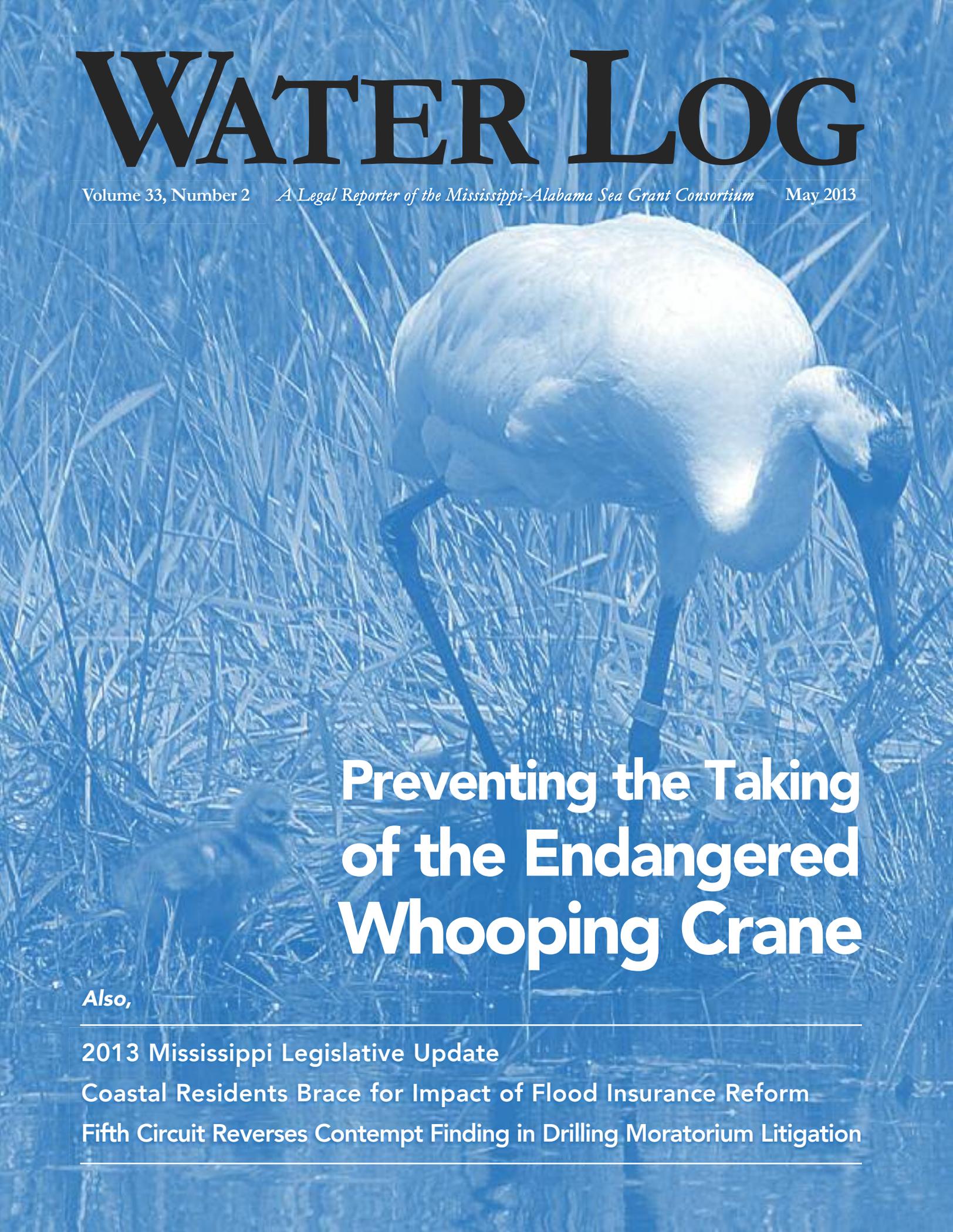


WATER LOG

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A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

May 2013



Preventing the Taking of the Endangered Whooping Crane

Also,

2013 Mississippi Legislative Update

Coastal Residents Brace for Impact of Flood Insurance Reform

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WATER LOG

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*Cover photograph of an adult Whooping Crane and chick,
courtesy of Gillian Photos of Chicago.*

*Contents photograph of Whooping Cranes in flight,
courtesy of Dasein Design.*

Preventing the Taking of the Endangered Whooping Crane

Cullen Manning¹



Photograph of Whooping Cranes at the Aransas National Wildlife Refuge in Texas, courtesy of Larry Johnson.

