courts in issues of essential state law and policy. The defendant-intervenors in the TAP case argued that, as in the *City of San Antonio* case, the district court should have abstained under the Burford doctrine rather than adjudicating the case. The Fifth Circuit, while acknowledging that the cases were “similar in certain ways” found the district court did not abuse

its discretion in the TAP case in refusing to abstain because of “the intrastate focus in *City of San Antonio*, more highly developed environmental protections there, and the broader grant of administrative and judicial authority by state law to remedy environmental grievances.”<sup>20</sup>

Finally, the Fifth Circuit found the district court abused its discretion in claiming a “relaxed” standard existed for granting injunctive relief in an ESA case. The Fifth Circuit acknowledged that the standard is more relaxed with respect to balancing the equities in granting or denying an injunction but found that the fact that listed species are involved does not relieve courts of the obligation to consider the likelihood of future harm before granting an injunction. The Court held that the district court in granting the injunction in the TAP case failed to properly consider whether there is “a reasonably certain threat of imminent harm to a protected species.” The Fifth Circuit found error in the district court having focused almost exclusively on the injury that occurred in 2008–2009 in granting the injunction. It explained that injunctive relief for the indefinite future cannot be predicated on the unique events of one year without proof of their likely, imminent replication.”<sup>21</sup> This finding by the Fifth Circuit is noteworthy because the court, having found no liability, was not compelled to address this issue.

Since *Sweet Home*, proximate causation has been recognized by most ESA practitioners as an element of a section 9 case. As such, the Fifth Circuit’s decision does not represent a change in the law. However, after the TAP decision, proximate causation, which has not been the focus in many section 9 cases, is likely to get more attention in all circuits and involve courts in the impacts on listed species in the context of a “vast and complex ecosystem.” This will be particularly likely with respect to water cases where the effects of drought can be a contributing factor. The time and cost of bringing such a case will increase, and a plaintiff can realistically be confident of success only where the defendant’s actions are patently tied closely to the “take” and, at least in the Fifth Circuit, the elements necessary for obtaining injunctive relief are clearly demonstrable.

Habitat conservation plans, safe harbor agreements, and candidate conservation agreements with assurances, are among the voluntary programs available to private landowners and entities to avoid or limit section 9 liability. The U.S. Fish and Wildlife Service (USFWS) has been relatively successful in encouraging and creating incentives for the use of these voluntary programs. Private parties enter into such programs for a wide variety of reasons, including a desire to obtain certainty, environmental stewardship, and economic considerations.

<sup>14</sup> The butterfly effect is the idea that a butterfly stirring the air today in China can transform storm systems next month in New York.

<sup>15</sup> *The Aransas Project v. Shaw*, slip op. at 23.

<sup>16</sup> *Id.* at 27.

<sup>17</sup> *Id.* at 29.

<sup>18</sup> *Id.* at 25 and 23.

<sup>19</sup> *Sierra Club v. City of San Antonio*, 112 F.3d 789 (5<sup>th</sup> Cir. 1997).

<sup>20</sup> *The Aransas Project v. Shaw*, slip op. at 15.

<sup>21</sup> *The Aransas Project v. Shaw*, slip op. at 33.

However, to the extent that “risk avoidance” is an important consideration, voluntary participation in such programs may be reconsidered by some in the Fifth Circuit as private parties re-evaluate the threat of section 9 liability or the likelihood that the USFWS or third parties will invest the resources necessary to bring such an action. The USFWS, which has heretofore been largely unready to bring such complex cases, may need to make such an investment, in an appropriate case, if it expects to maintain a credible threat under section 9.

The recent Edwards Aquifer Habitat Conservation Plan should not be jeopardized by the Fifth Circuit’s decision. The causation facts in a section 9 case against the principal pumpers seem to fit squarely within the Fifth Circuit’s paradigm of “take” liability involving a “landowner who knowingly drained a pond that housed endangered species.” This paradigm appears to be particularly apt because modeling by the Edwards Aquifer Authority and others has already demonstrated that at Comal Springs during a repeat of the drought of record, the lowest flows that would have occurred without any pumping would have been slightly below 300 cubic feet per second—a level well above where take is likely to occur.<sup>22</sup>

Although section 7 applies only to actions by federal agencies, such as permits issued by an agency, it is an important tool of the USFWS in protecting threatened and endangered species. If the USFWS’s proposed critical habitat regulations are promulgated as proposed, they will provide the USFWS with a significant tool under section 7 to help to recover these species.<sup>23</sup> Although the USFWS often applies the broader “but for” test in evaluating the effects of agency actions, proxi-

mate causation may be the standard that should be applied.<sup>24</sup> Accordingly, it remains unclear what impact the TAP case will have, if any, on biological opinions issued under section 7.

For a case that simply confirmed existing law, *The Aransas Project v. Shaw* is likely to have an impact on species protection. The full magnitude of that impact remains to be determined.

---

<sup>24</sup> See *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667-68 (2007) (“But the basic principle announced in *Public Citizen*—that an agency cannot be considered the legal “cause” of an action that it has no statutory discretion not to take—supports the reasonableness of the USFWS’s interpretation of § 7(a)(2) as reaching only discretionary agency actions.”); *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11<sup>th</sup> Cir. 2008); but see e.g., U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook*, March 1998 at 4-58 (“In determining whether the proposed action is reasonably likely to be the direct or indirect cause of incidental take, the Services use the simple causation principle; *i.e.*, ‘but for’ the implementation of the proposed action and its direct or indirect degradation of habitat, would actual injury or mortality to individuals of a listed wildlife species be reasonably likely to occur”).

---

<sup>22</sup> Edwards Aquifer Authority, *Draft Edwards Aquifer Authority Habitat Conservation Plan*, July 2004, as amended on September 21, 2004, at Appendix H, Table 4-1; David Thorkildsen and Paul D. McElhaney, Texas Water Development Boards Report 340, “Model Refinement and Applications for the Edwards (Balcones Fault Zone) Aquifer in the San Antonio Region, Texas,” July 1992.

<sup>23</sup> 79 Fed. Reg. 27,060 (May 12, 2014); 79 Fed. Reg. 27,066 (May 12, 2014).