

The Bellinger family on the segregated East Side of San Antonio paid taxes to support the University of Texas School of Law, but could not attend because their ancestors were brought involuntarily from Africa. Subsequently though, one Bellinger helped to right the wrong.⁶

The Velas and the Prados struggled to educate their children in the underfunded Edgewood Independent School District, notwithstanding the promise of equal education in the Texas Constitution.⁷ And Culebra Road seemed as wide as the Mississippi River to kids named Gloria and Ed.⁸

Women who preferred careers to domesticity could be secretaries, teachers or nurses. If they were married and wished to invest in real estate, husbands had to give permission based on the legal requirement of coverture.⁹ Nor were they seen on juries as full partners in a supposedly democratic society.¹⁰

Girls who wanted to participate in school activities had opportunities in band, choir, pep squad or cheerleading, but not in basketball, volleyball, track or softball until Title IX became federal law.¹¹

The Best of Times
South Texas, 1950-1970

Air conditioning was virtually nonexistent.

Human obesity largely occurred in small numbers. “We’re Number One,” was a chant denoting a winning sports team; now it refers to America’s fatness (not fitness) ranking in the world.¹²

Allergies and asthma were rare.

Sleeping outside or on screened-in porches in August was normal.

Young *Homo sapiens*, born after World War II, whom the Court denominates *Infantilus boomeramus*, played outside, returning to those thrilling days of yesteryear with a hearty “Hi-Yo Silver!”¹³ and leaped imaginary buildings in a single bound,¹⁴ wearing capes made from old pillowcases. They rode bikes or walked to schools which had windows that opened! The birth months of South Texas *Infantilus boomeramae*, minus nine, provide anecdotal evidence that the fundamental functioning of the procreation process took place in the cooler months, not in July or August.

Moms cooked and hung clothes on the line to dry. Dads supported the family on one income. Sons and daughters mowed the grass and washed the family car. Coaches

had authority to apply wooden paddles to the *gluteus maximus* of misbehaving boys. But, alas, there was no three point shot for vertically-challenged basketball players. On the other hand, elderly people did not run multiple marathons as some do today.¹⁵

The nascent San Antonio Airport was surrounded by grazing land and cows.¹⁶ Nearby, a youngster named Jim rode horses on property now covered with the asphalt, steel and concrete known as the Nowlin Building and the SWBC Tower. Meanwhile, about fifteen miles south, his future friend and colleague, affectionately known as Hippo, rarely ventured north of Hildebrand because his last name was Garcia. And the Rodriguez family could rent a home in Harlandale only if put in the name of an Anglo wife.¹⁷

Boerne, Kendall County, Texas had one flashing yellow light and one police officer who was also the Chief (Earl Buck). Kerr County had more goats and sheep than people.

One could drive north on two lane U.S. Highway 281 and see clear Edwards Aquifer water streaming from the limestone, some of which was used to brew La Cerveza Perla from the “Country of 1100 Springs.”¹⁸

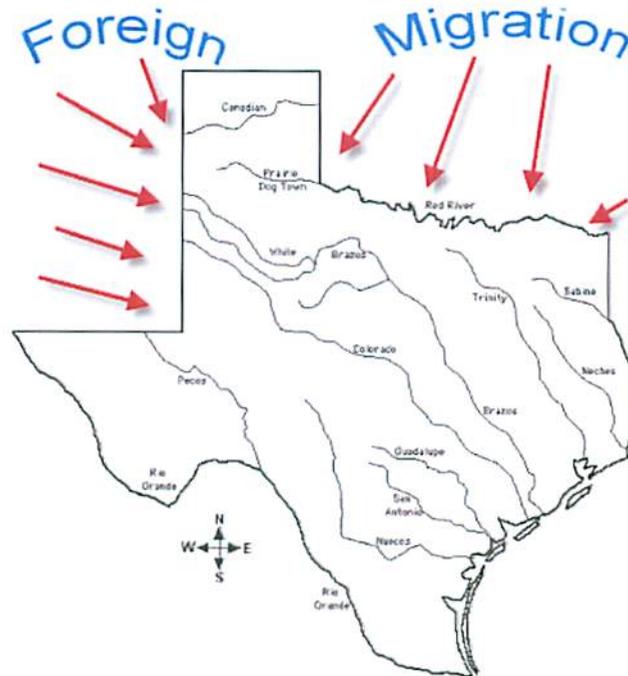
There were few traffic or water issues notwithstanding the severe drought of the 1950s.¹⁹

Lawyers Maverick, Cadena and Kauffman,²⁰ the Civil Rights Movement, and strong liberated women named Cockrell, Jarboe, Tafolla, and Valdez²¹ addressed the worst of times, though a perfect union has yet to be formed.

The sounds of affordable air conditioning silenced the best of those mystic chords of memory.²²

A Funny Thing Happened on the Way to Modernity²³

With artificially cooled cocoons, *Homo sapiens* theretofore unable or unwilling to take the heat in Texas began, and continue today, a diaspora from foreign states north, east and west of Texas:



One wag once waxed wittily: “Texans, you are guarding the wrong river.”²⁴

Instead of far from the madding crowd,²⁵ Texans saw the crowd getting closer and traffic more maddening. From a 1950 population of 500,000, Bexar County is now over 1,700,000 of suburban sprawl.²⁶ Comal, Kendall and Kerr, once pristine preserves of natural beauty, have fallen prey to avaricious, rapacious, and sometimes mendacious, development and its ubiquitous impervious cover of asphalt, roofs, concrete, shopping and eating venues. While many species live in the area in question, the subjects of this proceeding are *Homo sapiens* and karst invertebrates known as *Rhadine exilis* and *Rhadine infernalis*.