The story of the American whooping crane is one of the greatest comeback stories in conservation history. In the 1800s, industrial development destroyed much of the whooping crane's wetland habitat causing the population of approximately 1,400 cranes to plummet.² By the 1940s, loss of wetland habitat, industrial development, and hunting had reduced the whooping crane population to only 15 individual birds.³

After being placed on the endangered species list in the 1960s, conservationists undertook tremendous efforts to save the bird famously known

as "North America's tallest bird."⁴ Development of various techniques including captive breeding, habitat management, and guiding migration using aircraft helped increase the species' chance of survival. Today, the whooping crane population steadily increases each year and numbers in the hundreds. Whooping cranes are largely held in captivity, but there is still one group of wild migratory whooping cranes. These wild whooping cranes spend their springs and summers in northern Canada and their winters at the Aransas National Wildlife Refuge in Texas.

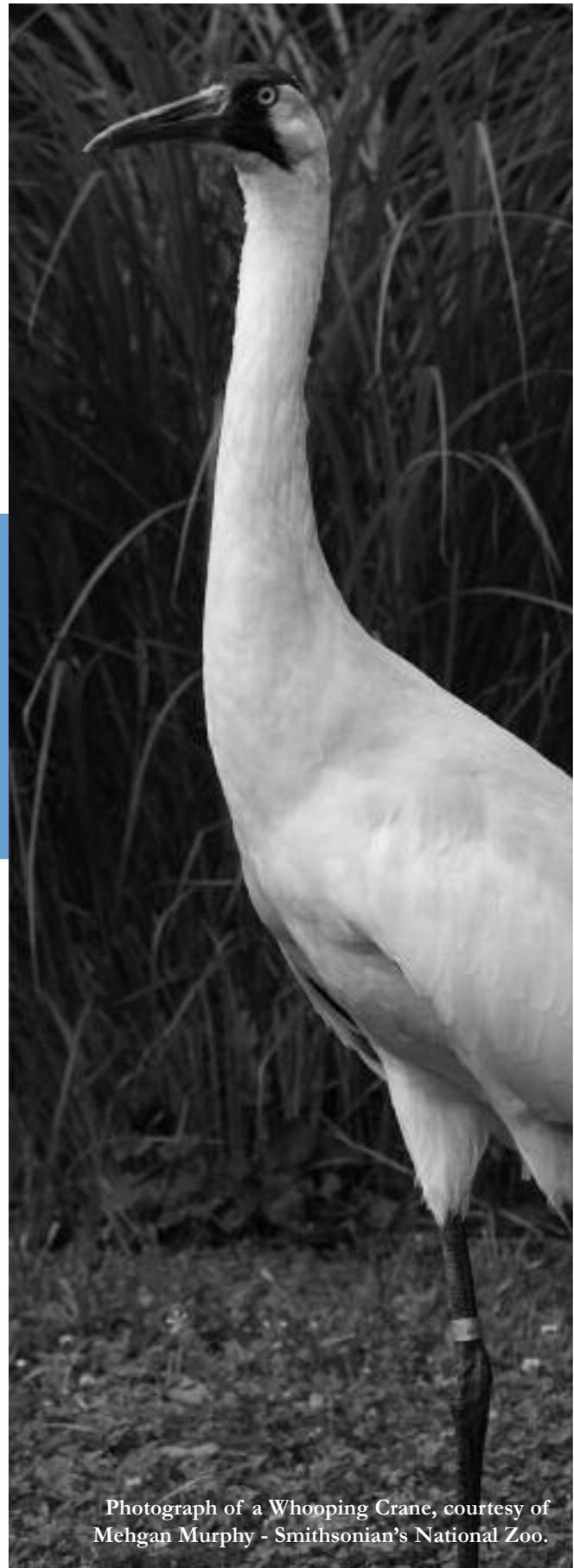
In 2008-2009, Dr. Chavez-Ramirez, a member of the Whooping Crane Recovery Team and an expert on whooping cranes with 20 years of experience, noticed a change in whooping crane behavior.⁵ Adult whooping cranes that normally would help feed soft shell crab and wolfberries to young cranes were shooing the young cranes away from the food.⁶ Further inquiries led Dr. Chavez-Ramirez to discover that increased salinity in San Antonio Bay correlated with a decrease in the whooping crane food supply. He concluded that the behavior he witnessed was the cranes' stress reaction to the lack of food. That year, 23 cranes were found dead. Another 34 birds failed to return in the fall after migration.

