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ARANSAS PROJECT V. SHAW: THE FIFTH CIRCUIT'S INCORRECT AND ATTENUATED PROXIMATE CAUSE ANALYSIS ON WHAT KILLED THE WHOOPING CRANE

BRIAN REAGAN*

INTRODUCTION

“Back from the brink, North America’s Whooping Crane is a symbol of hope for endangered species. Recovering from a low of only 22 birds in the wild in the 1940s to around 599 birds today, the whooping crane’s recovery is one of conservation’s most inspiring success stories.”¹ The world’s only wild population of whooping cranes breeds in the Wood Buffalo National Park of Canada, and winters in and near the Aransas National Wildlife Refuge (“ANWR”) in Texas.² While wintering, the whooping cranes stay on the ANWR’s coastal wetlands, near San Antonio Bay, which are fed freshwater by the Guadalupe River.³ At the start of the 2008–2009 winter season the flock numbered around 270 birds but over the course of that winter an unusually large amount, 23, of the whooping cranes died.⁴ This “record-breaking death toll” led to The Aransas Project’s (“TAP”) formation.⁵ TAP’s goal is to protect the wetlands and ensure they receive enough freshwater by promoting responsible water use.⁶

In Texas, the Texas Commission on Environmental Quality (“TCEQ”) regulates the use and capture of freshwater.⁷ Due to excessive use of Guadalupe River water, use that requires permits from the TCEQ, the freshwater entering the wetlands decreased. As this happened, water

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¹ *Whooping Crane Conservation*, INT’L CRANE FOUND. (on file with the author).

² THE WORLD CONSERVATION UNION, STATUS SURVEY AND CONSERVATION ACTION PLAN: THE CRANES, 172 <https://portals.iucn.org/library/efiles/documents/1996-022.pdf> [<https://perma.cc/5TB9-N4SQ>].

³ *Guadalupe Conservation Story*, INT’L CRANE FOUND., <https://www.savingcranes.org/guadalupe-conservation-story/> [<https://perma.cc/2R6L-MH3D>] (last visited Mar. 27, 2016).

⁴ *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 724 (S.D. Tex. 2013).

⁵ *About the Aransas Project*, THE ARKANSAS PROJECT, <http://thearansasproject.org/about/> [<https://perma.cc/A95Z-D2C8>] (last visited Mar. 27, 2016).

⁶ *Id.*

⁷ *Aransas Project*, 930 F. Supp. 2d at 725.

salinity levels throughout the ANWR increased.⁸ TAP believes that the increased salinity levels led to the cranes' deaths and sued the TCEQ under the Endangered Species Act ("ESA") for an illegal taking.⁹

The ESA states that it is illegal for any person to take any endangered species.¹⁰ Take "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹¹ TAP argued that the high salinity levels modified the whooping cranes' habitat enough that it qualified as a take.¹² The U.S. District Court for the Southern District of Texas held in favor of TAP and found that the TCEQ's use of water permits satisfied the elements for a taking.¹³ TCEQ appealed, and the U.S. Court of Appeals for the Fifth Circuit reversed in favor of TCEQ, finding that the TCEQ's water permits did not proximately cause the whooping cranes' deaths.¹⁴

This Note argues that the Court of Appeals for the Fifth Circuit used an improper proximate cause analysis and overextended the chain of events that led to the cranes' deaths, which caused the court to incorrectly hold that the TCEQ did not take the cranes. Part I of the Note discusses the history and purpose of the ESA, how proximate cause is analyzed in the court system under the ESA, and the different analyses the district court and the court of appeals used in *Aransas Project v. Shaw*. Part II examines the court of appeal's proximate cause test and analyzes how this will negatively affect future taking claims. Part III explains why the district court's proximate cause test was correct.

I. THE ESA, TAKINGS, AND PROXIMATE CAUSE ANALYSIS IN THE COURTS

This Part provides a background on the history and purpose of the ESA, as well as the definitions involved in the takings provision. Additionally, it examines these definitions through Supreme Court cases that helped shape takings law and also analyzes the importance of proximate cause in these cases. Lastly, this Part examines both the district court's and the court of appeals' analysis in regards to their differing holdings in *Aransas Project*.

⁸ *Id.*

⁹ *Id.*

¹⁰ 16 U.S.C. § 1538 (2012).

¹¹ 16 U.S.C. § 1532(19) (2012).

¹² *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 725 (S.D. Tex. 2013).

¹³ *Id.*

¹⁴ *Aransas Project v. Shaw*, 775 F.3d 641, 645 (5th Cir. 2014).

A. *The ESA and “Harm”*

With rising concerns that many of the United States’ native plants and animals were going extinct, Congress passed the Endangered Species Act in 1973.¹⁵ Section 1531 of Title 16, Chapter 35 of the U.S. Code clearly states Congress’ purpose for the ESA: “[T]o provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . and to take such steps as may be appropriate to achieve the purposes of [the act].”¹⁶ The ESA provides five criteria to judge whether a species should be listed as endangered or threatened.¹⁷ Under these criteria, the U.S. Fish and Wildlife Services (“FWS”) listed the whooping crane as endangered in 1967, which provided the whooping cranes with full protection under the act.¹⁸

This protection includes making it illegal for any person to take a whooping crane.¹⁹ Take, as described above, includes the word “harm” in its definition.²⁰ Harm is further defined in the Code of Federal Regulations as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”²¹

The FWS codified this definition in response to *Palila v. Hawaii Department of Land & Natural Resources*.²² The FWS feared that *Palila*, in combination with the old definition of harm, could imply that habitat modification alone would be a taking.²³ In order to remedy this, the FWS changed the definition to the one above and stressed that the modification or degradation “must be significant, must significantly impair essential behavioral patterns, and must result in actual injury.”²⁴ Today, there

¹⁵ *40 Years of Conserving Endangered Species*, U.S. FISH & WILDLIFE SERV. (Jan. 2013), http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf [<https://perma.cc/T4JA-GBKG>].