The conundrum facing this region is how to balance and manage finite resources of water, land, flora and fauna in light of exponential increases in the number of *Homo sapiens* and their vehicles, and the concomitant destruction of nature upon which all species rely for life. Perhaps a mission impossible.²⁷

	<u>1950 Census</u> ²⁸		<u>2010 Census</u> ²⁹
	500,460	Bexar County	1,714,773
	5,423	Kendall County	33,410
	16,357	Comal County	108,472
	25,392	Guadalupe County	131,533
	<u>14,022</u>	Kerr County	<u>49,625</u>
Total:	561,654		2,037,813

The best solution would be a reverse migration of one million *Homo sapiens* to north of the Red River and east of the Sabine. The Court unfortunately does not have power to order such movement, but it could occur if air conditioning were unaffordable or the Edwards Aquifer becomes toxic or runs dry. Indeed, the slow cancerous death of drought visits again,³⁰ but with four times as many humans sucking from the same basic water hole.

The forty days and nights of Noah are looking better.³¹

The lesson of move, adapt or die applies. Dinosaurs did not learn; cockroaches did.

In the meantime, the record reflects massive vehicular traffic congestion sought to be alleviated by proposed ramps connecting U.S. Highway 281 and Loop 1604.³²

The status quo of idling internal combustion engines on the subject roadways spews large quantities of carbon monoxide for Mother Earth to breathe, not a nice thing to do to one's mother, and causes automobile droppings onto and into the Edwards which the Court calls Petro Poop.

APOLOGUE

The Law and Just the Facts, Ma'am³³

Notwithstanding the foregoing historical observations and personal lamentation, the Court's obligation is to rule of law standards evolved through legislation, regulation, and *stare decisis*.

Rather than a case to be decided in the first instance in a court of law, this is an appeal from administrative and regulatory bodies to a court of law. As a result, this Court does not decide as a fact finder based on a preponderance of evidence standard, but instead sits in an appellate capacity to review administrative decisions³⁴ based on a standard of whether such decisions were arbitrary and capricious.³⁵

Summary of Arguments

Plaintiff seeks a preliminary injunction to maintain the aforesaid traffic congestion status quo until further environmental impact analysis can be accomplished. Plaintiff asserts a much larger expanse of the 281/1604 environs should be included rather than just the area over which the ramps would be built, and the administrative agency decision to exempt the project should be blocked by the Court because it was arbitrary and capricious.

Defendants respond that the administrative process provided appropriate public debate and the Federal Highway Administration decision to grant an exemption from environmental studies was made according to correct legal standards, was not arbitrary and capricious and, therefore, should not be reversed by the Court and that a two to three year environmental study of the larger area north of Loop 1604 is underway.³⁶

In lieu of a thousand words, two pictures show:

The Problem



and the Proposed Solution



See Alamo Regional Mobile Authority website at <http://www.alamorma.org/index.cfm/projects/us-281-loop-1604-interchange> for more detail.

Although it is undisputed that hundreds of thousands of vehicles pass through the U.S. 281/Loop 1604 interchange everyday, there is no direct connection between either roadway. All vehicles traveling between U.S. 281 and Loop 1604 must exit to frontage roads and travel through stop lights. Backups at the lights can be extreme. During the afternoon peak period, there is a queue of approximately 1,000 vehicles per hour waiting to turn from northbound U.S. 281 to westbound and eastbound Loop 1604. Administrative Record (“AR”) Doc. 338 at 1. The substantial backups have created unsafe conditions. Id. at 2-4. In 2008, 132 collisions were reported at the interchange—more than any other interchange in San Antonio. Id. at 4.

Construction has begun on a project developed by the Alamo Regional Mobility Authority (“ARMA”), the Texas Department of Transportation (“TxDOT”), and the Federal Highway Administration (“FHWA”) which hopes to provide relief. The project involves constructing ramps between U.S. 281 North and Loop 1604 where congestion is most severe, auxiliary lanes to insure the ramps operate safely and efficiently, and additional safety and mobility enhancements in the project area. Beyond improving safety, the project will eliminate up to 511,000 hours of traffic delays annually, resulting in a cost savings of \$7 million. AR Doc. 338 at 1-5; AR Doc. 112 at 10.

Because of the FHWA's involvement and the use of federal funds, an analysis of the projects's potential environmental impact was required under the National Environmental Policy Act ("NEPA").³⁷ ARMA, TxDOT, and the FHWA collaboratively conducted a detailed analysis, concluding the project will have no significant environmental impact. AR Doc. at 338. On February 24, 2010, after considering the results of the environmental analysis, public input and other studies and information contained in the Administrative Record, the FHWA concluded that the project qualified as a categorical exemption under FHWA regulations and that no further NEPA review was required. AR Doc. at 340.

On August 31, 2010, plaintiff moved to reopen this lawsuit to challenge the interchange project under NEPA and the Endangered Species Act. On December 20, 2010, after defendants filed the Administrative Record of over 10,000 pages, plaintiff filed the instant motion seeking a preliminary injunction, which would maintain the current traffic congestion status quo.

The legal issue before the Court in this preliminary injunction proceeding is whether the Federal Highway Department's determination that the U.S. 281/Loop 1604 interchange project is entitled to a categorical exemption ("CE")³⁸ from the NEPA is

arbitrary and capricious. Though plaintiff contends that FHWA bears the initial burden of demonstrating its decision was valid, the agency's decision is presumed valid under the Administrative Procedure Act ("APA"). Visiting Nurse Ass'n, Inc. v. Thompson, 447 F.3d 68, 72 (1st Cir. 2006). The burden falls entirely on plaintiff to overcome the presumption and demonstrate a likelihood of success on its claim that FHWA's decision does not meet even "minimal standards of rationality," which is all that is required for the decision to survive deferential APA review. Gulf Restoration Newtork v. United States Dep't of Transp., 452 F.3d 362, 368 (5th Cir. 2006). Plaintiff also bears the burden of demonstrating its members are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips decidedly in plaintiff's favor, and an injunction is in the public interest. Natural Res. Def. Council v. Winter, 129 S. Ct. 365, 376 (2008). As summarized below, plaintiff has not met the prerequisites for obtaining preliminary injunctive relief. An Appendix is attached for those interested in a lengthy exposition, those who wish to appeal and those who suffer from insomnia.