Adult whooping cranes that normally would help feed soft shell crab and wolfberries to young cranes were shooing the young cranes away from the food.

The whooping crane deaths prompted local businesses and individuals to form The Aransas Project (Aransas). The group is composed of local businesses, photographers, tourism operators, and other groups that capitalize on the whooping crane's migration to the Aransas Refuge. Aransas decided to take action and sue the Texas Commission on Environmental Quality (TCEQ) for violating the Endangered Species Act (ESA) by issuing permits that allow businesses along the San Antonio and Guadalupe Rivers to decrease freshwater flow into the bay, increasing the salinity of the San Antonio Bay area. Two more water flow management agencies, the San Antonio River Authority (SARA) and the Guadalupe-Blanco River Authority (GBRA), later joined the case as defendants.⁷

A "Taking" in Violation of the ESA

Aransas sued TCEQ in federal court for committing a "taking" of whooping cranes in violation of the ESA. The ESA was enacted in 1973 and is designed to



Photograph of a Whooping Crane, courtesy of Meghan Murphy - Smithsonian's National Zoo.

Photograph of a Whooping Crane in flight, courtesy of John Noll.



protect endangered species from becoming extinct. It creates an endangered species list and gives people the ability to sue on a variety of claims when an endangered species is threatened.⁸ One cause of action is an ESA “taking.” An ESA taking occurs when a listed endangered species is “harmed.” “Harm” has a variety of meanings, but includes the altering of an endangered species’ habitat.⁹

To cease practices that harm the endangered species’ environment, the court often will issue an injunction. Although the injunction will stop harmful practices, sometimes the court will allow parties that commit a taking “incidentally” to file for an Incidental Take Permit. These permits allow the party to continue their actions, but only after they submit a Habitat Conservation Plan that describes the measures that the party is taking to mitigate any further damage to the endangered species.¹⁰

At court, Aransas argued that TCEQ’s management of the freshwater inflows from the San Antonio and Guadalupe Rivers into San Antonio Bay created higher salt content in the bay that destroyed the food supply of the whooping crane and,

ultimately, resulted in the loss of 23 cranes. They further argued that the entire practice of issuing permits to businesses along the rivers violated the ESA because the management of those permits permitted the increase in salinity.¹¹

Causation and the Battle of the Experts

The most important factor that the court considered in deciding the case was whether the increased salinity caused the 23 whooping crane deaths. The court wanted to insure that the increased salinity in San Antonio Bay was responsible for the decrease in the whooping crane food supply and that whooping cranes were not dying because of some other phenomenon. As a result, the parties brought a variety of experts to testify as to whether the salinity had a negative effect on the cranes and their food supply.

The difference between the quality and preparation of Aransas’ experts and the defendants’ experts was staggering.¹² Aransas’ experts had decades of experience and high pedigrees, often holding prestigious positions at universities across the nation. They included a 2007

Nobel Prize winner, MacArthur Fellows, and several heavily published academics.¹³ On the other hand, many of the defendants' experts were researchers that had previously been employed by the defendants for a project to gather data on San Antonio Bay.

The two most critical questions the experts battled over were: (1) whether there was a substantial increase in bay salinity and, if so, (2) whether the increased salinity had a negative effect on the whooping crane's eating habits. Aransas submitted testimony of a water resource engineer that created a model demonstrating that the decrease in freshwater from the rivers flowing into the bay caused a substantial increase in salt content at different points in the year. Additionally, Dr. Chavez-Ramirez and others testified that the increased salt killed the blue crab and wolfberries that the whooping crane feeds on.



