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ALERT

New Decision Clarifies Breadth of Potential "Take" Suits

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A new Fifth Circuit Endangered Species Act (ESA) decision should increase the comfort of growers and pesticide registrants who are concerned with potential "take" suits against both the U.S. Environmental Protection Agency (EPA) and themselves. The case is *The Arkansas Project* v. *Texas Commission on Environmental Quality et. al* (No. 13-40317, decided June 30, 2014).

The *per curiam*, unanimous decision, a three judge panel found that the deaths of 23 endangered whooping cranes in a wildlife refuge downstream from where the Texas Commission on Environmental Quality (TCEQ) had authorized water withdrawals are too remote to prove a "take" by the TCEQ.

The court found that the cranes had died, but that as a matter of law that the chain of causation from permit issuer to alleged harm to the cranes was too attenuated, too remote and thus insufficient to support a "taking" claim against the permit issuer.

That ruling should give some comfort to EPA as it defends alleged "takings" of threatened endangered species by virtue of the issuance of pesticide registrations. And, although the water users who benefited from the permits were not defendants, the decision's reasoning also appears to apply equally to them, provided they are applying pesticides in accordance with label (*i.e.,* license) requirements.

In this regard, the appellate court criticized the lower court's "untethered linking of governmental licensing with ESA" and its finding of liability for "taking" an endangered species. The appellate court held that "[f]inding proximate cause and imposing liability...in

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the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes' [habitat] goes *too far...."* Notably, the Fifth Circuit panel expressly quoted Justice O'Connor's concurrence in the Supreme Court's 1995 *Babbitt v. Sweet Home Chapter* decision (515 U.S. 700). That decision found "proximate cause" analysis a key to *preventing* ESA liability. In her concurrence, Justice O'Connor wrote that "where a farmer tills his field, causes erosion that makes silt run into a nearby river which depletes oxygen in the water and thereby injures [a species]," the farmer does not face "take" liability. Rather, ESA "take" liability extends only to "foreseeable rather than merely accidental" actions.

Given EPA's extensive ecological reviews prior to issuance of pesticide registrations, it would seem difficult to argue that injury to any species—threatened, endangered or otherwise—is a "foreseeable" result of applying products in accordance with label directions. Indeed, EPA's historic analyses are sufficiently comprehensive that the fact that consultation with a Service had not occurred prior to their issuance (where that is the case) should not be dispositive.