

## Whooping Cranes Come First? How the Endangered Species Act Endangers the State Water Supply

by **Mario Loyola**

Policy Analyst, Armstrong Center for Energy & Environment and Director, Center for Tenth Amendment Studies

### Key Points

- New litigation under the Endangered Species Act endangers traditional state authority over surface water allocations, risks extinguishing existing property rights, and could cut off a vital source of water to communities in central Texas.
- The litigation shows how environmental laws are used to expand the power of the federal government while eroding the constitutional foundations of federalism.

### Introduction

In March 2010, the Aransas Project<sup>1</sup> filed a complaint<sup>2</sup> in federal district court against officials of the Texas Commission on Environmental Quality (TCEQ) alleging a “take” of whooping cranes under the Endangered Species Act (ESA).<sup>3</sup> The plaintiff—an environmental advocacy group—is trying to subject the allocation of much of the water in the Guadalupe and San Antonio rivers to the alleged needs of a small population of whooping cranes that winters in the Aransas National Wildlife Refuge, on the Gulf coast.

If this effort succeeds, it would significantly impair the state’s traditional authority over the allocation of Texas surface waters, effectively undermining the Congressional policy stated in the Clean Water Act, which affirms “the authority of each state to allocate quantities of water within its jurisdiction.” It would also significantly reduce the water available to those communities, farmers, and industries that depend upon the Guadalupe and San Antonio rivers. The litigation is currently in the pleadings stage and could soon proceed to discovery, with a trial tentatively scheduled for March 2011.

### Background

The lawsuit was triggered by what the Aransas Project has called an “unprecedented mortality event” in the whooping crane population that winters in and around the Aransas National Wildlife Refuge (ANWR) northeast of Corpus Christi, Texas on the Gulf coast, during the winter of 2008-09, following a period of severe drought in Texas. The plaintiff alleges that around 20 percent of the flock was lost during that time, with reproduction rates cut in half.

(The whooping cranes have been designated “endangered” since 1970, and the largest self-sustaining population numbers just a few hundred that nests in Canada and winters in and around the ANWR.)

The plaintiff points the finger for the alleged loss not at the drought but at decisions made by TCEQ. “These deaths directly reflect the lack of sufficient freshwater flowing to San Antonio-Aransas Bay system,” states the complaint. It goes on to allege that elevated levels of salinity were due to the defendants’ failure to adjust water allocations for recent periods of drought. The plaintiff alleges that TCEQ has “harmed and harassed” the whooping cranes, thereby violating the “take” prohibition in Section 9 of the ESA.

The plaintiff is seeking to compel TCEQ officials to protect the wintering grounds of the whooping crane. It wants TCEQ to come up with a Habitat Conservation Plan subject to federal enforcement under ESA Sec. 10; do an inventory of water withdrawals from the Guadalupe and San Antonio rivers (which flow into the San Antonio-Aransas Bay system); and set up a process to reduce freshwater withdrawals during times of drought and low flow in order to maintain enough freshwater inflows into the bay system to prevent harm to the whooping crane.

These steps could involve disrupting the already-allocated and vested water rights in the Guadalupe and San Antonio river basin, and could block the future issuance of otherwise legal water rights, such as Guadalupe-Blanco River Authority’s (GBRA) application for 180,000 acre-feet of water. The plaintiff’s notice

of intent to sue<sup>4</sup> says that the Project will seek a federal Habitat Conservation Plan that includes provisions to control the allocation of existing water right permits so that a minimum of 1.3 million acre-feet/yr flows past the last gage (at Tivoli, near the mouth of the river). By comparison, the Tivoli gage is currently reading a flow rate of 1280 cubic feet/second, which at an annualized rate is less than 930,000 acre-feet/yr. GBRA's diversion rights amount to 265,501 acre-feet/yr. In other words, the plaintiff seeks to control an amount of water that is greater than the current flow of the river plus all of the water GBRA diverts to its municipal and private clients.