Photograph of Whooping Cranes, courtesy of Doug Pellerin.

The experts for TCEQ, GBRA, and SARA were not as successful at convincing the court that the salinity did not affect the whooping crane's food supply. The court was particularly critical of SARA's supposed whooping crane expert Dr. Slack. When testifying, Dr. Slack admitted that he had very little experience studying whooping cranes. Instead, Dr. Slack claimed his experience stemmed from overseeing a graduate student that logged hundreds of hours studying whooping crane food supply. When asked whether the salinity levels had an effect on the cranes, Dr. Slack claimed that the whooping cranes had a "supraorbital salt gland" that enabled them to live in salt-water regions.¹⁴ Soon after, Dr.

Slack admitted that he had made that fact up to the court. Finding that the defendants' argument was unsupported, the court issued an injunction, preventing TCEQ from issuing any more water permits.

Conclusion

Citing the unreliability of the defense experts, the court concluded that TCEQ's management of the freshwater flow caused the taking of whooping cranes in violation of the ESA. It then issued an injunction requiring TCEQ to file for an Incidental Take Permit and submit a Habitat Conservation Plan that must be approved by the U.S. Fish and Wildlife Service for approval before it can issue permits again.¹⁵ The Texas Attorney General has already appealed the decision to the U.S. Fifth Circuit Court of Appeals requesting an emergency stay on the execution of the judgment. The Attorney General contends that executing the decision will devastate farmers, ranchers, and communities along the San Antonio and Guadalupe Rivers.¹⁶ 🐦

Endnotes

1. 2014 J.D. Candidate, University of Mississippi School of Law.
2. TEXAS PARKS AND WILDLIFE DEPARTMENT, <http://www.tpwd.state.tx.us/huntwild/wild/species/whooper/> (last visited April 2, 2013).
3. ALL ABOUT BIRDS, http://www.allaboutbirds.org/guide/whooping_crane/lifehistory, (last visited April 2, 2013).
4. *Id.*
5. Aransas Project v. Shaw, 2:10-CV-075, 2013 WL 943780, *3 (S.D. Tex. Mar. 11, 2013).
6. *Id.*
7. *Id.* at *4.
8. *Id.* at *5-6.
9. *Id.* at *5.
10. *Id.* at *6.
11. *Id.* at *21-22.
12. *Id.* at *21.
13. *Id.* at *20.
14. *Id.* at *43.
15. *Id.* at *65.
16. Katherine Rosenberg and David Sikes, *Attorney General Seeks Emergency Stay in Whooping Crane Ruling*, CORPUS CHRISTI CALLER TIMES, March 20, 2013, <http://www.caller.com/news/2013/mar/20/attorney-general-seeks-emergency-stay-in-crane/>.

2013 Mississippi Legislative Update



The 128th session of the Mississippi Legislature was held from January 8th through April 7th of this year. The following is a summary of legislation of interest enacted during the 2013 session that may impact coastal resources. Alabama's legislative session extends until May 20, 2013. Look for the Alabama update in the next edition of *Water Log*.

Fishing

House Bill 1002 requires Mississippi residents fishing in public fresh waters to purchase a combination small game and fishing license. Residents fishing on privately owned lakes or ponds do not need a license unless the owner charges a fee for fishing. Approved March 27, 2013.

House Bill 1216 gives Mississippi's assent to two federal restoration laws: the Pittman-Robertson Wildlife Restoration Act and the Dingell-Johnson Sport Fish Restoration Act. The provision authorizes the Commission on Marine Resources to take actions necessary to ensure the conservation of marine and fish life. Revenue from saltwater license sales is given to the Department of Marine Resources for use in managing the state's fish and marine resources. Approved April 22, 2013.

Ports

House Bill 750 revises the appointment of county port and harbor commissions to include three commissioners appointed by the governor, one commissioner each from three municipalities, and five commissioners appointed by the county board of supervisors. Approved April 25, 2013.

Restoration

Senate Bill 2700 authorizes the use of funds in the Deer Island Acquisition, Reclamation and Preservation Fund for restoration and preservation activities on Cat Island. Approved April 3, 2013.