With respect to likelihood of success on the merits, plaintiff contends all projects affecting U.S. 281 or Loop 1604, which someday may look like Charlotte's web,³⁹ must be analyzed in a single NEPA document and that FHWA improperly segmented the

interchange improvements from other projects in violation of NEPA. However, improper segmentation occurs only if the project at issue has no “independent utility.” Save Barton Creek Ass’n v. FHWA, 950 F.2d 1129, 1140 (5th Cir. 1992). The agency made a reasonable finding that replacing the congested stop lights with direct connectors, along with other safety and mobility enhancements included in the project, will be extremely useful even if no other projects are undertaken in the U.S. 281 or Loop 1604 corridor. AR Doc. 340.

Plaintiff next contends with respect to a likelihood of success on the merits that the interchange improvements do not qualify as a CE under FHWA regulations. However, plaintiff’s argument is based largely on the cost and duration, neither of which is a material factor. FHWA may categorically exclude a project from further NEPA review so long as the agency determines, based on its experience and expertise, the project: (1) satisfies the general CE requirements and (2) does not involve “significant environmental impacts.” 23 C.F.R. § 771.117(a), (d); 23 C.F.R. § 771.115(b). A review of the Administrative Record reflects the FHWA rationally determined the project will have no significant impact and otherwise qualified as a CE based upon the extensive analyses and documents in the record. Although plaintiff interprets the regulations differently, the Fifth Circuit has made clear “[c]ourts should defer to the agency’s

interpretation of its own [CE] regulations.” West Houston Air Comm. v. FAA, 784 F.2d 702, 705 (5th Cir. 1986).

Plaintiff has also filed declarations from several individuals who criticize the FHWA’s decision and various aspects of the supporting analyses. These declarations are not part of the Administrative Record and plaintiff has not shown they meet an exception which renders them legally relevant to the determination of whether FHWA’s decision complied with NEPA. Though plaintiff attempts to create a “battle of the experts,” with each party asserting their analysis is more reasonable than the other’s, such attempt is not the proper procedural or substantive method for an appeal of this nature. Moreover, plaintiff does not dispute that defendants do indeed have karst invertebrate environmental experts on site with authority to immediately stop construction if a void, cave or suspected karst feature is discovered. Lanham Decl. ¶ 12. Only after confirmation by the geologist and permitted karst specialist that the karst feature does not qualify as a suitable habitat for endangered karst invertebrates will construction continue. Id. Under the highly deferential standard afforded to agencies pursuant to NEPA, however, it is not within the purview of the federal courts to intervene if the result was not arbitrary or capricious. Spiller v. White, 352 F.3d 235, 244 (5th Cir. 2003). The agency has made its decision. The Court is “thus obligated to defer to [the agency’s] expert judgment.” Id.

This Court holds the categorical exemption decision of FHWA was not arbitrary or capricious.

Plaintiff has also failed to present sufficient evidence that it is likely to suffer irreparable injury as a result of any construction activities which may occur prior to a ruling on the merits. Plaintiff's declarants offer speculation about what they believe could occur. As a matter of law, however, simply alleging some possibility of irreparable injury does not support the issuance of a preliminary injunction, which is an extraordinary remedy never awarded as of right. Winter, 129 S. Ct. at 375-76.

Plaintiff's declarants, residents of a subdivision adjacent to the project, complain that traffic will be diverted through their neighborhoods creating congestion, noise and air pollution.

While the Court recognizes such projects create quite a kerfuffle (as opposed to a kartoffel) in surrounding areas, temporary construction disruption is a price of continued human migration and procreation. The endangered species list is not likely to see *Homo sapiens* added to it.

"To be considered to be irreparable, the injury must be permanent or of long duration." West Ala. Quality of Life Coal. v. FHWA, 302 F. Supp. 2d 672, 683 (S.D. Tex. 2004). The hypothetical effects on the neighborhood during the construction process, even if they were to occur, would be temporary and thus not irreparable. See

id. (finding there was no showing of irreparable harm because, “while there may be temporary effects of the construction project such as inconvenience, increased traffic, and increased noise and air pollution . . . , the project has a life expectancy of 33 months, which is not permanent or of long duration”).

Plaintiff has not satisfied the remaining two requirements for injunctive relief. Plaintiff’s interest in additional NEPA process is outweighed by the countervailing costs of delaying the project and prolonging the severe congestion at the interchange, which poses a threat to public safety, reduces the quality of life for the thousands of people who use the interchange every day, and creates thousands of hours of traffic delays each month. These same factors demonstrate an injunction would not serve the public interest, nor improve air or water quality.

EPILOGUE

**What a piece of work is a man,
How noble in reason,
How infinite in faculties . . . !⁴⁰
(Well, perhaps not.)**

The leaders of the twelve tribes of Israel taught their people to “[d]esignate a place outside the camp where you can go to relieve yourself.”⁴¹ American GIs in the foxhole had a more odorous but less printable way of expressing the same idea. See also the common sense of Uncle Fred and Aunt Della Grantham who built the outhouse away

from their water well. Order Concerning U.S. Highway 281 Toll Road Project, Docket no. 106, at 2 (“They knew nothing about computers or air conditioning or environmental impact statements, but they were wise enough not to build the privy close to their water supply.”) (Biery, J.).

**The fault, dear Brutus, is not in our stars,
But in ourselves,⁴²**

Homo sapiens, who rely on the South Texas version of Ol’ Man River,⁴³ apparently missed military basic training and those biblical lessons of protecting the Edwards,⁴⁴ the latest examples being 54,000 and 400,000 gallons of human sewage spilled over the aquifer as a result of human hubris and unbridled suburban growth.⁴⁵ Instead of the “X Files,”⁴⁶ this drama could be called the “Yuck Files.” So much for computer technology saving people from themselves. Nor does there appear to be a little Dutch boy⁴⁷ or a hoped-for powerful wizard behind the curtain⁴⁸ who can save them either.