Other cases around the country show that the danger posed to Texas by this litigation is far from trivial. In California's Central Valley, federal rules under the ESA mandate that as much as 500,000 acre feet of water be devoted to maintaining the habitat of the delta smelt, rather than reserved for municipalities and agriculture. Unemployment in the Central Valley now runs 20-40 percent, and 250,000 acres of the most productive farmland in the U.S. lay fallow and eroded.

## Legal Issues

The Aransas litigation is still in the pleadings stage. (Two parties, GBRA and the Texas Chemical Council, have been allowed to intervene on the defense side.) The defendants' and intervenors' motions to dismiss the complaint were recently denied. After the end of a stay ordered by the Fifth Circuit Court of Appeals in collateral appeals filed by entities that tried to intervene and were denied, the defendants and intervenors are expected to file their answers to the complaint. Several months of discovery are expected to follow, with the trial set to start in March 2011.

The most potentially far-reaching implications of the Aransas litigation lie in the increasingly high-stakes contest between state and federal governments for control of environmental regulation. Federal environmental law directly controls waste disposal, air quality, and water *quality* but heretofore has respected state authority over the allocation of water *quantities*—which almost invariably take the form of property rights. The defendants have several defenses at their disposal, ranging from procedural to statutory and constitutional.

### *Do the Plaintiffs Have Standing to Sue?*

The intervenors point<sup>5</sup> to evidence that the whooping crane population is already recovering. They further note that the state is already embarked on planning to safeguard instream

flows and freshwater inflows, thus habitats such as the ANWR. Under 1997 state legislation, the South Texas Regional Water Planning Group is at work. Under the state legislature's Senate Bill 3, passed in 2007, an "E-flows" process is under way, that will result in set-asides of water for the environment. The Edwards Aquifer Recovery Implementation Program and the TCEQ water rights permitting process both lead to better planning and greater environmental protection. Since 1985, the state law has allowed all new Texas surface water rights to include conditions to protect freshwater inflows.

The defendants and intervenors rely on the "abstention doctrine" articulated by the U.S. Supreme Court in the 1943 case of *Burford vs. Sun Oil Co.*<sup>6</sup> to argue that the case should be dismissed altogether. Under *Burford*, federal courts must normally abstain from exercising overlapping "federal question" jurisdiction in cases where a comprehensive state regulatory scheme exists, is necessary to regulate the matter at issue, and is subject to adequate judicial review under state procedures. The Fifth Circuit Court of Appeals has already held that the *Burford* doctrine is applicable to a similar case under the ESA.<sup>7</sup>

### *State Water Rights and the Federal Commerce Power*

The Clean Water Act appears to give the states preeminent authority over water rights, and though the ESA makes similar expressions, no court has held that the Clean Water Act statements of policy—or any aspect of the U.S. Constitution—trump the specific prohibitions contained in Sec. 9 of the ESA, which are the law of the land under the Supremacy Clause. As one treatise puts it, "Although to encourage passage of the legislation Congress apparently perceived the need to include such policy language accommodating state water law, in practice the authority of the states over water has been superseded by the specific commands in the ESA and CWA."<sup>8</sup>

No federal court has ruled that the requirements of the ESA exceed the federal commerce power, or any other enumerated power. One case ruled that federal regulatory action to enforce the ESA against a state agency by requiring it to deny water to certain private citizens with a pre-existing contractual right to the water constituted a "taking" without just compensation, in violation of the 5th Amendment. But subsequent cases, including a Supreme Court decision,<sup>9</sup> have cast considerable doubt on the validity of this theory.

### *Interpreting the Statutory Language*

A review of cases from across the country suggests that TCEQ is likely to find the most protection from the ESA within the Act itself—by convincing the court that its management of freshwater flows did not constitute a “take” pursuant to Sec. 9. One argument available to the defendants arises from the plaintiff’s broad use of the “take” prohibition under Section 9 of the ESA. They can argue that in order to prevail on an ESA Sec. 9 “take” claim, a plaintiff must demonstrate that a particular whooping crane has been harassed, harmed, etc., directly by the defendants’ action.