¹⁶ 16 U.S.C. § 1531(b) (2012).

¹⁷ 16 U.S.C. § 1531(a)(1).

¹⁸ *Whooping Crane (Grus americana)*, U.S. FISH & WILDLIFE SERV., https://ecos.fws.gov/tess_public/profile/speciesProfile.action?sPCODE=B003 [<https://perma.cc/9HGG-5NCW>] (last visited Mar. 27, 2016).

¹⁹ 16 U.S.C. § 1538(a)(1)(B).

²⁰ 16 U.S.C. § 1532(19).

²¹ 50 C.F.R. § 17.3(c) (2014).

²² Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 184–85 (1995).

²³ *Id.*

²⁴ 46 Fed. Reg. 54750 (1981).

are more recent court decisions that further explain the take prohibition of the ESA and the definition of harm.

B. Habitat Modification and Proximate Cause

1. Court's Analysis in *Sweet Home*

In 1995, the Supreme Court decided *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.²⁵ Sweet Home, the respondents, was a combination of people and companies that depended on forest products industries.²⁶ They brought this case against the Secretary of the Interior and the Director of the FWS to challenge the regulation that defined "harm," specifically the part referring to habitat modification and degradation.²⁷ The respondents challenged this regulation on the basis that, as it applied to the red-cockaded woodpecker and the northern spotted owl, it had hurt them economically.²⁸

The Supreme Court held that the interpretation by the FWS to include significant habitat modification in the definition of harm was reasonable.²⁹ The Court supported this decision with three reasons.³⁰ First, the Court looked at the plain definition of harm and found that the definition "naturally encompass[ed] habitat modification."³¹ The Court further supported this argument by stating that the definition did not use the word "directly."³² Next the court examined the ESA's purpose and found that its comprehensive nature clearly includes the definition stated by the FWS.³³ Lastly, the Court discussed the fact that the Secretary of the Interior can issue permits for takings.³⁴ The Court stated that since the act provides permits "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,"³⁵ Congress meant for the ESA "to prohibit indirect as well as deliberate takings."³⁶

²⁵ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

²⁶ *Id.* at 692.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 708.

³⁰ *Id.* at 697.

³¹ *Babbitt*, 515 U.S. at 697.

³² *Id.*

³³ *Id.* at 698.

³⁴ *Id.* at 700.

³⁵ 16 U.S.C. § 1539(a)(1)(B) (2012).

³⁶ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 700 (1995).

While the Court in *Sweet Home* clearly stated and supported the definition of harm, the Court's opinion on causation in regards to a taking was unclear.³⁷ The majority opinion only mentioned proximate cause briefly to state that "ordinary requirements of proximate causation and foreseeability" are necessary to knowingly violate the act.³⁸ The concurring and dissenting opinions, however, provided some insight into the Court's thoughts on proximate cause.³⁹

Justice O'Connor stated that liability should only be found if habitat modification proximately causes death or injury.⁴⁰ She went on to provide two examples of a taking to illustrate when proximate cause would and would not be found, at least according to her: "The farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge cannot . . . be considered the proximate cause . . . [The] landowner who drains a pond on his property, killing endangered fish in the process," would be the proximate cause.⁴¹ Justice O'Connor further elaborated that the principle is used to eliminate the bizarre, that it is similar to foreseeability, and that considerations of the fairness of imposing liability should be taken into account.⁴² She ended her examination by stating that the "'harm' regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury."⁴³

2. *Sweet Home* in Conjunction with *Lujan v. Defenders of Wildlife*

The Supreme Court decided *Lujan v. Defenders of Wildlife* three years before they would hear *Sweet Home*. Looking back at *Lujan* in light of *Sweet Home* helps illuminate the notion of proximate cause in regards to ESA takings.⁴⁴ *Lujan* concerned environmental groups bringing an action to force the FWS to comply with the ESA abroad.⁴⁵ The Supreme Court found that the plaintiffs did not have standing because they did not state a sufficiently imminent injury.⁴⁶ Five of the sitting justices

³⁷ Duane J. Desiderio, *Sweet Home on the Range: A Model for As-Applied Challenges to the "Harm" Regulation*, 3 ENVTL. L. 725, 739–44 (1997).

³⁸ *Babbitt*, 515 U.S. at 696, n.9.

³⁹ *Id.* at 713 (O'Connor, J., concurring).

⁴⁰ *Id.* at 712.

⁴¹ *Id.* at 713.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Desiderio, *supra* note 37, at 763.

⁴⁵ *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

⁴⁶ *Id.* at 556.

agreed that an imminent injury requires at least the threat of a real and immediate harm.⁴⁷

An examination of this holding in conjunction with the proximate cause analysis in *Sweet Home* reveals that most likely the Supreme Court would require that injury or death caused by habitat modifications must be foreseeable.⁴⁸ In light of *Lujan*, foreseeability is satisfied when an imminent injury that is certain to occur will injure a species.⁴⁹

C. Aransas Project v. Shaw: *District Court*

As discussed in the Introduction, TAP brought the TCEQ to court for illegal takings of the whooping cranes in the ANWR. In support of its case, TAP brought in multiple expert witnesses and documents to show that the high salinity levels were the cause of the cranes' deaths.⁵⁰ TAP used this information to show that the water management practice of the TCEQ drastically modified the cranes' habitat.⁵¹ TAP explained that the ANWR receives freshwater inflows from the Guadalupe and San Antonio Rivers, and that the excessive water use allowed by TCEQ permits decreased this inflow and raised the salinity levels of the water.⁵²

In support of these claims, TAP entered exhibit PX-90 into evidence.⁵³ PX-90 provided an average of the salinity levels across the ANWR from 1987–2009.⁵⁴ This exhibit showed that for the 2008–2009 winter the San Antonio Bay had salinities greater than 25 parts per trillion ("ppt").⁵⁵ Additionally, this information illustrated that when freshwater inflow was low and bay salinities high, the cranes always had a high mortality percentage.⁵⁶ Reasoning from this data, it can be concluded that cranes have a higher mortality rate when the saline levels are higher.⁵⁷ It is important to note that these findings only confirmed what multiple crane organizations had observed and warned about.⁵⁸

⁴⁷ Desiderio, *supra* note 37, at 762.