Shellfish

Senate Bill 2580 requires shellfish harvesters, processors, and dealers to successfully complete educational training on shellfish sanitation before receiving commercial licenses. Approved March 25, 2013.

Waters

House Bill 1072 extends the boundaries of state territorial waters from three miles offshore of the barrier islands to three marine leagues (roughly 10 miles) offshore. Approved March 20, 2013.

Coastal Residents Brace for Impact of Flood Insurance Reform

Anna Outzen¹

Photograph of Hurricane Katrina over southeast LA and southern MS, courtesy of NASA Goddard Photo and Video.

President Obama signed **The Biggert-Waters Flood Insurance Reform Act** into law in July of 2012. The Act not only reauthorized the National Flood Insurance Program through September 2017, but substantively changed several aspects of the program, most importantly the way that flood insurance premiums are calculated.² Because of the Act's effects, specifically hikes in insurance rates and removal of rate subsidies, U.S. Rep. Steven Palazzo (representing Mississippi's Fourth Congressional District which includes the Mississippi coast) has recently introduced new legislation to lessen the Act's resulting financial burden on the property owners of south Mississippi.

National Flood Insurance Program

Congress created the National Flood Insurance Program (NFIP) in response to the frequent severe flooding of the Mississippi River in the 1960s, which made it nearly impossible for property owners to get flood insurance from private insurers. This federal program is operated by the Federal Emergency Management Administration (FEMA), and allows property owners in participating communities to purchase flood insurance from the government. In exchange for participation in the NFIP, communities must implement ordinances and regulations to reduce the risk of future flooding, and

property owners in areas deemed high risk are required to purchase flood insurance in order to receive federally backed mortgages. Once a community decides to participate, FEMA maps each community's flood zones on Flood Insurance Rate Maps (FIRMs) using historical flood data.

Biggert-Waters Reforms

Before the new reforms, many properties could keep their original flood-risk rating (and a lower insurance rate) through grandfathering provisions in the NFIP. For example, structures built before a participating community got its first FIRM could be insured at their pre-FIRM rates. Buildings constructed after FIRMs were in place that also complied with the FIRM could be insured at the rate in effect at the time of its construction even when updated maps later changed the area's flood-risk rating.

Under the Biggert-Waters reforms, these grandfathered subsidies are no longer allowed for many categories of properties, including: non-primary residences, businesses, newly purchased property, substantially damaged property, repetitive loss property, property at least 30% improved, properties that received offers of mitigation assistance related to repetitive loss or a major disaster, and property with lapsed NFIP coverage.



Photograph of a stilt home damaged by Hurricane Katrina, courtesy of David Helvarg, Blue Frontier Campaign/Marine Photobank.

The Act phases out these subsidized insurance rates for the above listed property types by allowing an annual rate increase of 25% until actuarial rates are achieved (i.e., the true cost of insurance on the private market). For all other properties, the Act raises the limit on annual rate increases from 10% to 20%. Furthermore under the new Act, when updated maps show properties in higher-risk areas, those property owners will pay increased premiums for five years until the actuarial rate is met, beginning on the Effective Date of the map that identifies the increased risk. The Act's higher insurance premium calculations affect anyone considering buying, selling, or improving their home or business.

Palazzo Legislation

U.S. Rep. Stephen Palazzo recently introduced new legislation in hopes of slowing down the spike in flood insurance rates for Mississippians.³ Recognizing the important need to keep NFIP solvent so that people can purchase affordable insurance, Palazzo's bill seeks to balance those concerns with the need to avoid imposing serious financial burdens on current

and future home owners and business owners, many of whom have just recovered financially from picking up their lives after Hurricane Katrina. Finding that immediately and severely increasing insurance rates is not fair, Palazzo calls for a more gradual plan—generally preventing imposition of the Act's higher rates for the first year (until January 1, 2015), and then increasing property owner's insurance rates over a ten-year period at 10% per year. Beginning in 2015, Palazzo proposes that this one-year delay and ten-year increase be enforced permanently for property newly purchased and properties subject to new FIRMs. Another component of the proposed legislation is the creation of a tax credit for homeowners to offset the costs of flood insurance. 🐼

