

CASE NO. 13-40317

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IN THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

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THE ARANSAS PROJECT, Plaintiff-Appellee  
v.  
BRYAN SHAW, in his Official Capacity as Chairman of the Texas Commission  
on Environmental Quality, et al, Defendants-Appellants

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On Appeal from the United States District Court for the  
Southern District of Texas, Corpus Christi Division  
Case No. 2:10-CV-75

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***AMICUS CURIAE* BRIEF OF NATURE CANADA IN SUPPORT OF  
APPELLEE THE ARANSAS PROJECT**

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## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for Nature Canada certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 may have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Appellee The Aransas Project (“TAP”) is Plaintiff-Appellee.
2. James B. Blackburn, Jr., Charles W. Irvine, and Mary B. Conner of Blackburn Carter, P.C. representing Appellee TAP.
3. Jeffery Mundy of the Mundy Firm, PLLC, representing Appellee TAP.
4. David A. Kahne of the Law Office of David A. Kahne representing Appellee TAP.
5. Patrick Waites of Johnson, Deluca, Kurisky & Gould, P.C. representing Appellee TAP.
6. Appellant Bryan Shaw, also referred to as a State Official Defendant at the trial court, is the Chairman of the Texas Commission on Environmental Quality.
7. Appellant Carlos Rubinstein, also referred to as a State Official Defendant at the trial court, is a Commissioner of the Texas Commission on Environmental Quality.
8. Appellant Toby Baker, also referred to as a State Official Defendant at the trial court, is a Commissioner of the Texas Commission on Environmental Quality. Mr. Baker replaced Commissioner Buddy Garcia.
9. Appellant Mark Vickery, also referred to as a State Official Defendant at the trial court, was the Executive Director of the Texas Commission on Environmental Quality. Mr. Vickery has since retired and been replaced by Zak Covar.
10. Appellant Esteban Ramos, also referred to as a State Official Defendant at the trial court, is the South Texas Watermaster. Mr. Ramos replaced Al Segovia as South Texas Watermaster.

11. Jonathan F. Mitchell, Solicitor General, Evan Scott Greene, and James Patrick Sullivan of the Texas Attorney General’s Office, Appellant Counsel for State Official Appellants, Bryan Shaw, Toby Baker, Carlos Rubinstein, Mark Vickery, and Esteban Ramos.
12. Mark L. Walters, John R. Hulme, David Marshal Coover, III, and Cynthia Woelk of the Texas Attorney General’s Office, Environmental Protection Division, Counsel for the State Official Appellants, Bryan Shaw, Toby Baker, Carlos Rubinstein, Mark Vickery, and Esteban Ramos.
13. Guadalupe-Blanco River Authority (“GBRA”) – Intervenor Defendant - Appellant.
14. Molly Cagle, Evan Young, Carlos R. Romo, Aaron M. Streett of Baker Botts LLP, Appellate Counsel for GBRA, Intervenor Defendant - Appellant.
15. Edward F. Fernandes, Kathy Robb, Andrea W. Wortzel, Maida O. Lerner, Christopher Taylor, Patricia Acosta, and Thomas R. Julin of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.
16. Kathryn Snapka of The Snapka Law Firm, Trial Counsel for GBRA, Intervenor Defendant - Appellant.
17. Bruce Wasinger, General Counsel for the GBRA, Intervenor Defendant - Appellant.
18. Texas Chemical Council (“TCC”), Intervenor Defendant –Appellant.
19. Kenneth R. Ramirez of the Law Offices of Ken Ramirez, Appellant Counsel for TCC, Intervenor Defendant - Appellant.
20. Amy Leila Saberian of Enoch Keever, PLLC, Appellant Counsel for TCC, Intervenor Defendant - Appellant.
21. San Antonio River Authority (“SARA”), Intervenor Defendant - Appellant.
22. Edmond R. McCarthy, Jr. of Jackson, Sjoberg, McCarthy & Townsend, LLP, Appellant Counsel for SARA, Intervenor Defendant - Appellant.
23. David W. Ross, Appellant Counsel for SARA, Intervenor Defendant - Appellant.
24. Amicus Curiae Texas Farm Bureau.