⁴⁸ *Id.* at 763.

⁴⁹ *Id.* at 764.

⁵⁰ Aransas Project v. Shaw, 930 F. Supp. 2d. 716, 725, 744 (S.D. Tex. 2013).

⁵¹ *Id.* at 725.

⁵² *Id.*

⁵³ *Id.* at 746.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *Aransas Project*, 930 F. Supp. 2d at 724, 746 (listing the average salinity levels as 4.3%, 3.4%, and 7.8%, all lower than the 8.5% of the 2008–2009 winter).

⁵⁷ *Id.*

⁵⁸ *Id.* at 747.

TAP also hired crane experts to testify about the cranes' habits and preferences.⁵⁹ These experts found that when the freshwater inflow was not impeded, barely any cranes died; however, when that inflow decreased, crane deaths spiked.⁶⁰ The experts also testified that blue crabs and wolfberries are the most important food to the whooping cranes.⁶¹ They further testified that without those staples a crane would expend more energy than it could ingest.⁶² During the 2008–2009 winter both blue crabs and wolfberries were extremely scarce.⁶³ The experts also noted that during this winter they observed the cranes acting out of character, such as a parent acting aggressive when a baby approached, a trait that is typical of food stress.⁶⁴ Lastly, experts noted that when salinity levels reached 15 ppt the cranes began to fly to different sources of freshwater and that by the time the salinity levels reached 23 ppt all of the cranes left.⁶⁵

Based on these facts the district court found the TCEQ liable for the cranes' deaths.⁶⁶ With regards to proximate cause, the district court only mentioned it to state that its ordinary requirements apply and that “proximate causation exists where a defendant government agency authorized the activity that caused the take.”⁶⁷ The court, however, as illustrated above, discussed in great detail the cause through the evidence provided by TAP, beginning with the issuance of water permits and ending with the whooping cranes' deaths.⁶⁸

D. Aransas Project v. Shaw: Court of Appeals for the Fifth Circuit

TCEQ quickly appealed the district court's decision and the court of appeals reversed the lower court.⁶⁹ The court stated that the lower court barely discussed proximate cause or any of its required concepts, such as “remoteness, attenuation, or the natural and probable consequences of actions.”⁷⁰ The court then continued to discuss its own version of proximate cause.⁷¹

⁵⁹ *Id.* at 764.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Aransas Project*, 930 F. Supp. 2d at 765.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 766.

⁶⁶ *Id.*

⁶⁷ *Id.* at 786.

⁶⁸ *Aransas Project*, 930 F. Supp. 2d at 786.

⁶⁹ *Aransas Project v. Shaw*, 775 F.3d 641, 645 (5th Cir. 2014).

⁷⁰ *Id.* at 658.

⁷¹ *Id.* at 659.

The court of appeals mentioned and relied on the example from *Sweet Home* about a farmer draining a pond and stated that this example is “the limited, albeit not definitive, *Sweet Home* conception of an ‘indirect’ taking.”⁷² The court of appeals continued to analyze every piece of the evidence provided in the original court case that was linked to the cranes’ deaths.⁷³ In doing this the court looked at the start as the issuing of the water permits and the end of it as the cranes’ deaths. The court stated their chain of causation as follows:

TAP asserted that the state defendants’ water permitting and regulatory practices had led to private parties’ withdrawing water from the San Antonio and Guadalupe Rivers, in turn leading to a significant reduction in freshwater inflow into the San Antonio Bay ecosystem. That reduction in fresh-water inflow, coupled with a drought, led to increased salinity in the bay, which decreased the availability of drinkable water and caused a reduction in the abundance of blue crabs and wolfberries, two of the cranes’ staple foods. According to TAP, that caused the cranes to become emaciated and to engage in stress behavior, such as denying food to juveniles and flying farther afield in search of food, leading to further emaciation and increased predation. Ultimately this chain of events led to the deaths of twenty-three cranes during the winter of 2008–2009.⁷⁴

Based on the events stated this way, the court of appeals found that proximate cause did not exist and that the injury was not foreseeable and therefore overturned the district court’s decision.⁷⁵

Discussing the issue of foreseeability, the Fifth Circuit brought up the 2007 United States Fish and Wildlife Service International Whooping Crane Recovery Plan.⁷⁶ The court then discussed select paragraphs and phrases to support their idea that the TCEQ could never have foreseen an increase in whooping crane deaths caused by a decrease in freshwater inflows from water permit use.⁷⁷ The Fifth Circuit highlighted

⁷² *Id.*

⁷³ *Id.* at 660.

⁷⁴ *Id.* at 646–47.

⁷⁵ *Aransas Project*, 775 F.3d at 646–47.