Whether one is glass half-empty Cassandra or glass half-full Pollyanna, the water in the glass best be clean.⁴⁹

A rabbi from Nazareth spoke of “lilies of the field,” “the least of those among us,” “reaping what one sows,” and “they know not what they do,” thoughts which take on new meaning in the context of stewardship, or ignominious lack thereof, of the natural

world.⁵⁰ To live those words in enlightened self-interest would require the better angels of *Homo sapien* nature.⁵¹

Insouciant humans seem to misunderstand they consist of 61.8% H₂O⁵² and underestimate their folly in the use of 60% of water for green lawns⁵³ in a semi-arid, drought prone region. Nice to look at, but does nothing to quench thirst or satisfy hunger.

Sapiens is Latin for wise. If *Homo sapiens* suppress their instinct to survive and fail to care for the whole circle of life,⁵⁴ including karst invertebrates, the species should be renamed *Homo stupiditus*, having breached the environmental contract⁵⁵ between themselves and all the Little Critters.

Ten years of extreme floods, droughts, blizzards, fires and hurricanes⁵⁶ give new meaning to “I’ve seen fire and I’ve seen rain.”⁵⁷ In Texas, this past March—the month which usually brings spring rains—was listed as the driest month of March in recorded history.⁵⁸ Wildfires have spread across more than 700,000 acres and a fire in southwest Austin destroyed at least eight homes and damaged ten others on April 17, 2011.⁵⁹

A prescient, and follicly impaired, judge wrote nine years ago that Mother Nature bats last and the top of the eighth is at hand.⁶⁰ It is beginning to look like the bottom of the eighth inning.

**At the end of the game,
We are all the same,
Back to the Earth,
From whence we came.⁶¹**

Perhaps *Homo sapiens* will experience a Darwinian epiphany to take better care of their home before they return to it. The alternative is a Captain Kirk moment: “Beam me up, Scotty!”⁶²

The motion for preliminary injunction is DENIED.

Happy trails, and ramps, to you,⁶³ 281.

Signed on Earth Day, April 22, 2011.



FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE

With grateful appreciation to Court family members Joani Sullivan, Gloria Christmas, Nathan Mechler, Chris Poage, Martin Strasser, Liane Noble, Neha Casturi, Edgar Napoles and these authors and sources:

1. Ogden Nash, Come, Come, Kerouac! My Generation is Beater Than Yours, *The New Yorker*, April 4, 1959, at 45.
2. “It was the best of times, it was the worst of times.” Charles Dickens, A Tale of Two Cities 13 (Signet Classic 1997) (1859).
3. “The Way We Were” is the title song to the 1973 movie starring Barbara Streisand and Robert Redford. The song was written by Alan Bergman and Marilyn Bergman and scored by Marvin Hamlisch. ALAN & MARILYN BERGMAN: THE OFFICIAL WEBSITE, <http://www.alan&marilynbergman.com> (last visited Mar. 10, 2011).
4. Gustavo “Gus” C. Garcia worked with fellow San Antonio attorney Carlos Cadena in the landmark case of Hernandez v. Texas, 160 Tex. Crim. 72, 251 S.W.2d 531 (Tex. Crim. App. 1952), rev’d, 347 U.S. 475 (1954), successfully arguing before the United States Supreme Court for the end of the practice of systematically excluding Hispanics from jury service in Texas.
5. David Montejano, Quixote’s Soldiers: A Local History of the Chicano Movement 1966-1981 91 (University of Texas Press 2010) (including Landa Park as a “historical reference to [Congressman] Gonzalez’s much publicized encounter with segregation in New Braunfels [Texas] in the mid 1950s”).
6. Herman Marion Sweatt volunteered to be the plaintiff in Sweatt v. Painter, 210 S.W.2d 442 (Tex. Civ. App.–Austin, 1948, writ ref’d), rev’d, 339 U.S. 629 (1950), the desegregation lawsuit which the NAACP formulated against the University of Texas in the mid-1940s. Prominent African-American attorneys were involved, including Harry Bellinger of San Antonio.
7. Discrimination against children in poor school districts continued until the Texas Supreme Court reversed the holding of the Austin Court of Appeals in Kirby v. Edgewood Independent School District, 761 S.W.2d 859 (Tex. App.–Austin, writ granted), rev’d, 777 S.W.2d 391 (Tex. 1989). Albert H. Kauffman of San Antonio and other prominent lawyers successfully challenged the school financing system which was based in part upon local district financing. Kirby, 777 S.W.2d at 392. The Supreme Court found this system, which showed a 700 to 1 ratio between the value of taxable property in the wealthiest and poorest districts, and district spending per student varied from \$2,112 to \$19,333, violated the Texas constitutional provision requiring an “efficient” and “free” public school education. Id.
8. United States Circuit Judge Edward Prado and Deputy United States District Clerk Gloria Vela.

9. Laws of the Republic of Texas, An Act to Adopt the Common Law of England–To Repeal Certain Mexican Laws, and to Regulate the Marrital [sic] Rights of Parties, Approved Dec. 22, 1840, 5th Cong., R.S., §§ 3,4, 1841 Repub. Tex. Laws 4, reprinted in 2 H.P.M. Gammel, The Laws of Texas 1822-1897, at 178 (Austin, Gammel Book Co. 1898) (codified at Tex. Civ. Stat. art. 1299 (1925)), repealed by Acts 1963, 58th Leg., p. 1189, ch. 473, § 1, eff. Aug. 23, 1963; see also Black’s Law Dictionary 422 (9th ed. 2009) (“*Coverture*, is a french word . . . particularly applied in our common lawe, to the estate and condition of a married woman, who, by the lawes of our realme, is in (*potestate vire*) [under the power of her husband] and therefore disabled to contract . . . without his consent and privity; or at the least without his allowance and confirmation.”) (quoting John Cowell, The Interpreter (1607)).

