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White: Ruling puts birds ahead of people

By Kathleen Hartnett White

Texas Public Policy Foundation

As Texas continues to endure widespread drought, a new man-made water shortage is percolating through the federal courts. An unusually, if not uniquely aggressive court ruling under the Endangered Species Act now collides with a vital state authority and the Fifth, 10th and 11th amendments of the U.S. Constitution. This decision elevates the needs of the Whooping Cranes above all Texans need for water.

On March 11, the federal district court in Corpus Christi ruled that Texas had violated the federal law by causing harm to the endangered whooping cranes who winter in San Antonio bay and the estuary of the Guadalupe River basin. If this ruling survives appeal, our state's already formidable effort to increase available water supply becomes, by orders of magnitude, more challenging. Thankfully, the Fifth Circuit Court of Appeals in New Orleans on March 25 granted that state's request to stay the district court's order pending complete appellate review.

The 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.

According to Judge Janis Jack, the state's past actions and inactions reduced freshwater inflows and thus reduced the main food source of the cranes. Rare among ESA rulings, the judge held that Texas' implementation of state water law made the state liable for the deaths of — some 23 whooping cranes during the severe drought of 2008 and 2009.

The ruling in Corpus Christi ordered the Texas Commission on Environmental Quality to develop a plan, to be approved and enforced by the federal government, which will guarantee enough fresh water inflows for the cranes' habitat before all other human water users.

The most disturbing aspect of this court ruling is that it rewrites Texas water law in contradiction to consistent Texas case law. Judge Jack's ruling not only proscribes decisions about new water rights in the Guadalupe River basin but also would require curtailing existing water rights, the exercise of which would be otherwise lawful.

The order of this federal court could force the state environmental agency to violate not only a legislated duty but also constitutional one. The judges finds TCEQ liable for harming the whooping cranes because the agency did not use vague powers to deny the exercise of vested property rights to divert and use water. So compliance with the ESA involves forcing state agencies to "take" private rights in water rather than to uphold those rights? The first sentence in chapter 11 of the Water Code states: "Nothing in this chapter affects vested property rights to use water." Prohibiting a water rights holder's diversion of water from the river in order to dedicate that water to fresh water inflows for the whooping crane habitat would amount to a compensable taking of private property guaranteed by the Texas and U.S. constitutions.

If not overturned, Texas would be forced to manage the state water in ways that fundamentally contradict the scheme created by the Texas Legislature and reinforced by Texas courts over the past century. This implicates the 10th Amendment's

prohibition on federal commandeering of state authority. Most federal courts give broad deference to a state agency's interpretation of the statutes that the agency is required to uphold. TCEQ can only act under the authority delegated to it by the Legislature. TCEQ cannot be liable for failing to act on an authority it does not have.

Texas water law already requires protection of freshwater inflows to bays and estuaries in a variety of ways. And the state is well under way in the development of Environmental Flow Standards applicable to new water rights, which would provide water to protect the environment. In contrast to the ESA, the Texas programs aim to balance the needs of the environment and human beings as well as to uphold vested property rights. The ESA allows no parity. The needs of the species trump human needs.

There must be a better way to support the unique whooping crane population in Texas. Mandates under the ESA have not had a stellar record. The list of endangered species now approaches 1,400 while only 24 species have been officially "recovered" and removed from the list. Texas farmers are already watching their fields shrivel. The absolute terms of the ESA not only pose a daunting challenge to state authority, they harm real people. The ESA needs to incorporate balance and to address basic human need.

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- Posted by MissClaire at 7:46 a.m. Apr. 1, 2013
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The federal courts did not rule against all of the people of Texas, but against a powerful and wealthy minority - developers.

I'm sure the rice farmers who depend on a greater release of water are happy about the situation, but people who become wealthy enough to support the TPPF and Rick Perry's campaigns see their profit margins slashed. It will be much more difficult to pave over Central Texas. The average Texan will undoubtedly pay more for water, as we all should. And it's long past time for some serious conservation efforts to reduce the demand for water.

As my daddy predicted 40 years ago, water is the new oil in Texas.

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