⁷⁶ *Id.*

⁷⁷ *Id.*

phrases and words used in the report such as “predicted,” “at times,” and “[u]ncertainty remains concerning possible long-term declines”⁷⁸ The Fifth Circuit analyzed this 150-page report in about a page of their opinion and concluded that TCEQ could not anticipate a “significant die-off” due to increased salinity.⁷⁹

Continuing the discussion of foreseeability, the court stated that the TCEQ could not predict the cranes’ deaths because of the number of contingencies in the chain of causation.⁸⁰ The court started this discussion by mentioning that the state does not directly control the water usage but rather the landowners regulate their own usage, subject to a permit that the state grants.⁸¹ The court further supported its opinion by noting that salinity levels are also affected by natural forces.⁸² Then the court discussed the fact that as salinity levels rise, it is harder for the whooping crane to find food sources in the “critical habitat of the [] cranes.”⁸³ Lastly, it mentioned that the lack of food could also be attributed to natural forces.⁸⁴ Ending their analysis of proximate cause, the Fifth Circuit likened the Aransas situation to a hypothetical in the *Exxon Co., U.S.A. v. Sofec, Inc.* case, “in which a vessel colliding with a bridge should not be held liable for the death of a patient whose doctor arrived late because of the bridge closing.”⁸⁵

II. THE INCORRECT AND ATTENUATED ANALYSIS OF PROXIMATE CAUSE BY THE FIFTH CIRCUIT IN *ARANSAS PROJECT V. SHAW* 2

This Part examines the Fifth Circuit’s proximate cause analysis and discusses its importance. Additionally, it explains that the Fifth Circuit incorrectly focused on the proximate cause of the cranes’ deaths instead of the proximate cause of the habitat modification, which caused an indirect taking. Following this explanation, this Part discusses if the TCEQ could have foreseen that significant habitat modification would occur. Lastly, this Part discusses the possible impact this decision could have on future takings claims under the ESA.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 662.

⁸¹ *Aransas Project*, 775 F.3d at 662.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 663.

A. *An In-Depth Examination of the Fifth Circuit's Proximate Cause Analysis*

1. Habitat Modification and the Fifth Circuit's Proximate Cause Analysis

In *TVA v. Hill*, the Supreme Court first held that the intent of Congress with the ESA “was to halt and reverse the trend toward species extinction, *whatever the cost*.”⁸⁶ *Sweet Home* followed from this precedent and the Supreme Court upheld the definition of “harm” as it is stated in the takings provision.⁸⁷ Therefore, a taking occurs when significant habitat modification actually kills or injures a protected species.⁸⁸ This point is reiterated because the Fifth Circuit’s decision seemed to ignore the significant habitat modification provision and instead focused their entire proximate cause analysis on whether or not the cranes’ deaths were proximately caused by the TCEQ issuing water permits.⁸⁹

The Fifth Circuit succinctly stated their proximate cause analysis.⁹⁰ They began this analysis with, “TAP asserted that the state defendants’ water permitting and regulatory practices had led to private parties’ withdrawing water from the San Antonio and Guadalupe Rivers, in turn leading to a significant reduction in freshwater inflow into the San Antonio Bay ecosystem.”⁹¹ The Fifth Circuit then continued by focusing on every minute detail that was affected by the reduction of freshwater inflow and how all these factors in turn led to the cranes’ deaths.⁹² Under the ESA, and confirmed by *Sweet Home*, however, all that is necessary for a taking is that an endangered species is harmed.⁹³ Once again, for a species to be considered “harmed,” there must be “significant habitat modification or degradation where it actually kills or injures wildlife by *significantly impairing essential behavioral patterns*, including breeding, feeding or sheltering.”⁹⁴

In the first sentences of its analysis, the Fifth Circuit acknowledged that the water permitting and regulatory practices by the TCEQ

⁸⁶ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

⁸⁷ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

⁸⁸ 16 U.S.C. § 1531(b).

⁸⁹ *Aransas Project v. Shaw*, 775 F.3d 641, 657–60 (5th Cir. 2014).

⁹⁰ *Id.* at 646–47.

⁹¹ *Id.* at 646.

⁹² *Id.* at 646–47.

⁹³ 16 U.S.C. § 1538.

⁹⁴ *Aransas Project*, 775 F.3d at 646 (emphasis added).

significantly reduced the freshwater inflow into the San Antonio Bay ecosystem.⁹⁵ The court then provided numerous examples of how the habitat was significantly affected, such as: the increase in salinity, the decrease in available drinking water, and the reduction of blue crabs and wolfberries.⁹⁶ Because of all these habitat modifications, the whooping cranes had to fly further and further to find food.⁹⁷ Because they had to fly further they had to expend more energy and had less energy intake.⁹⁸ This led to food stress and food guarding and resulted in cranes dying.⁹⁹ Based on these observations, the decrease in freshwater clearly affected the sheltering and feeding habits of the whooping cranes.

Despite this evidence, the Fifth Circuit found that there was no proximate cause; they based this on an unnecessary causation chain they created when under the ESA, all the Court had to find was that the permits proximately caused a significant habitat modification that led to the actual death of the whooping cranes.¹⁰⁰ The Court in *Sweet Home* “exemplifies the Supreme Court’s willingness to defer to agency expertise and the ESA’s broad delegation of authority.”¹⁰¹ Further, the *Sweet Home* decision made a statement that the court was willing to enforce and promote the ESA by “affording threatened and endangered species *and their critical habitats the ultimate protection under the law . . .*”¹⁰² By drawing out this long chain of causation and attributing each factor to the subsequent one and the eventual death of the cranes, the Fifth Circuit ignored the legislative and judicial history of the ESA takings provision.¹⁰³

2. Water Permits and the Issue of Foreseeability

The Fifth Circuit held that the TCEQ did not proximately cause the whooping cranes’ deaths because the chain was too tenuous.¹⁰⁴ The

⁹⁵ *See id.*

⁹⁶ *Id.* at 646–47.

⁹⁷ *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 766 (S.D. Tex. 2013).

⁹⁸ *Id.* at 765.

⁹⁹ *Id.* at 724.