Endnotes

1. 2013 J.D. Candidate, University of Mississippi School of Law.
2. Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, 126 Stat. 405.
3. Flood Insurance Premium Relief Act of 2013, available at: <http://palazzo.house.gov/sites/palazzo.house.gov/files/Flood%20Insurance%20Relief%20Plan.pdf>

Fifth Circuit Reverses Contempt Finding in Drilling Moratorium Litigation

Catherine M. Janasie¹

Recently, the Fifth Circuit Court of Appeals decided whether the U.S. Department of Interior's (DOI) decision to impose a drilling moratorium after the Deepwater Horizon Oil Spill amounted to civil contempt.² In response to the oil spill and pursuant to President Obama's direction, DOI issued a six-month moratorium in May 2010, also known as the May Directive, on all pending, approved, and current oil and gas drilling operations located on the Outer Continental Shelf. Soon after, members of industry challenged the moratorium, and a federal district court temporarily stopped DOI from enforcing the moratorium. DOI responded by publically stating that it believed a moratorium was needed and issued a new moratorium in July 2010, which raised the question of whether these actions amounted to civil contempt of the district court's order.

Background

After DOI issued the May Directive, Hornbeck Offshore Services, L.L.C. (Hornbeck) and other members of industry challenged the directive, claiming it violated both the Administrative Procedure Act (APA) and the Outer Continental Shelf Lands Act (OCSLA). The district court found that the moratorium was not adequately justified and explained under the APA, but the court did not address the OCSLA claims. The district court granted Hornbeck a preliminary injunction that prohibited DOI from enforcing the drilling moratorium.

In response, the Secretary of the Interior made comments to both the oil and gas industry and the public at large that he believed the moratorium was the right action to take after the oil spill. Although DOI planned on appealing the district court's decision, it also took steps to comply with the injunction, including sending individual letters to the operators of the deepwater wells currently in production. In July, DOI rescinded the May Directive and

issued a new moratorium, referred to as the July Directive. While the July Directive was virtually the same as the May Directive, it did provide a more thorough explanation for why a moratorium was needed.

After several court filings by both sides regarding the injunction, the Secretary of the Interior lifted the July Directive in October 2010, which effectively made the arguments in the parties' remaining claims irrelevant. In response, Hornbeck asked the court for its attorney fees, claiming that DOI's actions in regards to the injunction amounted to civil contempt and bad-faith litigation tactics. Although the district court did not reach the claim for bad-faith, it did find clear and convincing evidence of DOI's contempt.³ The court granted Hornbeck over \$500,000 in attorney fees and costs.⁴

Fifth Circuit Decision

In its review of the district court's decision, the Fifth Circuit established that while a court order has to be clear, it does not have to anticipate all the actions that may be taken under the order. Thus, a district court has some flexibility in determining whether an action that is not expressly prohibited by an injunction nonetheless violates the "the reasonably understood terms of the order."⁵ In finding that there was clear and convincing evidence of DOI's contempt, the lower court relied on several factors that it believed showed DOI defied and disregarded the injunction. These factors included DOI's failure to ask the court for a remand to the agency before it took new administrative action and DOI's statements to the public and industry of its plan to put a new moratorium in place.

On the remand issue, the Fifth Circuit found that the injunction did not expressly state or infer that DOI needed to seek a remand before acting and that DOI had complied with all the court-related mandates in the injunction. In examining DOI's communications to



Photograph of the Deepwater Horizon oil spill site in the Gulf of Mexico, courtesy of Deepwater Horizon Response.

industry and the public, the Fifth Circuit determined that while these statements did show a resolve by DOI to overcome the injunction, DOI's intent did not violate the terms of the injunction. Further, both the district court and the Fifth Circuit found that the injunction could not be read broad enough to allow the July Directive to be used as evidence of contempt. Hornbeck also claimed that DOI exceeded its authority under OCSLA, and the Fifth Circuit found that the claim was out of the scope of the injunction. The court explained that since the injunction was issued because of DOI's failure to explain its reasoning for the moratorium, the injunction did not expressly prohibit a new moratorium and did not address whether such a broad moratorium was appropriate.

