



Ensuring Guadalupe River Flows
from the Hill Country to the Coast

What's on TAP

Updates from The Aransas Project Jan 13, 2015

Update on Whooping Crane Litigation

January 13, 2015

This update is intended for groups and individuals who are members of The Aransas Project (TAP). As you probably have heard, Judge Jack's wonderful decision in TAP v. Shaw, et al was overturned by the 5th Circuit Court of Appeals. We sought a Motion for Rehearing from the full 5th Circuit and were turned down by an 11-4 vote. However, Judge Prado wrote a strong dissent wherein he laid out a blueprint for an appeal to the U.S. Supreme Court. I am writing to update our situation with regard to a Supreme Court appeal and to ask your help and support.

Appeal to the U.S. Supreme Court

We do not have a right to be heard by the U.S. Supreme Court. Instead, we have the right to petition the court to hear our case. This is called a Petition for Certiorari, or the "cert petition." We have 90 days from mid-December to file our cert petition. The board of directors of TAP has authorized the legal team to prepare this petition and work is underway.

This appeal is neither easy nor certain. We have to identify a reason for the Supreme Court to grant our petition. As a general proposition, this court is concerned about legal issues and less so about the outcome of a particular dispute. As they view their job, they can only hear a certain number of cases, and they try to address legal questions which, if resolved, will clarify applicable law throughout the United States. The most common case taken by the U.S. Supreme Court is one where different Courts of Appeal across the United States are in conflict on the interpretation of a law. The court also takes cases that involve the

U.S. Constitution and cases that involve a failure of a court of appeals to follow Supreme Court rules.

In the dissent written by Judge Prado, he identified that, in his opinion, the decision issued by the three judge panel (Judges Jones, Smith and Garza) violated rules of appellate review set by the Supreme Court. In particular, Judge Prado felt that the three-judge panel substituted its opinion regarding fact findings in place of the trial court's fact findings. According to the rules, the court of appeals is supposed to accept the trial court's factual determinations, unless there is clear error, and mostly restrict its review to points of law.

In our case, the panel stated that they were correcting an "error of law" and then proceeded to rewrite Judge Jack's fact findings and findings of witness credibility. Judge Prado felt that this was legal error and pointed out that the 5th Circuit has been corrected for this same error by the U.S. Supreme Court in the past. We are planning to make this argument of procedural error a central aspect of our appeal.

We are also exploring types of substantive challenges that we will include in our petition. For example, there are two issues that may be appropriate for this appeal, one addressing the issue of regulator liability under the federal Endangered Species Act and the other addressing the issue of the 5th Circuit refusing to follow the clear wording of the definition of "harm" under the regulations implementing the ESA.

Your support is needed for this appeal

This is not an easy appeal. It will take time and effort from many dedicated lawyers. The lead will be taken by Charles Irvine and Mary Conner of the firm of Irvine and Conner. They were part of the original TAP litigation team. I will remain as lead counsel but will not take primary writing responsibility. We will seek assistance from David Kahne of Houston, a volunteer Washington D.C. law firm and one or more law professors. And this will require money.

At this point in time, I need to ask any and all of you for financial support for this effort. My estimate is that we will need at least \$50,000 for this effort. Printing and filing the petition with all requisite copies alone will cost at least \$5000 and we will likely pay two more attorneys to assist in issue development and review.

The bottom line is that we need to raise money now. The fees for all litigation and appeals to date exceeded \$3 million, but we will endeavor to use \$50,000 to cover the costs of a Supreme Court review. The family that earlier generously supported

TAP has ended their financial support of the TAP litigation, and we are continually grateful for the help and assistance to this point in time. Thus, we need to raise some money now from groups and individuals that care about this action.

Please let us hear back from you with pledges and checks. You can send your check, and made out to, The Aransas Project, c/o BlackburnCarter, 4709 Austin St., Houston, Texas 77004, [donate online](#), or you can email your pledge or commitment to make a donation to jbb@blackburncarter.com. TAP is a 501(c)(3) non-profit and donations are tax deductible.

Any help of any type is appreciated. We have an initial commitment from the Matagorda Bay Foundation and are hopeful of support from one or more foundations.

As a final note, I want to thank all of you for your support so far. We could not be where we are without the members that gave us standing for the litigation and support for the effort.

[Please feel free to forward this on to a friend.](#)

Jim Blackburn

LEAD COUNSEL, THE ARANSAS PROJECT

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