¹⁰⁰ 16 U.S.C. § 1538; *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

¹⁰¹ Shelli L. Iovino, *Habitat Modification and ESA Takings under Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 7 VILL. ENVTL. L.J. 481, 502 (1996).

¹⁰² *Id.* (emphasis added).

¹⁰³ *Id.* at 501.

¹⁰⁴ *Aransas Project v. Shaw*, 775 F.3d 641, 660 (5th Cir. 2014).

analysis did not stop there, however: the Fifth Circuit went on to analyze whether or not the TCEQ could foresee that an increase in water permits would lead to the cranes' deaths.¹⁰⁵ Again, the Fifth Circuit looked over this information in a simple manner and based their decision on a selective reading of the International Recovery Plan for the Whooping Crane ("IRPWC").¹⁰⁶ The Fifth Circuit claimed that the lower court found that the TCEQ could foresee the death "because a 2007 United States Fish and Wildlife Service International Whooping Crane Recovery Plan noted that '[u]pstream reservoir construction and water diversions for agriculture and human use reduce freshwater flows.'"¹⁰⁷

The IRPWC is a 125-page document that discussed, in extreme detail, the background of the whooping cranes, their habits, their habitat requirements, and threats to their habitat.¹⁰⁸ The Fifth Circuit highlighted specific portions of the report to prove their conclusion, that the whooping cranes' deaths were unforeseeable.¹⁰⁹ The Fifth Circuit also stated that the report "includes numerous non-specific, conditional, predictive statements not quoted by the district court."¹¹⁰ The Court continued then to highlight *only* those "non-specific, conditional, predictive statements," and ignored the many statements that are supported by evidence and conclusive in nature.¹¹¹

The Fifth Circuit highlighted three particular passages from the IRPWC in an attempt to show that the IRPWC only believed that inflows will be a problem in the future or are not always the problem.¹¹² The court then summarized those examples into the statement: "decreased freshwater inflows 'at times' have been 'insufficient,' and in future decades the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 661.

¹⁰⁷ *Id.*

¹⁰⁸ See generally U.S. FISH & WILDLIFE SERV., INTERNATIONAL RECOVERY PLAN FOR THE WHOOPING CRANE (3rd Revision, 2006) [hereinafter IRPWC].

¹⁰⁹ *Aransas Project*, 775 F.3d at 661.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See *id.* (stating, "[w]ithdrawals of surface and groundwater for municipal and industrial growth are predicted to leave insufficient inflows to sustain the ecosystem in less than 50 years. . . .," "[i]nflows are already *at times* insufficient and reduced over historic levels, leading to increases in mean salinity and decreases in blue crabs. . . . Long before ecosystem collapse, due to lack of inflows, significant adverse impacts to blue crab populations would occur. . . .," and, "[w]inter habitats at Aransas are presently sufficient to support at least 500 individuals. . . . Uncertainty remains concerning possible *long-term declines* in ecosystems used by the cranes as a consequence of expanding human populations and their demands for fresh water. . . .").

decline may affect the bay's ecosystem."¹¹³ Then it concluded that the three statements it cherry-picked out of the 125-page report and the court's summarization of it do not establish foreseeability.¹¹⁴

Discussing freshwater inflows, the authors of the IRPWC stated that expanding human populations have a particularly severe impact on the wintering grounds.¹¹⁵ The report continued to specifically mention the Guadalupe and San Antonio Rivers and that inflow from those rivers "are needed to maintain proper salinity gradients . . . that produce an ecologically healthy estuary."¹¹⁶ Additionally, in the outline for the recovery plan, the authors explicitly stated that maintaining freshwater inflows into the ANWR is a priority because of their impact on the whooping cranes' critical habitat.¹¹⁷ The IRPWC then highlighted the significance of freshwater inflows by stating that they are essential to the productivity of the coastal waters used by the whooping cranes as well as to produce foods used by the whooping cranes. Lastly, the Texas Parks and Wildlife Department ("TPWD") recommended target freshwater inflow levels needed to maintain the Guadalupe Estuary in 1998.¹¹⁸

These levels were criticized, however, and in 2003, when the San Marcos River Foundation applied for a water right in accordance with the levels, they were denied.¹¹⁹ The foundation appealed the denial and in 2005, the court sent the application back to the TCEQ.¹²⁰ This shows that at least as early as 2005, the TCEQ was aware of the freshwater inflow situation and its importance to the biological communities in the area.¹²¹ This report made it clear that freshwater inflows were not only important to the critical habitat of the cranes but essential to the whooping cranes' survival. Additionally, based on the observations stated in the report that the TCEQ was aware of, it is foreseeable that TCEQ permitting would lead to crane deaths, because the permitting significantly modified the cranes' habitat.¹²²

The Fifth Circuit concluded its analysis of foreseeability by stating "[c]ontingencies concerning permittees' and others' water use, the forces

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ IRPWC, *supra* note 108, at 20.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 50.

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.* at 20–21.

¹²⁰ *Id.* at 21.

¹²¹ IRPWC, *supra* note 108, at 21.