After reviewing these issues, the Fifth Circuit concluded that DOI's actions simply did not violate the terms of the injunction or how it could be reasonably interpreted. The court reasoned that even though DOI tried to get around the effect of the injunction by issuing a new moratorium, DOI did not take actions that were prohibited by the injunction. As a result, the Fifth Circuit reversed the district court's finding of contempt, as well as the court's award of attorney fees and costs.

Potential Implications of the Decision?

The dissent in the Fifth Circuit opinion believes the majority's analysis was too narrow and did not give proper deference to the district court. In the short dissenting opinion, Judge Elrod expresses concern about the effect of the majority's opinion on future

litigants and the balance of power between the different branches of government. The dissent believes that the decision may encourage litigants to think of creative ways to get around court orders and finds this potential especially worrisome when the party trying to get around a court order is another branch of government, as was the situation in this case. Expressing concern about how this dynamic may influence the balance of power among the three branches of government, the dissent cites the Federalist Papers to characterize the judiciary as the weakest branch of government whose role is to check and balance the executive and legislative branches. The dissent emphasizes that courts should vigilantly enforce its court orders to ensure that the courts do not become powerless against the other branches of government. In future cases, it will be interesting to see if the dissent's concerns are well founded and if the court's decision has any real effect on the behavior of litigants subject to court orders. ↗

Endnotes

1. Ocean and Coastal Law Fellow, Mississippi-Alabama Sea Grant Legal Program.
2. *Hornbeck Offshore Servs. v. Salazar*, No. 10-30936, 2013 WL 1437675 (5th Cir. Apr. 9, 2013).
3. *Hornbeck Offshore Servs. v. Salazar*, No. 10-1663, 2011 WL 454802 (E.D. La. Feb. 2, 2011).
4. *Hornbeck Offshore Servs. v. Salazar*, No. 10-1663, 2011 WL 2214765 (E.D. La. June 01, 2011).
5. *Hornbeck Offshore Servs. v. Salazar*, No. 10-30936, 2013 WL 1437675, at *5 (5th Cir. Apr. 9, 2013).

Designation of Gopher Frog Habitat Faces Legal Challenge

Benjamin Sloan¹

Photograph of a gopher frog, courtesy of the Florida Fish and Wildlife Conservation Commission.

Last year, the U.S. Fish & Wildlife Service (FWS) designated additional land as critical habitat for the endangered gopher frog, expanding the area to include land located in both Mississippi and Louisiana. Currently, the Mississippi gopher frog population consists of roughly 100 individuals still living in the wild, concentrated in only a few ponds in one Mississippi county. Historically, eastern Louisiana had populations of gopher frogs, but the species has not been seen in this area in some time. Landowners in Louisiana whose property falls within the newly designated critical habitat area are seeking court review of the FWS decision.² The landowners are concerned about the potential impact of the critical habitat designation on their current and future property values.

Background

The dusky gopher frog, commonly known as the Mississippi gopher frog, is about three inches long, brown or black in color, and covered in warts. The frog's habitat once stretched from the Mississippi River across the Gulf Coast to Mobile Bay.

However, it has not been seen in eastern Louisiana in the last 50 years.³ Currently, the remaining wild population resides in only a few ponds in Harrison County, Mississippi. Its habitat consists of sandy, upland areas as well as southern pine forests. For breeding, it depends on the seasonal drying up and refilling of isolated ponds to allow its offspring to fully develop.⁴ In maturity, the dusky gopher frog lives in burrows and stumps.

In 2001, the FWS placed the Mississippi gopher frog on the endangered species list.⁵ Nine years later, the FWS announced proposed critical habitat for the frog in 2010,⁶ which encompassed about 2,000 acres in Forrest, Harrison, Jackson, and Perry Counties in Mississippi. FWS amended the proposed habitat designation in 2011, raising the total habitat designation to 7,000 acres and extending it into Louisiana.⁷ As part of a court approved settlement agreement, the FWS issued the final habitat designation in June 2012.⁸ The final rule designates 6,477 acres as critical habitat, including 1,544 acres in St. Tammany Parish,

Louisiana (an area about 15 miles north of Slidell, Louisiana). In designating the habitat, FWS hoped to encourage the frog to spread from its current home in Mississippi to a broader swath of its historical habitat. In February 2013, landowners within St. Tammany Parish sued the FWS challenging the designation of the 1,544 acres.