25. Amicus Curiae American Farm Bureau Federation.
26. Amicus Curiae Oklahoma Farm Bureau Legal Foundation.
27. Amicus Curiae Oregon Farm Bureau Federation.
28. Amicus Curiae Wyoming Farm Bureau Federation.
29. Amicus Curiae California Farm Bureau Federation.
30. Amicus Curiae Mississippi Farm Bureau Federation.
31. Amicus Curiae Louisiana Farm Bureau Federation.
32. Sydney W. Falk, Jr. and Douglas G. Caroom of Bickerstaff Heath Delgado Acosta, LLP, Counsel for Amicus Curiae Texas Farm Bureau, American Farm Bureau Federation, Oklahoma Farm Bureau Legal Foundation, Oregon Farm Bureau Federation, Wyoming Farm Bureau Federation, California Farm Bureau Federation, Mississippi Farm Bureau Federation, and Louisiana Farm Bureau Federation .
33. Amicus Curiae Texas Water Conservation Association.
34. Lyn E. Clancy of Lower Colorado River Authority, Counsel for Amicus Curiae Texas Water Conservation Association.
35. Amici Curiae City of Kerrville.
36. Amicus Curiae Structural Metals, Inc. d/b/a CMC Steel Texas.
37. Amy M. Emerson of Lloyd Gosselink Rochelle & Townsend, P.C., Counsel for Amici Curiae City of Kerrville and Structural Metals, Inc. d/b/a CMC Steel Texas.
38. Amicus Curiae Texas Public Policy Foundation.
39. Mario Loyola and Josiah Neeley, Counsel for Amicus Curiae Texas Public Policy Foundation.
40. Amicus Curiae City of Victoria.
41. Michael J. Booth of Booth, Ahrens & Werkenthin, P.C., Counsel for Amicus Curiae City of Victoria.

42. Amicus Curiae CPS Energy.
43. Russell S. Johnson, Carl R. Galant, and Regina M. Buono of McGinnis, Lochridge & Kilgore, LLP, Counsel for Amicus Curiae CPS Energy.
44. Trial Court Amicus Curiae: Guadalupe Valley Electric Cooperative, Inc.; Caldwell County; City of Port Lavaca; City of Boerne; City of Bulverde; City of Cibolo; City of Lockhart; City of Luling; City of San Marcos; City of Yoakum; Fair Oaks Ranch; Foresight Golf Partners Ltd.; Golf Associates Ltd.; Guadalupe Basin Coalition; Guadalupe-Blanco River Authority Customers; Kendall County; Royal Marina Holdings, LLP; Royal Oaks Partners at Fulton Beach, LLP; SJWTX, Inc.; Victoria County; National Water Resources Association; Comal County; Calhoun County; Guadalupe County, Texas; City of Wimberley, Texas, Mayor Bob Flocke; City of New Braunfels; East Central Special Utility District.

/s/ Marisa Perales

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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

Established in 1939, Nature Canada is a national organization with 40,000 supporters and a network of over 350 naturalist organizations operating at local, regional and provincial levels. Nature Canada supports and oversees the development of protected areas across the country, defends endangered species by pushing for effective legislation and support programs, and engages Canadians to achieve a deeper public awareness of the issues affecting Canada's natural heritage. Nature Canada's strategy is rooted in a foundation of extensive scientific evidence.

Bird conservation is at the forefront of Nature Canada's efforts and because 89% of Canada's birds migrate annually to other countries, it is a distinctly international issue. As a Canadian partner of BirdLife International, Nature Canada has supported the establishment and conservation of Important Bird Areas, provided scientific data on bird species, and worked with our partners in the Americas to ensure the conservation of migratory bird flocks. As signatories to the 1916 Migratory Birds Convention, the United States is Canada's oldest partner in the protection of migratory bird species. This treaty led to the enactment of Canada's *Migratory Birds Convention Act* (1917) and the corresponding *Migratory Bird Treaty Act* (1918) in the United States.

Nature Canada has an interest in this lawsuit for the purposes of maintaining a meaningful partnership with the United States under the Migratory Birds Convention, and wishes to draw this court's attention to the United States' international obligations to protect the critically endangered Whooping Crane. Nature Canada strongly urges the court to ensure that the near-century of efforts on behalf of both Canada and the United States to conserve whooping cranes is not undermined.