¹²² *See generally id.*

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 . . .”¹²³ This statement did make much sense in light of the IRPWC’s existence, which clearly demonstrated the necessity of freshwater inflows for the crane’s survival.¹²⁴ There was not a “fortuitous confluence of adverse factors,” but rather an increase in water permits and usage that directly affected the bay’s salinity and therefore significantly modified the whooping cranes’ habitat.¹²⁵

At the end of the opinion the court of appeals claimed that the death of the whooping cranes is similar to a patient dying because a vessel collided with a bridge, closing the bridge down thus making the doctor arrive too late to the patient.¹²⁶ Broken down, the doctor example is simply a patient dying because the doctor arrived late due to an unforeseen circumstance. This situation is more analogous to a situation where either the TCEQ did not know the whooping cranes were in the area or did not realize that an increase in permits would increase the salinity and then the whooping cranes died. Here, though, as was proven in the report and in the district court, the TCEQ knew that whooping cranes wintered in the area, that the area was supplied by freshwater from the San Antonio and Guadalupe rivers, and that the permits were increasing the salinity, and which was dangerous for the whooping cranes.¹²⁷

Therefore, a doctor example that actually parallels the situation here would involve a doctor that is forewarned certain roads or bridges are going to be closed and then takes those roads anyway to get to the patient, only to have the patient die because the doctor arrived late. In that circumstance the patient’s death is foreseeable because the doctor knew he would not arrive on time because he knew the roads were closed yet took them anyway.

B. Illustrating the Effect of the Aransas Proximate Cause Analysis by Looking at Past ESA Takings Cases

The Fifth Circuit supported a criticism that the issuing of permits to take water is comparable to a state being held liable for drivers who run over endangered species because they issue driver’s licenses.¹²⁸ This

¹²³ *Aransas Project v. Shaw*, 775 F.3d 641, 662 (5th Cir. 2014).

¹²⁴ IRPWC, *supra* note 108, at 20.

¹²⁵ *Aransas Project*, 775 F.3d at 662.

¹²⁶ *Id.* at 663.

¹²⁷ *See generally id.*

¹²⁸ *Id.* at 659.

is notable because a similar comparison was drawn by the defendant in *Strahan v. Coxe*, an ESA takings case.¹²⁹ In *Strahan*, the defendant stated that if a permit to set lobster traps could be part of proximate cause then it is the same as saying the “licensure of automobiles and drivers solicits or causes federal crimes . . .”¹³⁰ The court responded that while a licensed driver *could* use the license to break the law, it is impossible for a licensed commercial fishing operation to use its lobster trap without the risk of violating the ESA.¹³¹ This analysis is the correct way to think about it, and the *Aransas* court missed this point.

If the *Strahan* court had used the same analysis that the *Aransas* court used then it would have had to find that there was no proximate cause between the licensing of the lobster traps and the taking of right whales. An *Aransas* interpretation of *Strahan* would look something like this: (1) Fishermen request license to set up lobster traps, (2) Fisherman receive license, (3) Fishermen set up lobster traps, (4) right whales are hurt by lobster traps. This analysis is much more attenuated and more likely to fail than if they had just followed the *Strahan* analysis which, summarized, looks more like this: (1) Fisherman receive license and (2) right whales are hurt.¹³² The *Aransas* proximate cause analysis just weakened the analysis that goes into proximate cause and foreseeability by making it more attenuated.

Other earlier cases would also be affected by this analysis despite clearly being ESA takings. An example of this is *Sierra Club v. Yeutter*, where red-cockaded woodpeckers were harmed by the Forest Service’s timber management policies.¹³³ The Court found that the Forest Service committed a take of the red-cockaded woodpeckers because they practiced clear-cutting within two hundred feet of trees in which red-cockaded woodpeckers inhabited and did not remove midstory hardwood, which led the red-cockaded woodpeckers to abandon certain trees.¹³⁴ Since these practices modified the red-cockaded woodpeckers’ habitat, the court ruled that it was a taking.¹³⁵

Analyzing *Sierra Club* under *Aransas* could result in a different holding. The court of *Aransas* would more likely see the proximate cause analysis like this: (1) Forest Service cuts down trees, (2) the amount of

¹²⁹ *Strahan v. Coxe*, 127 F.3d 155, 164 (1st Cir. 1997).

¹³⁰ *Id.* at 163–64.

¹³¹ *Id.* at 165.

¹³² *Id.* at 164.

¹³³ *Sierra Club v. Yeutter*, 926 F.2d 429, 432 (5th Cir. 1991).

¹³⁴ *Id.* at 438.

¹³⁵ *Id.*

trees over 100 years old is reduced, (3) midstory hardwood is not cleared, (4) decrease in 100+ year old trees means the Southern pine beetle is living in more of the old growth pines, (5) red-cockaded woodpecker has to fly further for shelter/cannot find shelter. Looking at the *Aransas* analysis in this case illustrates how easy it is to attenuate proximate cause in order to come to the desired result. If the chain of events from *Aransas* does not satisfy proximate cause then the chain of events above also should not and therefore *Sierra Club* would have a different result if the *Sierra Club* court used the *Aransas* court's analysis.

These two cases illustrate the effects that the *Aransas* proximate cause analysis could have on future takings claims. By stretching out the chain of causation from the original act to the harm of the endangered species it clearly becomes harder to find proximate cause. The above two examples are also more direct in the way the species' habitat is modified, at least compared to the whooping crane, however, it still becomes hard to find proximate cause. This type of analysis essentially makes it extremely difficult for a taking to occur when there is a habitat modification involved because the defendant can always muddy the waters with many other factors. This is important to note because of the many endangered water species in the Southwest and the Southwestern states' problem with water.

C. *Weakening the Habitat Modification Aspect Will Have Serious Effects on the Endangered Species that Inhabit Western Waters*

The West is an arid region in the United States.¹³⁶ As the human population grows, naturally the demand for water also grows.¹³⁷ Aquifers, dams, river diversions, and plumbing redistribution systems are just some of the ways that the West is handling this increased demand for water.¹³⁸ All of these solutions, however, divert water from other water sources and have an effect on the ecosystem in those areas.¹³⁹ Besides having a scarcity of water, or perhaps because of it, the West also has quite a few endangered species living in those same waters.¹⁴⁰ Many Western states have already faced ESA takings claims due to the divided pressure

¹³⁶ Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361, 362 (2001).

¹³⁷ *Id.* at 363–64.

¹³⁸ *Id.* at 369–72.