10. Prior to the adoption of the Texas Constitution, “the common law of England was adopted during the existence of the Republic, as early as 1840, thus bringing in, as a part of that system, the definition of the term ‘jury,’ which, when used without qualification, addition or prefix, meant a body of twelve men.” Glover v. Cobb, 123 S.W.2d 794, 796 (Tex. Civ. App.–Dallas 1938, writ ref’d). “Throughout the constitutional and statutory history of the subject, the people in their legislative capacity, and the Legislature in its representative capacity, without break in continuity, repeatedly announced that men only were eligible for jury service.” Id.; see TEX. CONST. art. 5, § 13 (requiring grand and petit juries to be composed of twelve men); TEX. CODE CRIM. PROC. art. 349 (providing for completion of grand jury until it shall include twelve men); TEX. CIV. STAT. art. 2133 (providing that all male persons over twenty-one years of age unless disqualified are competent petit jurors); TEX. PENAL CODE art. 19 (defining “man” as used to signify a male person of any age, and the word “woman” a female of any age not eligible for jury service). Women were not permitted to serve on a jury until Article 16, § 19 of the Texas Constitution was amended in November of 1954.

11. 20 U.S.C. § 1681 (prohibiting gender discrimination in physical education and other school programs which receive federal funding).

12. With the exception of tiny Pacific Island nations which prize obesity, the United States tops the list of the world’s fattest countries. See WHO, World Health Statistics 2010 (2010).

13. Departing on his white stallion, Silver, the Lone Ranger would shout, “Hi-yo, Silver! Away!” The Lone Ranger is a fictional masked Texas Ranger who, with his Native American companion, Tonto, fights injustice in the American Old West. The character has become an enduring icon of American culture. David H. Shayl, Hi-Yo, Silver! Away!, SMITHSONIAN MAGAZINE, October 2001, available at http://www.smithsonianmag.com/history-archaeology/Hi-Yo_Silver_Away.html (last visited Mar. 14, 2011).

14. Excerpt from the opening narration of the radio and television Adventures of Superman (RKO-Pathe Studios 1952 - 1957) (“Faster than a speeding bullet. More powerful than a locomotive. Able to leap tall buildings in a single bound. Look! Up in the sky! It’s a bird. It’s a plane. It’s Superman!”).

15. The most marathons completed in one year by an American male was 106 by R. Laurence Macon between January 1st and December 31st, 2010. Mr. Macon was 66 years old at the completion of his record setting year. GUINNESS WORLD RECORDS, MOST MARATHONS RUN IN A CALENDAR YEAR, MEN (2011) (<http://www.guinnessworldrecords.com/Search/Details/Most-marathons-run-in-a-calendar-year,-Men/59080.htm>) (last visited April 4, 2011).
16. Statement of Lackland Air Force Base 1964 trainee and United States Air Force (retired) Master Sergeant and Federal Court Security Officer Ralph Miller, Honor Guard to President Gerald Ford and President Jimmy Carter.
17. Statement of United States District Court Judicial Assistant Gilbert Rodriguez.
18. "From the Country of 1100 Springs" has been the slogan of Pearl beer since 1961. The Pearl Brewing Company was an American brewery established in 1883 in San Antonio. Pearl beer is still in production at Miller Brewing facility in Fort Worth, Texas.
19. Texas baked under the most severe drought recorded to date in history from 1950 to 1957. (<http://www.tsl.state.tx.us/exhibits/parks/1950s/page1.html>) (list visited March 25, 2011).
20. Maury Maverick, Jr. and Carlos Cadena of San Antonio represented the plaintiff in Harvey v. Morgan, 272 S.W.2d 621 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.), the case which ended segregation in Texas boxing in 1954. As noted in endnote 20, Albert Kauffman represented the plaintiff in Kirby v. Edgewood School District, 777 S.W.2d 391 (Tex. 1989), the case which ended discrimination against children in poor school districts.
21. The Honorable Lila Banks Cockrell was the first female mayor of a major American city and the only woman who has held the position in the City of San Antonio. At a time in when most "gals" were corralled in what was known as the "Women's section" of the newspaper, Ms. Jan Jarboe Russell landed a job in the newsroom and reported on serious issues as San Antonio females took their place in politics, business, art and every other field. Jan Jarboe Russell, Goodbye, Readers, its Time to Write a Book, San Antonio Express News, March 27, 2011. Dr. Carmen Tafolla, one of the most anthologized of Latina writers, has published work for both children and adults in more than 200 anthologies, magazines, journals, textbooks and readers. <Http://www.carmentafolla.com> (last visited April 17, 2011). Sheriff Lupe Valdez, of Dallas County, is Texas's only elected female sheriff. <Http://www.lupevaldez.com/about.html> (last visited April 18, 2011).
22. From the First Inaugural Address of President Abraham Lincoln, March 4, 1861.
23. A FUNNY THING HAPPENED ON THE WAY TO THE FORUM, (New York run: Alvin Theatre, beginning May 8, 1962), is a musical with music and lyrics by Stephen Sondheim and book by Burt Shevelove and Larry Gelbart. Inspired by farces of the ancient Roman playwright Plautus (251-183 BC), it tells the bawdy story of a slave named Pseudolus and his attempt to win his freedom by helping his young master woo the girl next door. Syanley Green and Kay Green, Broadway Musicals, Show by Show, 198 (Hal Leonard Corp. 1996).

24. Author unknown.

25. Far from the Madding Crowd, (Harper & Brothers edition, 1912) (1874), is Thomas Hardy's fourth novel. It centers on Gabriel Oak, an up and coming, yet frugal, shepherd in the prime of life at twenty-eight, who falls in love with a newcomer eight years his junior, Bathsheba Everdene, a proud and somewhat vain young beauty, who arrives to live with her aunt.

26. [Http://www.census.gov/population/cencounts/tx190090.txt](http://www.census.gov/population/cencounts/tx190090.txt):
[Http://www.census.gov/2010census/data.txt](http://www.census.gov/2010census/data.txt).