## ARGUMENT

### Introduction

The Whooping Crane is a remarkable species that almost went extinct, with only one remaining breeding wild flock. As a migratory bird, it spans the North American continent each year travelling between its winter and summer habitats. Whooping Crane conservation is therefore only possible through international cooperation. The joint dedication of Canada and the United States since the early 20<sup>th</sup> century has seen the slow climb in Whooping Crane populations. However, it still remains one of the rarest birds on Earth, and still faces extinction.

Canadian governments and conservation organizations continue to make substantial efforts to conserve the Aransas Wood Buffalo flock (AWB flock) of Whooping Cranes in its summer habitat in northern Alberta. The species is protected under a network of Canadian legislation, and Canadian government and organizations play a key role in Whooping Crane conservation strategies. While species conservation is undoubtedly a more difficult enterprise today than it has been in the past as human populations swell and resources are stretched thin, Canada nevertheless continues to expect a corresponding effort on behalf of the State of Texas to ensure the enduring conservation of the AWB flock in its wintering habitat.

**I. The Whooping Crane is an iconic North American endangered species and is protected under Canadian law.**

The Whooping Crane is an iconic species, both for its remarkable appearance and extreme rarity. While its population has increased from just fifteen birds in the 1940s to approximately 500 today—fewer than 300 in AWB flock, and the rest in experimental flocks or captivity—this success has not come easily. Conservation and breeding efforts encompassing a variety of methods have been spirited, but plagued by the chronic difficulty of introducing captive-raised birds into the wild. It is exceptionally difficult for human beings to teach captive crane fledglings to survive and function as wild birds, and a number of re-introduction experiments to this date have failed.

This is why the AWB flock, around which this litigation centres, is of paramount importance for the survival of the species as a whole. It is the only successful, self-sustaining wild flock left in the world. The loss of 8.5% of the AWB flock in the 2008-2009 winter at the Aransas Refuge is therefore a staggering and unprecedented setback to Whooping Crane conservation.<sup>1</sup>

The Whooping Cranes' rarity has brought the species under the jurisdiction Canadian law, beginning with the *Migratory Bird Convention Act*. Signed between the United States and Great Britain on behalf of Canada in 1916, the Migratory Birds Convention is one of the many bilateral conventions pioneered by the United

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<sup>1</sup> Mem. Op. at 8.

States for the conservation of birds, and is an early example of collaborative conservation efforts between the two nations. Both countries implemented corresponding legislation—the *Migratory Bird Treaty Act* (1918) in the United States and the *Migratory Birds Convention Act* (1917) in Canada—to enact the Convention’s goals by providing a statutory framework for prohibiting the possession and killing of migratory birds.

These Acts, which were reaffirmed in 1995, have since become effective tools for the maintenance of a high standard of species conservation in North America. In 2010, for example, an Alberta court found Syncrude Canada Ltd. guilty under section 5.1 (1) of the MBCA and liable for a \$3 million dollar fine for depositing hazardous substances in an area frequented by migratory birds.<sup>2</sup> The parallel U.S. legislation has similarly been used to hold companies liable in American courts.<sup>3</sup>

Whooping Crane protection under the *Migratory Birds Convention Act* is supported by national and provincial legislation in Canada. The *Canada National Parks Act*<sup>4</sup> designates and protects national parks, classifies areas of natural significance across the country as Wilderness Areas, which imposes positive obligations on the government to maintain the land’s natural ecology and prohibit

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<sup>2</sup> R v Syncrude Canada Ltd 2010 CarswellAlta 1157.

<sup>3</sup> See *United States v. FMC*, 572 F. 2d 902, 11 ERC 1316 (2d Cir 1978) and *United States v. Corbin Farm Service*, 444 F. Supp. 510, 12 ERC 1257 (ED Cal 1978).

<sup>4</sup> Canada National Parks Act S.C. 2000, c. 32 at s.14.

detrimental human interference, and establishes that “maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the minister...”<sup>5</sup> The Whooping Crane Nesting Area and Summer Range is a prime example of a designated Canadian Wilderness Area, and its ecological integrity is strictly protected under the *Act*.