¹³⁹ *Id.* at 371.

¹⁴⁰ *Id.* at 369–72.

from needing water to support the urban population and needing water to support endangered species' habitats.¹⁴¹

Many articles have been written about the battles Western states may have or have had with environmental groups because of the scarcity of water. These articles all illustrate the worry that these states have about possible takings claims being successful due to the habitat modification confirmation in *Sweet Home*.¹⁴² One example of this is the Edwards Aquifer, the sole aquifer to supply San Antonio with its water.¹⁴³ Because the Edwards Aquifer is the sole supplier to San Antonio, heavy demands have been placed upon it, which is beginning to greatly affect the San Marcos and Comal Spring systems, which are home to a unique aquatic ecosystem.¹⁴⁴

Holly Doremus, in her article, noted that "diminished spring flows, together with urbanization, recreational water uses, pollution, and introduction of exotic species," all threaten the springs.¹⁴⁵ By mentioning all these aspects threatening the aquifer, it is reasonable to believe that a court following the *Aransas* decision could list all those other reasons for the proximate cause or at least state that they make proximate cause too attenuated, even if the large supply of water is truly affecting the endangered species habitat, therefore modifying it.

Another example of concern for Western states is in the Pacific Northwest¹⁴⁶—specifically the way dams there affect the salmon population, especially the chinook and bull trout.¹⁴⁷ Both Doremus and Melissa Estes believe this is a cause of concern for a possible takings claim.¹⁴⁸ Quoting John Volkman, Doremus stated how dams make life difficult for the salmon by "slow[ing] migration, heat[ing] up the river, subject[ing] fish to pressure changes and descaling and affect[ing] food production in the river."¹⁴⁹ Estes elaborated further and stated that "the reduction in

¹⁴¹ See *id.* See generally Melissa K. Estes, *The Effect of the Federal Endangered Species Act on State Water Rights*, 22 ENVTL. L. 1027 (1992); James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law about Imposing ESA Responsibility for Wildlife Harm on Water Users and other Joint Habitat Modifiers*, 33 ENVTL. L. 595 (Summer 2003).

¹⁴² Estes, *supra* note 141, at 1039.

¹⁴³ Doremus, *supra* note 136, at 370.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 376.

¹⁴⁸ *Id.*; Estes, *supra* note 141, at 1039.

¹⁴⁹ Doremus, *supra* note 136, at 376.

stream flows caused by water storage behind dams has . . . slow[ed] the outmigration of juvenile fish into the ocean.”¹⁵⁰ Right before stating these factors, Estes specifically mentioned that any action that modifies a habitat adversely would qualify as a taking.¹⁵¹ These authors’ statements, taken together, demonstrate their concerns about the likelihood of a successful takings claim.

Post-*Aransas*, however, the authors should not worry as much, especially because of the way they characterize the salmon’s plight. First, Estes’ statement that any action that adversely modifies a habitat could be a taking is clearly not the case in a post-*Aransas* world because the whooping cranes’ habitat was clearly modified as the salinity rose, yet there was no taking.¹⁵² Additionally, Doremus’ explanation of the habitat modification draws a sharp parallel to the many factors that affected the cranes.¹⁵³ Estes’ and Doremus’ concerns demonstrate their belief that the dam is clearly the proximate cause of the harm even though it affects all those other aspects, *because the habitat is modified*.¹⁵⁴ Post-*Aransas*, however, it could be argued that they should not be concerned about this because the court will not focus on the fact that the habitat was modified, but rather to the extent the habitat was modified prior to a direct harm to the endangered species, and therefore find proximate cause lacking.

Concern for water is a problem in the West, and it is understandable the state agencies as well as citizens are concerned that their water rights will be overruled by the ESA in favor of protecting endangered species. It seems that this concern may have played a part in the *Aransas* decision, but because the court of appeals took the approach they did, they went beyond protecting the state’s water rights and negatively affected the protection the ESA provides to endangered species. The *Aransas* opinion could be used in future cases to make the chain of causation longer than necessary and therefore find no taking. Cases involving the diversion of water obviously have more factors in play than a person just shooting an endangered animal, but that does not mean there is no proximate cause, especially when the ESA provides a way for legal indirect takings.

¹⁵⁰ Estes, *supra* note 141, at 1039.

¹⁵¹ *Id.*

¹⁵² *Aransas Project v. Shaw*, 775 F.3d 641, 647 (5th Cir. 2014).

¹⁵³ Doremus, *supra* note 136, at 376 (comparing to the *Aransas* reasoning it could look like this: (1) dams are constructed, (2) dams heat up the river, (3) pressure in the river changes, (4) food production in the river goes down, (5) salmon are harmed).

¹⁵⁴ *Id.*; Estes, *supra* note 141, at 1039.

III. THE CORRECT WAY TO APPROACH PROXIMATE CAUSE IN ESA
TAKINGS CLAIMS AND WHY IT WILL NOT NEGATIVELY IMPACT
THE ABILITY FOR STATES TO USE THEIR WATER

The final Part of this Note briefly details the correct proximate cause test, which is not a new one, but rather the one the courts have always used until *Aransas*. Following the discussion of the proximate cause test, this section examines how this will not affect states that are not directly taking endangered species by providing a quick overview of the Incidental Take Permit (“ITP”).