27. Mission: Impossible is an American television and movie series which was created and initially produced by Bruce Geller. It chronicles the missions of a team of secret American government agents known as the Impossible Missions Force ("IMF"). The television series ran on both CBS and ABC. Mission: Impossible (CBS 1966-1973); (ABC 1988-1990). The first movie based on the television series of the same name was made in 1996, and was followed by two sequels in 2000 and 2006, with a fourth installment due later this year. MISSION: IMPOSSIBLE (Paramount Studios 1996, 2000, 2006, 2011).

28. [Http://www.census.gov/population/cencounts/tx190090.txt](http://www.census.gov/population/cencounts/tx190090.txt); (last visited March 30, 2011).

29. [Http://www.census.gov/2010census/data.txt](http://www.census.gov/2010census/data.txt) (last visited March 30, 2011).

30. The great drought of 2011 may have started in October 2010. According to the National Climatic Data Center, the months of October and November were the state's eighth-driest on record and second-driest in 44 years. This trend continued during the months of December and January, and February was the seventeenth driest on record. State of the Climate, National Overview, October 2010 - February 2011, found at: [Http://ncdc.noaa.gov/sotc/national/](http://ncdc.noaa.gov/sotc/national/) (last visited April 1, 2011). The National Weather Service reports that March was also very dry, with rainfall of less than one half the normal to date, and the outlook is not good for any significant rainfall over the next few months, at least. National Weather Service, Drought Information Statement, found at: [Http://www.crh.noaa.gov/product.php?site==NWS](http://www.crh.noaa.gov/product.php?site==NWS) (last visited April 1, 2011).

31. The length of time it rained while Noah was on the ark was forty days and forty nights. Genesis 7:12.

32. Administrative Record passim.

33. Dragnet was a radio and television crime drama about the cases of a dedicated Los Angeles police detective, Sergeant Joe Friday, and his partners. Sergeant Joe Friday's famous catchphrase, "Just the facts, ma'am," entered the American subconscious during an episode which aired on television on October 10, 1951. J. Michael Hayde, My Name's Friday: The Unauthorized but True Story of Dragnet and the Films of Jack Webb, 73 (Cumberland House 2001).

34. Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 202 (1st Cir. 1999) (noting that district court's review of Federal Highway Administration's decision is appellate in nature when reviewing

agency action taken under NEPA); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538-39 (11th Cir. 1990) (pointing out that district court sits as appellate court when reviewing agency action in NEPA case); see also Trout Unlimited v. United States Dept. of Agric., 441 F.3d 1214, 1219 (10th Cir. 2006) ("If the Forest Service's decision on remand is not satisfactory, defendant-intervenors can pursue administrative remedies and, if necessary, seek appellate review in the district and appellate courts at a later stage in the proceedings.").

35. Federal regulatory agencies, such as the Federal Highway Administration, are "charged with keeping the ball somewhere around the 50-yard line as between encroaching human activity and environmental concerns." Center for Biological Diversity v. United States Fish & Wildlife Serv., 202 F.Supp.2d 594, 597 (W.D. Tex. 2002) (Biery, J.). The law requires the judicial branch of government to give deference to administrative agency decisions so long as they are supported by substantial evidence and are not arbitrary and capricious. See Newell Recycling Co., Inc. v. United States Env'tl. Prot. Agency, 231 F.3d 204, 206 (5th Cir. 2000) (decision by Environmental Protection Agency's Appeal Board must be affirmed by court unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); Meadows v. Sec. & Exch. Comm'n, 119 F.3d 1219, 1224 (5th Cir. 1997) (finding that court must uphold decision by agency unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; factual findings by the Commission to be upheld "if supported by substantial evidence"); Louisiana v. Mathews, 427 F. Supp. 174, 175 (E.D. La. 1977) (judicial review of action by Food & Drug Administration banning sale and distribution of small turtles limited to whether defendants acted "arbitrarily, capriciously, in abuse of their discretion or otherwise unlawfully"); see also Texas Alcoholic Beverage Comm'n v. Top of the Strip, Inc., 993 S.W.2d 242, 249 (Tex. App.—San Antonio, 1999, pet. denied) (court's review of TABC order based on substantial evidence rule; court may reverse or remand case if substantial rights of appellant have been prejudiced because administrative findings, conclusions, inferences, or decisions are "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion"; reviewing court evaluates reasonableness not correctness of the order).

36. On July 8, 2009, after the Federal Highway Administration withdrew its approval of the Finding of No Significant Impact, defendants published notice of intent to prepare an EIS "for a proposed transportation project on [U.S. 281] from Loop 1604 to Borgfeld Road, about 7.5 miles in Bexar County, Texas." Notices: Federal Highway Administration- Environmental Impact Statement: Bexar County, Texas, 74 Fed. Reg. 32,684 (July 8, 2009); see also <http://www.411on281.com/us281eis/index.cfm/understanding-an-ies/eis-location-map/> (defendant ARMA's website providing EIS location map) (last visited March 30, 2011). The EIS "will develop and evaluate a range of alternatives including 'No action' (the no-build alternative), Transportation System Management (TSM)/Transportation Demand Management (TDM), rapid transit and roadway build alternatives." 74 Fed. Reg. 32684. In Defendants' Joint Response to the Court's Request for Record Designation or Additional Information, (docket no. 154 at 2-3), defendants explain the time line for completion of the EIS is difficult to predict. Several public meetings have been held, but a draft EIS identifying the range of alternatives for analysis, including the preferred alternative, has not yet been issued. Defendants presently estimate that Notice of Availability of the Draft EIS will be published in the Federal Register in or about February 2012. Id. at 2. Defendants will then

solicit, analyze, and address public comments on the draft EIS as required by 40 C.F.R. § 1503.1 and 40 C.F.R. § 1503.4. Id. Defendants will conduct a public hearing and conduct at least one additional public meeting prior to preparing the final EIS. Id. Defendants presently estimate that Notice of Availability of the final EIS will be published in the Federal Register in or about June of 2013. Id. It is estimated that the FHWA will issue its Record of Decision regarding the final EIS in October in or about October of 2013. Id. at 3. The Record of Decision constitutes the final agency action concluding the NEPA process. 40 C.F.R. § 1505.2; see also Oregon Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1118 (9th Cir. 2010) (“Once an EIS’s analysis has been solidified in a [Record of Decision], an agency has taken final agency action.”).

