Client Alert

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Fifth Circuit Rules that Texas Regulators' Permitting of Water is Too Attenuated to Cause ESA Take of Endangered Whooping Crane Under Causation Analysis Required

The US Court of Appeals for the Fifth Circuit has held that the Texas Commission on Environmental Quality ("TCEQ") did not cause the deaths of endangered whooping cranes by issuing permits to withdraw water from rivers that flow to the estuary where the whooping cranes winter, in *The Aransas Project v. Shaw, et al*. (June 30, 2014). Reversing the decision of the district court, a three-judge panel said that "the district court either misunderstood the relevant liability test or misapplied proximate cause when it held the state defendants responsible for remote, attenuated, and fortuitous events following their issuance of water permits." Hunton & Williams LLP served as lead trial counsel for defendant intervenors in the case.

Emphasizing that "[p]roximate cause and foreseeability are required to affix liability for ESA violations," the Fifth Circuit stated that "[n]owhere does the [district] court explain why the remote connection between water licensing, decisions to draw river water by hundreds of users, whooping crane habitat, and crane deaths that occurred during a year of extraordinary drought compels ESA liability." The decision provides guidance to state and local officials about potential ESA challenges to their regulatory actions, and offers more certainty to water permit interest-holders that their rights will not be disturbed under the ESA without direct proof of causation of a take.

At the center of the case is the iconic whooping crane, which winters in Texas around the Aransas National Wildlife Refuge ("refuge") located on San Antonio Bay at the bottom of the Guadalupe and San Antonio River Basins. Listed as endangered under the ESA, the ongoing recovery of the whooping crane is considered an ESA success. Estimates of the flock's size have increased from only 15 in 1941, to 247 by the end of winter 2008–09, to 283 by winter 2010–11 and to 300 by winter 2011–12.

The plaintiff "The Aransas Project" ("TAP"), a nonprofit group formed for the purpose of the litigation, filed a complaint in March 2010 in federal district court alleging that 23 whooping cranes died at the refuge during the winter of 2008–09, during a severe drought, as a result of the state's regulation of water diversions. TAP claimed that the diversions decreased inflows and resulted in higher salinity in the San Antonio Bay, allegedly reducing the abundance of wolfberries and blue crabs, which TAP asserted are the two most important food sources for the cranes.

Under the US Supreme Court decision in *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, regulators cannot be held liable for a "take" of an endangered species under the ESA unless their actions are the proximate cause of actual harm to the species. But contrary to *Sweet Home*, the district court concluded that the state agency officials are liable for a take under the ESA merely by issuing lawful water permits, even when their action indirectly authorizes an activity that does not inherently cause take.

While the ESA explicitly requires consultation under Section 7 by federal agencies in certain circumstances, there is no consultation requirement for state agency action under the ESA. The district court decision would essentially have imposed on the TCEQ, a state agency, a Section 7–type

consultation process that is required under the ESA explicitly only for certain federal agency action. The litigation had cast a shadow on financing options and the ability to proceed with much-needed water projects in its high-growth river basin.

Reviewing the district court decision under an abuse of discretion standard, the Fifth Circuit rejected the determination of causation at trial, stating that "[t]he lack of foreseeability or direct connection between TCEQ permitting and crane deaths is also highlighted by the number of contingencies affecting the chain of causation from licensing to crane deaths. The contingencies are all outside the state's control and often outside human control." Those unpredictable contingencies included not only water use by and availability from other sources, but "even more unpredictable and uncontrollable" forces of nature, including "weather, tides and temperature conditions," which "dramatically affect" conditions in the bay. "Contingencies concerning permittees' and others' water use, the forces of nature, and the availability of particular foods to whooping cranes demonstrate that only a fortuitous confluence of adverse factors caused the unexpected 2008–2009 die-off found by the district court. This is the essence of unforeseeability."

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," distinguishing this case from others where regulators have been found liable for take. The Fifth Circuit also held that granting injunctive relief was an abuse of discretion by the district court judge.

Hunton & Williams partners Edward Fernandes and Kathy Robb led the team that assembled scientific experts from all over the country, who offered testimony on behalf of the defendants and defendant intervenors in response to plaintiff's causation theory. The team included attorneys Chris Taylor, Lea Brigtsen, Andrew Turner, Maida Lerner, and Andrea Wortzel, and senior paralegal Sandi Staskus.

Fernandes observed, "We are pleased with the Fifth Circuit's Opinion confirming that the defendants' actions did not cause the death of any whooping cranes." Robb said that "the opinion is important in distinguishing potential state and local regulator liability under the Endangered Species Act — which differs from the consultation required under Section 7 of the Act by federal agencies in certain circumstances — and even more so in carefully analyzing proximate cause as a critical requirement to establish a 'take' under the Act."

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