The Whooping Crane is also protected in Canada under the federal *Species at Risk Act* (SARA) which, like the American *Endangered Species Act*, establishes a regulatory regime for the recovery of species that are extirpated, endangered, threatened, or of special concern as a result of human activity.<sup>6</sup>

**II. Canada has put decades of work seeking to bring the Whooping Crane back from the brink of extinction. The TCEQ’s failure to regulate freshwater flows with a mind to the Crane refuge downstream undermines these international conservation efforts.**

Each year, the AWB flock spans the continent to migrate from its winter habitat in the Aransas National Wildlife Refuge to its summer habitat and breeding grounds in the Whooping Crane Nesting Area and Summer Range, part of the greater Wood Buffalo National Park. The Canadian refuge is part of a 16,800 km<sup>2</sup> protected wetland complex that is carefully protected from human interference.<sup>7</sup>

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<sup>5</sup> *Supra* at s.8(2).

<sup>6</sup> *Species at Risk Act* S.C. 2002, c. 29 at s.6.

<sup>7</sup> The Whooping Crane Nesting Area and Summer Range is a Wilderness Area protected under Canadian federal law; it is also designated by BirdLife International as an Important Bird Area, and “a wetland of international importance” by the Ramsar Convention.

Because the AWB flock is the only truly wild flock of Whooping Cranes, it is uniquely important in Whooping Crane conservation. Nevertheless, Canada has undertaken a variety of methods for the recovery and protection of other Whooping Crane populations as well. Alberta's Calgary Zoo, for example, is a key player in Whooping Crane recovery. The Calgary Zoo's long-term reintroduction program breeds and releases cranes into the non-migratory flock established in Florida and was granted additional funding by the Canadian Government this past April to continue this program.

Operation Migration is an organization which developed the first successful method of teaching fledgling birds to migrate using ultra-light aircraft. This has become the method of choice for training fledgling Whooping Cranes, and is regularly used to guide the experimental Eastern Migratory Population of Whooping Cranes between Wisconsin and Florida. Operation Migration was pioneered in Canada in 1994.

The efforts on behalf of the Canadian government, non-profit organizations and citizenry, are the product of decades of collaborative research and education on the plight of the Whooping Crane in Canada and the United States. Because the Whooping Crane in its wild state is a migratory species which traverses huge distances each year, conservation work in this particular instance must be a shared effort if it is to succeed. The AWB flock is North America's best chance of

ensuring that the Whooping Crane as a species is not extirpated from this continent, and for decades the Canadian and United States governments have done a phenomenal job as partners in the conservation process.

The unprecedented nature of the Whooping Crane mortality that occurred in the 2008-2009 winter in the Aransas National Wildlife Refuge cannot simply be rationalized as an accident of nature. Canada has worked hard under the Migratory Bird Convention and national legislation to ensure the safety the AWB flock in its summer habitat in the Wood Buffalo National Park. Nature Canada asks that this court consider the international obligations and expectations that underlie this iconic North American species.

### CONCLUSION

This Court should uphold the decision of the district court.

Respectfully submitted,



Stephen Hazell  
Nature Canada  
June 6, 2013

/s/ Marisa Perales

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**STATEMENT OF COUNSEL FOR AMICUS CURIAE**

In accordance with Fed. R. App. P. 29(c)(5), amicus curiae Nature Canada states that no party or parties' counsel authored any part of this brief or paid costs associated with its preparation. No party other than *amicus curiae* contributed money that funded the preparation or submission of this brief.

Respectfully Submitted,



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Stephen Hazell  
Nature Canada

**STATEMENT OF CONSENT**

I certify that Nature Canada conferred with the parties and no party opposed the filing of this amicus curiae brief.

Respectfully Submitted,



Stephen Hazell  
Nature Canada



## CERTIFICATE OF SERVICE

On this 6th day of June, 2013, a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF NATURE CANADA** was filed with the electronic case filing (ECF) system of the U.S. Court of Appeals for the Fifth Circuit, which currently provides electronic service on the counsel of record.

/s/ Marisa Perales

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**CERTIFICATIONS UNDER ECF FILING STANDARDS**

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: June 6th, 2013

/s/ Marisa Perales

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

This brief contains 1555 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman style.

/s/ Marisa Perales

Dated: June 6th, 2013