A. *The Proximate Cause Test That Should Be Applied When
Hearing an ESA Takings Claim*

This Note discussed the proximate cause analysis of the District Court in *Aransas Project v. Shaw* in great detail in Part I, and it is that proximate cause test that should be applied when hearing a takings claim.¹⁵⁵ A brief explanation of it, again, is that the TCEQ issued water permits, people with permits withdrew water, and the salinity level rose in the whooping cranes’ habitat.¹⁵⁶ The salinity level rising was a habitat modification and, due to this habitat modification, whooping cranes were harmed. The analysis should have stopped there, as it did in the district court, and the court of appeals should have confirmed the taking because that is all that is required to be a taking.¹⁵⁷ The court of appeals seemed concerned that this would negatively affect the water rights of the TCEQ and the people permitted by it and therefore found no taking.¹⁵⁸

The dissent by Circuit Judge Prado, in regards to the petition for rehearing and rehearing en banc, helps illustrate why the Fifth Circuit incorrectly examined proximate cause and why the lower court was correct.¹⁵⁹ Judge Prado stated that the TCEQ’s water diversions reduced the freshwater, raising salinity; that the higher salinities affected the whooping crane habitat; and lastly that whooping cranes died and that emaciation was the cause of death for some per autopsy reports.¹⁶⁰ Judge Prado continued by comparing this situation to the one in *Sierra Club v.*

¹⁵⁵ See *supra* Part I.

¹⁵⁶ *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 725 (S.D. Tex. 2013).

¹⁵⁷ 16 U.S.C. § 1538.

¹⁵⁸ *Aransas Project v. Shaw*, 775 F.3d 641, 660 (5th Cir. 2014).

¹⁵⁹ *Aransas Project*, 775 F.3d at 329 (Prado, J., dissenting).

¹⁶⁰ *Id.*

Yeutter.¹⁶¹ He stated that “[i]f the difference between 80- and 100-year-old trees can support a finding of a ‘take,’ surely a district court—faced with emaciated crane corpses—could reasonably conclude that a reduction of freshwater inflows . . . proximately caused a ‘take’ here.”¹⁶²

The correct proximate cause test is to not overly attenuate the causal chain because if that happens, then of course it will be hard to find proximate cause, and that is exactly what the court of appeals did. No new concerns are raised by applying this version of the proximate cause test because it is the one that has been used in almost all other cases as can be seen in *Sierra Club v. Yeutter*.

B. The Court of Appeals Should Not Be Concerned with the Affect this Would Have on Water Rights Because the TCEQ Can Apply for an ITP

The ESA, under section 10(a)(1)(B), allows the incidental taking of species as long as the taker applies and receives a permit for the activity that will result in the taking.¹⁶³ In order to receive the ITP, the applicant only has to design, implement, and fund a plan that reduces harm to the endangered species.¹⁶⁴ In fact, the holding of the district court was for the TCEQ to apply for an ITP.¹⁶⁵

The created plan is known as a Habitat Conservation Plan (“HCP”).¹⁶⁶ The HCP needs to include an assessment of the effects the proposed taking will have, details about how the applicant will lessen and observe these effects, as well as the necessary funding and procedures required for this, and why there are no alternative measures other than the taking.¹⁶⁷ Mitigation involves steps that will address the specific needs of the species by reducing the harm.¹⁶⁸ Here, the TCEQ can implement a program where they monitor the inflows more strictly, set a salinity

¹⁶¹ *Id.*; see *Sierra Club v. Yeutter*, 926 F.2d 429, 432 (5th Cir. 1991).

¹⁶² *Aransas Project*, 775 F.3d at 328 (Prado, J., dissenting).

¹⁶³ *Endangered Species Permits*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/Midwest/endangered/permits/hcp/index.html> [<https://perma.cc/7LCS-S5BT>] (last visited Mar. 27, 2016) [hereinafter *Endangered Species Permits*].

¹⁶⁴ *Id.*

¹⁶⁵ *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 789 (S.D. Tex. 2013).

¹⁶⁶ *Endangered Species Permits*, *supra* note 163.

¹⁶⁷ *Endangered Species Permits: Fact Sheet*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/Midwest/endangered/permits/hcp/hcp_wofactsheet.html [<https://perma.cc/3K2Z-YAF6>] (last visited Mar. 27, 2016).

¹⁶⁸ *Id.*

level limit, and adjust the amount of water that can be taken out if the salinity level starts to rise too high.

CONCLUSION

The court of appeals found that the TCEQ's issuance of water permits did not proximately cause the death of the whooping cranes thereby reversing the lower court's decision.¹⁶⁹ The court of appeals claimed that the lower court incorrectly applied the proximate cause test;¹⁷⁰ however, it was actually the court of appeals that analyzed proximate cause improperly.

The court of appeals claimed that the causal chain was too attenuated.¹⁷¹ That is wrong. Regarding the causal chain, the TCEQ issued water permits; the users used the water permits, thereby decreasing water flow to the whooping cranes habitat; the salinity levels rose; and the whooping cranes died. By looking at that chain of events, it is clear that the issuance of permits proximately caused a significant modification in the whooping cranes' habitat that led to their deaths.

The court of appeals also incorrectly found that the TCEQ had no way of foreseeing the harm issuing water permits could cause to the Cranes.¹⁷² That is also absolutely wrong. Not only was the result actually foreseeable, it was actually foreseen in the IRPWC.¹⁷³ The IRPWC clearly stated that water permits would affect the freshwater inflows and that those inflows are *necessary* to the whooping cranes' critical habitat.¹⁷⁴

Because the causal chain is not overly complicated or actually attenuated and because the reduction of freshwater inflows hurting the whooping cranes' habitat was foreseen, the district court's proximate cause analysis was correct. If the court of appeal's analysis is allowed to persist and becomes a model for other courts, future indirect takings claims will have a very hard time getting past the proximate cause prong and the endangered species of the United States will be in a much worse position.

¹⁶⁹ *Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014).

¹⁷⁰ *Id.* at 645.

¹⁷¹ *Id.* at 656.

¹⁷² *Id.* at 657.

¹⁷³ See generally IRPWC, *supra* note 108.

¹⁷⁴ *Id.* at 21.