37. Congress passed NEPA to focus governmental and public attention on the potential environmental effects of any proposed “major federal action.” See 42 U.S.C. § 4332; Marsh v. Oregon Natural Res. Def. Council, 490 U.S. 360, 361 (1989). The Council on Environmental Quality regulations provides guidance to agencies in applying the Act. 40 C.F.R. §§ 1500-1508; Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). NEPA’s statutory and regulatory mandate is “essentially procedural.” Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978). The statute does not mandate a particular result, but instead prescribes that federal agencies simply consider the potential environmental consequences of proposed actions. Robertson, 490 U.S. at 350; see also O’Reilly v. United States Army Corps of Eng’rs, 477 F.3d 225, 228 (5th Cir. 2007). The environmental information required by NEPA must be “available to public officials and citizens before decisions are made and before actions are taken. 40 C.F.R. 1500.1(b). While NEPA does not command agencies to select an environmentally preferable course of action, it does require the agency’s decision to be “environmentally conscious.” Sierra Club v. Sigler, 695 F.2d 957, 976 (5th Cir. 1983). Thus, two fundamental principles underlie NEPA’s requirements: federal agencies have the responsibility to consider the environmental effects of major actions significantly affecting the environment, and the public has the right to review this consideration. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 101 (1983).

38. The National Environmental Policy Act (“NEPA”) requires that federal agencies prepare a detailed report, known as an environmental impact statement (“EIS”), for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Pursuant to NEPA, the Council on Environmental Quality has promulgated an array of regulations, some of which govern the procedures a federal agency must follow to determine whether an agency action is one which requires the preparation of an EIS. See generally 40 C.F.R. pts. 1500-1508. First, the agency can prepare a shorter document, known as an environmental assessment (“EA”), and, based on the EA’s conclusion that the action will not significantly affect the human environment, issue a finding of no significant impact or “FONSI.” Id. §§ 1508.9; 1508.13. Second, because the preparation of an EA is itself time consuming and burdensome, an agency can identify a class of actions, known as a categorical exclusion (“CE”), which normally does not significantly affect the human environment. Id. §§ 1507.3(b)(2)(ii); 1508.4. If the agency determines that an action falls into a previously adopted CE and that there are no extraordinary circumstances rendering a normally excluded action likely to have a significant effect, id. § 1508.4, it can go forward with the action absent NEPA documentation, that is without the need to prepare an EA or EIS. Id. § 1501.4; see also

Wildlaw v. United States Forest Serv., 471 F. Supp. 2d 1221, 126 (M.D. Ala. 2007) (discussing NEPA and concept of categorical exclusions). The Federal Highway Administration's regulations define CEs as:

[A]ctions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

23 C.F.R. § 771.117(a). Federal Highway Administration's regulations specify twenty-one categories of actions which meet the CE criteria and normally do not require any further NEPA approvals within the agency. See 23 C.F.R. §§ 771.117(c); 771.115(b). The regulations also provide that other actions "may be designated as CEs are satisfied and that significant environmental effects will not result. Id. § 771.117(d); see id. § 771.115(b). The regulations contain a nonexclusive list of examples of the types of actions which may be designated as CEs after administration approval. Id. § 771.117(d).

39. "Charlotte's Web" is a children's novel by American author E.B. White about a pig named Wilbur who is saved from slaughter by an intelligent spider named Charlotte. The book was first published in 1952, with illustrations by Garth Williams. E.B. WHITE, CHARLOTTE'S WEB (Harper Collins 1952).

40. WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK 41 (W.G. Clark & W.A. Wright, eds., Oxford, Clarendon Press Series 2006) (1599-1601).

41. *Deuteronomy* 23:12

42. WILLIAM SHAKESPEARE, JULIUS CAESAR 186 (Horst Zander, ed., Routledge 2005) (1599-1601).

43. "Ol' Man River" is a song in the 1927 musical Show Boat with music by Jerome Kern and a book and lyrics by Oscar Hammerstein II. [Http://www.ibdb.com](http://www.ibdb.com) (last visited April 14, 2011).

44. The Edwards Aquifer provides the "springflow required for endangered species habitat, as well as recreational purposes and downstream uses in the Nueces, San Antonio, Guadalupe and San Marcos river basins." [Http://www.edwardsaquifer.org](http://www.edwardsaquifer.org) (last visited April 14, 2011).

45. San Antonio Water System crews on December 28, 2010, were cleaning up a sewer overflow near a lift station in far north San Antonio, located near Evans Road and U.S. 281. It appears that the fail-safe alarm system did not sound when debris clogged the pumps at the lift station, triggering a power shutdown, resulting in wastewater overflow into nearby Mudd Creek. The amount of the

overflow is estimated at 54,000 gallons. Mudd Creek is on the Edwards Aquifer Recharge Zone. [Http://www.saws.org.com](http://www.saws.org.com) (Lift Station Malfunction Causes Sewer Overflow) (last visited March 22, 2011); see also *id.* at August 20, 2010: Major Sewer Overflow in Northwest San Antonio (informing public that San Antonio Water System crews were cleaning up a 400,000 gallon sewer spill on the Edwards Aquifer contributing zone) (last visited March 22, 2011).

46. “The X-Files” is an American science fiction television series which embraced conspiracy theories centered on efforts to uncover the existence of extraterrestrial life. The show was a hit for Fox network and the program originally aired from September 10, 1993 to May 19, 2002. The X Files (Fox television broadcast 1993-2002).

