

# JOSIAH NEELEY: Water decision endangers state sovereignty

By Josiah Neeley

Texas Public Policy Foundation | Posted: Friday, August 9, 2013 11:02 pm

The fate of Texas' water supply may soon be decided in New Orleans. On Aug. 8, the U.S. Fifth Circuit Court of Appeals heard oral arguments in *The Aransas Project v. Shaw*, a case with potentially profound implications for Texas' ability to meet its growing water needs.

*Shaw* involves a claim brought by a group of private environmentalists that water management policies by the Texas Commission on Environmental Quality had resulted in the deaths of 23 federally protected whooping cranes in the Aransas Bay area.

In March, federal district court judge Janis Jack ruled that TCEQ's action had violated the Endangered Species Act, and ordered an immediate halt to new water permitting in the Guadalupe and San Antonio River basins. Her aggressive ruling dictated an amount of freshwater inflows to the Bay that would require curtailing long-held water rights. The Fifth Circuit quickly granted a stay of the district court's decision pending appeal, but the court's order now hangs like the Sword of Damocles over Texas' long term water planning. If the district court's decision is upheld, it would moot most of the water projects listed in Region L of the State Water Plan (which includes San Antonio). And an adverse decision would raise the prospect that other endangered species actions could thwart water projects throughout the state.

The factual basis of the district court's decision is scientifically questionable. Of the 23 claimed bird deaths at issue in the case, only four were based on discovered carcasses. The other 19 deaths were estimated by comparing bird sightings in 2008-2009 to numbers from previous years, and assuming that any reduction was due to death. Missing, however, is not the same as dead, and 17 of the supposedly dead birds reappeared the following year. Such methodological flaws may explain why the U.S. Fish and Wildlife Service had not determined that the whooping cranes' habitat had been taken in violation of the ESA and why the Service, most unusually, was not involved in this litigation against the state of Texas.

Even in the few cases of verified deaths, it is not clear that TCEQ's water management policies are truly responsible. The court's decision relied on a long chain of causation, whereby TCEQ policies affected a population of crabs which the whooping cranes used as a food source. Yet according to a report by Dr. Lee Wilson, published by the Texas Public Policy Foundation, this connection is at best questionable. To the extent that a lack of water harmed the crane population, this was due more to extreme drought conditions in the Crane's habitat than to any TCEQ action.

Perhaps what is most striking about the case are the implications for federalism. The district

court's decision sunders the state's long-recognized authority to allocate the water within its borders for beneficial human use - without federal interference. Such a primary state authority is recognized in most federal laws but not in the ESA.

The Constitution, however, does recognize protections for state authority, protections that the court has largely disregarded in this case. In *Printz v. United States*, the Supreme Court held that it is unconstitutional for the federal government to "commandeer" state officials by requiring them to enforce federal law. The district court's decision, however, requires exactly that. If not overturned, Texas would be forced to manage the state water according to federal dictates, rather than according to state law. This represents a clear violation of the protections for state sovereignty contained in the Tenth Amendment.

Protecting endangered species like the whooping crane is important. And in fact the crane population and occupied habitat around Aransas Bay is increasing. Long experience, however, has shown that government efforts to protect endangered species only work when they have the support of localities, and land owners. By pitting state and federal government against each other, the district court's decision almost ensures that the only result will be to harm Texans without appreciably helping the endangered whooping cranes. That's unfortunate, because efforts to protect the whooping crane need not and should not endanger the continued prosperity of Texas.

Josiah Neeley is a Policy Analyst with the Armstrong Center for Energy and the Environment at the Texas Public Policy Foundation, a non-profit, free-market research institute based in Austin.