Where courts have ruled against state water authorities in Sec. 9 cases, the harm done to a listed species was more directly attributable to the state action. In *U.S. v. Glenn-Colusa Irrigation District*,<sup>10</sup> a local California water district was pumping water for irrigation purposes from a river during the river’s peak winter-run Chinook salmon downstream migration. The evidence showed that the force of the water district’s pumps caused the fish to be sucked onto the pump’s fish screens and killed in large numbers, resulting in a 97 percent reduction in the fish’s population. The district court ruled that the water district was guilty of a Sec. 9 “take.”

One line of cases suggests that state authorities can be liable for the actions of those they regulate. The leading case in favor of this proposition is *Strahan v. Coxe*,<sup>11</sup> in which the First Circuit Court of Appeals ruled that state fisheries regulators were guilty of violating Sec. 9 of the ESA by permitting fisherman to use certain equipment that was killing protected whales. The *Coxe* decision has been criticized as wrongly decided, and the 5th Circuit has yet to rule on this theory of “causation.” But *Coxe* should be distinguished from the present case because, first, unlike the normal regulatory context, here the state has little power to disturb water rights that have already been allocated except through eminent domain, and, second, any injury to whooping cranes here was caused not by third parties but by nature itself.

Where injury to wildlife results from acts of nature, rather than human agency, a Sec. 9 “take” is far less likely to be found. The same California district court that decided *Glenn-Colusa* ruled in another case (*Pacific Shores v. U.S. Army Corps of Engineers*)<sup>12</sup> that the cause of the injury to a listed species stemmed from unusual rainfall into lakes that dangerously raised their water level and created a risk of area flooding, rather than subsequent protective action permitted by the Army Corps of

Engineers to breach sand bars between the lakes and the Pacific Ocean in order to cause a controlled flood. (The plaintiff in *Pacific Shores* complained that the Corps of Engineers was waiting too long to cause the controlled flood, and sought an injunction to force the Corps to breach the sand bars when the lake water reached a lesser depth).

Similarly a federal district court in Alabama ruled (*Alabama v. U.S. Army Corps of Engineers*)<sup>13</sup> that the plaintiffs had failed to prove a “necessary causal link” between federal regulatory authorities and the harm to a protected species of mussels, where the lack of sufficient water flow to the mussels’ habitat was caused by severe drought and sedimentation at the entrance to the mussels’ habitat. Deferring to the U.S. Fish and Wildlife Service’s expertise, the court noted that the defendants had already established measures to protect the mussels in an Interim Operations Plan and were not required to provide any protection beyond the “protection that nature provides.”

### *Other Constitutional Issues*

Beyond the issue of statutory construction raised by the ESA’s “take” prohibition, there is at least one constitutional theory that the defendants can advance. It is well accepted that state and local authorities are subject to the prohibitions federal law imposes on everyone, and TCEQ would likely admit that it cannot legally “take” whooping cranes. But the Aransas Project arguably wants TCEQ to do much more than that. It wants TCEQ to alter its water management in order to mitigate the effects of drought on the whooping crane population. That arguably turns TCEQ into an instrumentality of the federal government for purposes of implementing the ESA, a violation of the “anti-commandeering” doctrine articulated in cases such as *Printz vs. U.S.*<sup>14</sup> In *Printz*, the Supreme Court struck down a federal requirement that state police conduct background checks on gun purchasers, because it impermissibly imposed a responsibility to enforce federal law on state authorities.

Part of the Court’s reasoning in *Printz* had to do with inequity of allowing Congress to pass laws and then require that states pay the costs of implementation. That concern is certainly implicated here. The only way for the plaintiff to prevail is for the district court to rule that the state of Texas must refuse to fulfill its obligations to holders of vested water rights, which would be an unconstitutional taking of private property for public use unless the state provides compensation to the holders of

those water rights. If the state were to pay compensation, it would be bearing the cost of implementing federal policy.

