

**THE ARANSAS PROJECT v.
BRYAN SHAW, et al.**

Case No. 2:10-cv-075

**U.S. District Court, Southern Division of Texas,
Corpus Christi Division**

Background on the Whooping Cranes

- “AWB” whooping crane flock
- winter home: Aransas National Wildlife Refuge in Texas
- approximately 9,000 hectares of salt flats and adjacent islands
- freshwater inflows: the San Antonio and the Guadalupe Rivers
- AWB flock population: 270 in 2008-2009; 264 in 2009-2010

Background on TCEQ's Surface Water Rights Authority

- State surface water diversion: usually need permit or a prior certificate of adjudication
- “First in time, first in right” priority system
- Tools for bay inflows in water rights permits:
 - environmental flow restrictions on diversions of water
 - pass-through requirements for reservoirs
 - special conditions
- August 2012: environmental flow standards for new or amended permits in the Basins (Chapter 298 rules)
- South Texas Watermaster Program includes the Basins

The TAP Lawsuit

- “The Aransas Project” or “TAP” formed 2009
- March 10, 2010: TAP sued five TCEQ officials
 - violated Endangered Species Act
 - “authorizing” others to withdraw water
 - “take” of the protected whooping cranes
- Permitting water rights = death of 23 whooping cranes in 2008-2009
- No relief sought against water rights holders
- State violates Endangered Species Act by issuing permits

The Hearing and Opinion

- Eight day bench trial in December 2011
- March 11, 2013: “Memorandum Opinion and Verdict of the Court”
- Adopted all of TAP’s assertions:
 - water diversions reduced freshwater inflows
 - increase in salinity reduces blue crabs and wolfberries
 - food stress caused crane deaths in 2008-2009
- Issuance of water rights permits make TCEQ liable for a “take”
- Enjoins TCEQ from approving new water permits affecting the Basin
- Orders TCEQ to seek Incidental Take Permit via Habitat Conservation Plan
- Grants TAP recovery of attorney’s and expert fees

The Judge's language regarding the Whooping Cranes

- Opinion uses demonstrative language for whooping cranes
- “In the annals of conservation, the return of the whooping crane from the brink of extinction is one of the most fabled stories”
- “these remarkable birds – the tallest in North America and the rarest species of crane in the world”
- “the ‘whoopers’ are still at risk, as development and environmental issues continue to threaten their habitat”

The Judge finds expansive authority of the TCEQ for securing bay inflows

- Expansive view of how TCEQ can manage surface waters
- Authority to modify existing water rights and deny new permits
- TCEQ failed to:
 - monitor permitted water withdrawals
 - exercise enforcement authority over permits
 - use special permit conditions
 - require inventory of riparian users
- “Across the board” authority during droughts
- Texas Water Code § 11.053: new express authority to adjust water diversions for drought
- Threatening endangered species could constitute “emergency”

The Court rejects abstention from jurisdiction

- No “*Burford* abstention”
- No deference to state's regulatory and judicial schemes for unsettled state law
- Senate Bill 3 does not address crane concerns
- Federal Court will not disrupt state E-flow process
- Senate Bill 3 only analyzes flows without enforcement to maintain recommended inflows

The Opinion's criticism of Senate Bill 3

- Senate Bill 3 may hopefully provide basin information
- May eventually promote actions to secure recommended inflow
- No attempt to *ensure* that any E-flow amounts remain in basins
- Bays have “to the extent practicable” status
- TCEQ may suspend inflows to bays and estuaries during drought
- Only applies to *new* permits or increases after September 2007

The Judge's witness credibility determinations

- Enormous difference in witness credibility
- TAP's experts: "world renowned in their respective field"
- Grouping TAP's witnesses as "opinions of the crane experts"
- GBRA's witnesses: "alarming trend of limited experience"
- Defense experts: "insignificant knowledge of whooping cranes."

The Judge's eight step chain of causation to find a "take"

- 1) TCEQ grants water rights permits on San Antonio and Guadalupe Rivers;
- 2) Water rights holders actually diverted water, which lowered inflows into Bay;
- 3) Low freshwater caused higher salinities in the Refuge;
- 4) Higher salinities caused diminished abundance of blue crabs and wolfberries;
- 5) Diminished blue crabs and wolfberries caused cranes to leave Refuge areas;
- 6) Limited food and increased upland movements caused food stresses in the cranes;
- 7) At least 23 cranes actually died in 2008-2009; and
- 8) Food stresses cause of the deaths of 23 cranes.

Rejected Defendants' evidence concerning causation

- Rejected Defendants' evidence:
 - drought, tides, temperature, and commercial crabbing affect freshwater inflows, salinity, and abundance of blue crabs and wolfberries
 - supplemental crane feeding stations, natural and manmade conditions affect cranes' behavior and location
- Judge appears to ignore Defendants' testimony for witness credibility concerns

The convincing mortality evidence of whooping crane deaths

- Judge agrees with TAP that 23 whooping cranes died in 2008-2009
- Four bird remains were recovered
- Basis for 23 deaths: US Fish & Wildlife aerial flyover recordings
- If aerial spotter did not see a particular bird on two successive flights = crane death
- Rejected Defendants' challenges to data that equated non-detection = death
- Characterizes Defense witnesses as having lack of crane experience and its basic biology
- Accepts that food stress caused all 23 crane deaths

The rejection of re-opening of the record

- “Aransas-Wood Buffalo Crane Abundance Survey (2011–2012)” criticized the previous aerial-surveys
- Survey written after the bench trial
- Survey done by the successor to TAP’s US Fish & Wildlife employee witness
- October 12, 2012: Defendants filed motion to reopen record
- Denial of the Motion *without a hearing*
- Refused to admit the Survey into evidence

The Opinion enjoins future TCEQ actions from the past “take”

- TAP pursued past “take” declaration and future injunctive relief
- Endangered Species Act allows injunctive relief with a “relaxed standard”
- Injunction prevents new permits until "sufficient assurances" of no harm to cranes
- Injunction could redress freshwater inflow concerns
- Presumes the eight step causation chain will always exist

The Court mandates one forced remedy

- TCEQ required to apply for an Incidental Take Permit with US Fish & Wildlife
- TCEQ must apply for an Incidental Take Permit and develop a Habitat Conservation Plan within 30 days
- Habitat Conservation Plan developed under Federal Court supervision
- Require higher inflow volume with Bay salinity monitoring

Actions since the Opinion

- District Court denied the Defendants' motion for stay
- District Court amended injunction to allow permits necessary to protect public health and safety
- Defendants and Intervenors Defendants filed notices of appeal and motions for emergency stay
- Fifth Circuit Court of Appeals granted emergency stay of the injunction / ordered expedited briefing
- TAP seeks \$3.3 million in attorneys' fees with the District Court
- Appellate case set for oral argument in August 2013.

Final Note

- 2012-2013 winter survey: AWB flock population = 279
- 12 more than prior year's 267 cranes
- Despite ongoing “takings” risks and multi-year drought issues, AWB flock has expanded