47. The novel, “Hans Brinker, or the Silver Skates,” by American author Mary Mapes Dodge, takes place in the Netherlands during the early 19th Century. Although the novel is about a boy who entered an ice skating race, a small fictional story within the novel actually became well known in its own right. The story within the story, called “The Hero of Haarlem,” is of a Dutch boy who saves his country by putting his finger in a leaking dike. Despite the cold, the boy stays all night until the adults in his village find him. MARY MAPES DODGE, HANS BRINKER, OR THE SILVER SKATES 58-60 (Digireads.com Publishing 2009) (1865). The story of the Dutch boy has since been retold by several poets and children’s authors.

48. “The Wizard of Oz” is a 1939 American musical fantasy film based on the 1900 novel “The Wonderful Wizard of Oz” by Frank Baum. In the story, Dorothy and her dog Toto are caught in a tornado’s path and somehow end up in the Land of Oz. Dorothy meets some memorable friends and foes in her journey to meet the Wizard of Oz, who everyone says can help her return home and possibly grant her new friends their goals of a brain, heart and courage. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

49. In Greek mythology, Cassandra was a princess in Troy endowed with the gift of prophecy, but fated by Apollo never to be believed. WEBSTER’S II NEW RIVERSIDE UNIV. DICTIONARY 235 (1984). A Cassandra-type person is characterized by unheeded negativity and pessimism. *Id.* Pollyanna is the heroine of the novel of the same name written by Eleanor Porter in 1913. *Id.* at 935. A Pollyanna-type person is characterized by blind faith and foolish optimism. *Id.*

50. Matthew 6:28 (“Look at the lilies of the field and how they grow.”); Matthew 25:40 (“Whatever you did for one of the least of these brothers and sisters of mine, you did for me.”); Galatians 6:7 (“For whatsoever a man soweth, that shall he also reap.”); Luke 23:34 (“Jesus said, ‘Father, forgive them, for they know not what they do.’”)

51. From the First Inaugural Address of President Abraham Lincoln, March 4, 1861.

52. ARTHUR C. GUYTON, TEXTBOOK OF MEDICAL PHYSIOLOGY 274 (W.D. Saunders 1991).

53. Texas A&M Agricultural Extension Service, Response to “Ask the Expert” question, April 8, 2011 (on file at Chambers).

54. “The Circle of Life” is a song from Disney’s 1994 animated film “The Lion King,” composed by Elton John with lyrics by Tim Rice. ELTON JOHN, The Circle of Life, from THE LION KING (Walt Disney Productions 1994).

55. Jean Jacques Rousseau wrote that “each of us puts his person and all his power in common under the supreme direction of the general will, and in a body we receive each member as an indivisible part of the whole.” JEAN JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT, OR PRINCIPLES OF POLITICAL RIGHT (DU CONTRAT SOCIAL OU PRINCIPLES DU DROIT POLITIQUE) (Amsterdam Press 1762). The author believed that society and the government create a social contract by a process of mutual consent, agreeing to abide by certain rules and to accept duties to protect one another from violence, fraud, or negligence. Id.

56. The U.S. Climate Extremes Index published by the National Oceanic and Atmospheric Administration at the National Climate Data Center documents increasing extreme weather-related events including floods, droughts, blizzards, fires, hurricanes, mud slides, earthquakes, and tsunamis, during the last ten years. <http://www.ncdc.noaa.gov/extremes/cei/index/html> (last visited March 30, 2011). In a single day of wild weather on April 10, 2011, a tornado flattened the town of Mapleton, Iowa; a lightning strike sent nine to the hospital in Raleigh, North Carolina; and flood waters devastated Fargo, North Carolina, as the Red River crested for the third time in so many years. See <http://www.cpc.ncep.noaa.gov>. (last visited April 11, 2011). On April 9, 2011, the Texas Forest Service announced that wildfire weather conditions “could shape up to be among the worst in Texas history.” <http://www.txforestservicetamu.edu/mail/default.aspx> (last visited April 11, 2011). The next day, west Texas was ravaged by nine separate unconstrained wildfires fueled by pervasive drought conditions and winds gusting up to 50 m.p.h. Id. As of April 11, 2011, with raging fires in Fort Davis and the surrounding area expected to last several weeks, the Texas Forest Service announced it is establishing a regional office in Midland to battle outbreaks which are predicted to occur until extreme drought conditions are broken. Id. A furious storm system which began on April 14, 2011, brought over 62 tornados, along with flash floods and hail, claiming at least 43 lives in Arkansas, southeast Oklahoma and North Carolina, while drought and fires continued in Texas and Oklahoma. <http://www.ncdc.noaa.gov/stories2011/20110317.html> (last visited April 19, 2011). Meanwhile, widespread and record setting floods occurred from the North Central United States through the Midwest and the Northeast. Id.

57. JAMES TAYLOR, FIRE AND RAIN (Apple Records 1976).

58. <http://txforestservicetamu.edu> (last visited April 18, 2011).

59. <http://npr.org/templates/story> (quoting Austin Fire Department spokesman Chayer Smith) (last visited April 18, 2011).

60. Center for Biological Diversity v. United States Fish & Wildlife Serv., 202 F. Supp. 2d 594, 663 (W.D. Tex. 2002) (Biery, J.).

61. Obituary for my daughters’ favorite federal judge when the inevitable probably will happen.

62. “Beam me up, Scotty!” is a catch phrase which made its way into pop culture from the science fiction television series Star Trek. It comes from the command Captain Kirk (played by William Shatner) gives his chief engineer (played by James Doohan), Montgomery “Scotty” Scott, when he needs to be transported back to the Starship Enterprise. JAMES DOOHAN, BEAM ME UP, SCOTTY: STAR TREK’S SCOTTY - IN HIS OWN WORDS (Pocket Books 1996).

63. “Happy Trails” by Dale Evans Rogers was the theme song for the 1940s and 1950s radio program and the 1950s television show starring Roy Rogers and Dale Evans Rogers. The song, which begins “Happy trails to you” was always sung over the end credits of the program. DALE EVANS ROGERS, HAPPY TRAILS (RCA Victor Records 1952); <http://www.royrogers.com/> (last visited March 30, 2011).