One major problem with the ESA is that the Secretary of Interior is delegated the power to define the ESA's key terms (e.g., "harm") and has done so broadly. In one seminal case (*Palila v. Hawaii*) the 9th Circuit ruled that according to the Secretary's definition, "harm" included not just physical injury, but also injury caused by any impairment of essential behavior patterns such as breeding, feeding, or sheltering, that arise from habitat modification as a consequence of state action.<sup>15</sup> That definition is elastic enough to make this a close case. For this reason, and because of the federal judiciary's failure to keep the federal commerce power within meaningful constitutional limits, the ESA will remain a threat to state water authorities beyond the current litigation.

## Conclusion

The stakes of the Aransas litigation are high. If the plaintiff succeeds in forcing TCEQ to guarantee a minimum freshwater inflow at the mouth of the Guadalupe River, it could upend the whole system of water rights in the Guadalupe-Blanco River Basin. GBRA is statutorily charged with managing

all the water resources within a 10-county district. It contracts with over 115 municipal, industrial, and agricultural users to provide water and services including hydroelectric generation and wastewater treatment. It provides water to San Marcos, Blanco, Seguin, Cibolo, Port Lavaca, and San Antonio. It holds water rights from TCEQ to divert and use 175,501 acre-feet/yr from the Guadalupe River (run-of-river) and 90,000 acre-feet/yr from the Canyon Reservoir, all of which would likely be affected if the Aransas Project prevails.

Beyond the potential local consequences, there is a national and even constitutional dimension to this litigation. Intrusive environmental laws undermine important constitutional constraints necessary to keep the federal government one of limited enumerated powers. Though the threat to state and individual rights has been mounting for decades, the Obama administration has been particularly aggressive in attacking state autonomy through heavy-handed environmental regulatory actions. If the Aransas Project prevails, another barrier to federal encroachment—namely the traditional state authority over water allocation—will suffer potentially irreparable harm, with effects that could be felt across the country. ★

## Endnotes

- <sup>1</sup> The Aransas Project was formed in December 2009 to advocate for preservation of the Aransas habitat from the "mismanagement" of the Guadalupe River Basin Authority, and in particular to pursue the subject of the present litigation. Its membership includes Aransas County and the city of Rockport, the local Republican and Democratic Party organizations, and dozens of environmental groups and area businesses, as well as hundreds of area residents.
- <sup>2</sup> *Aransas Project v. Shaw*, No. 2:10-cv-00075 (S.D. Texas, filed March 10, 2010).
- <sup>3</sup> 16 U.S.C. § 1531 *et seq.*
- <sup>4</sup> Dated December 7, 2009, and attached as Exhibit 1 to the complaint.
- <sup>5</sup> See, e.g., Defendant-Intervenor Guadalupe-Blanco River Authority's Motion to Dismiss and Memorandum of Law in Support. [Document 43].
- <sup>6</sup> 319 U.S. 315 (1943).
- <sup>7</sup> *Sierra Club vs. City of San Antonio*, 112 F.3d 789 (1997) (holding that given the finite water in the Edwards aquifer, the need for uniform regulation is paramount, warranting federal abstention).
- <sup>8</sup> James Rasband, *Natural Resources Law and Policy* 872 (2009).
- <sup>9</sup> *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).
- <sup>10</sup> 788 F.Supp. 1126 (E.D. Cal. 1992).
- <sup>11</sup> 127 F.3d 155 (1st Cir. 1997).
- <sup>12</sup> *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 538 F.Supp. 2d 242 (E.D. Cal. 2008).
- <sup>13</sup> *Alabama v. U.S. Army Corps of Eng'rs*, 441 F.Supp 2d 1123, 1134 (N.D. Ala. 2006).
- <sup>14</sup> 521 U.S. 898 (1997).
- <sup>15</sup> *Palila v. Hawaii Dept. of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988). See also, *Bobbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995) (upholding Dept. of Interior regulations that broadly define "take" in ESA).