ESA and Critical Habitat

Under the Endangered Species Act (ESA), the FWS is tasked with identifying and protecting endangered and threatened species. Once a species is listed, the FWS is required to identify habitat essential to the survival of the species, which is referred to as critical habitat.⁹ Critical habitat is not limited to the species' current geographical range, but may include areas beyond its current range if the FWS determines such lands are essential to the preservation of the species. When designating habitat, the agency considers a variety of factors including whether human activities are threatening the species and if designating critical habitat would likely decrease this risk. Certain areas may be excluded if the FWS finds that the benefits of excluding the area outweigh the benefits of designating the particular area, so long as the exclusion would not result in the species' extinction.¹⁰

Challenges to Habitat Designation

The landowners raise a host of challenges to the designation of their property as critical habitat for the gopher frog. Specifically, the landowners dispute the procedural timing of the habitat designation, the standards used to determine the critical habitat, and the economic analysis of the habitat designation. Therefore, the Louisiana landowners argue that the habitat designation is invalid.

In its final rule however, the FWS wrote that their choice to designate the land at issue was well reasoned, based on their consultation with experts, and that the simple promulgation of a regulation does not inherently deny the landowners their ability to utilize their land in an economically sensible way.¹¹ The FWS based the decision to include this tract of land in the gopher frog's critical habitat based on peer reviews of the original proposed rules and consultation, which

concluded that the FWS should look outside of the gopher frog's current ponds in Mississippi to ponds in Louisiana as well. They also assert in the final rule that the Louisiana land provides suitable breeding habitat, access to multiple ponds which would allow the population to expand, and geographic distance from the original ponds which would insulate the species from destructive events on either parcel of land. The FWS is currently in the process of preparing the habitat restoration plan for the dusky gopher frog, another component of the ESA.

Conclusion

While the Louisiana land could require modification before it is truly suitable for the gopher frog, the FWS believes that this section of land has the best set of features for the promotion of the species. Although the gopher frog has not been present on this land for over 50 years, it did at one point reside in East Louisiana, and the FWS believes that this geographical diversification is necessary. The landowners are waiting on the government's response by early June. 🐸

Endnotes

1. 2014 J.D. Candidate, University of Mississippi School of Law.
2. Complaint, P & F Lumber Co. v. U. S. Fish and Wildlife Serv., No. 13-362 (E.D. La. Feb. 27, 2013).
3. U.S. Fish and Wildlife Service, *Mississippi Gopher Frog*, available at <http://www.fws.gov/southeast/publications/gopher.pdf> (last visited April 14, 2013).
4. The Nature Conservancy, *Mississippi Dusky Gopher Frog*, available at <http://www.nature.org/ourinitiatives/regions/northamerica/united-states/mississippi/explore/dusky-gopher-frog-profile.xml> (last visited on April 15, 2013).
5. 50 C.F.R. § 17.11 (2013).
6. Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31387 (proposed June 3, 2010).
7. Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59774 (proposed Sept. 27, 2011).
8. Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35118 (June 12, 2012).
9. 16 U.S.C. § 1532-33.
10. 16 U.S.C. § 1533(b)(2).
11. 77 Fed. Reg. at 35121, 35143-4. (June 12, 2012).

Comer Litigation Heads to the Fifth Circuit: Will the Third Time be the Charm?

Evan Parrott¹

In May, the U.S. Fifth Circuit Court of Appeals will review a decision to dismiss the lawsuit of a group of Mississippi residents against various energy companies for damages related to a combination of greenhouse gas emissions and Hurricane Katrina. The suit in question alleges that over 30 energy and chemical companies released greenhouse gases that contributed to global warming, which led to a rise in sea levels, which in turn, increased the intensity of the 2005 storm. The suit was originally brought over seven years ago and has since gone through a roller coaster of procedural hearings, dismissals, and appeals. Now, the end may be in sight as both sides prepare for arguments in New Orleans on May 1st.

Background

In 2005, landowners and residents of the Mississippi coastal area brought suit against various oil, coal, and chemical corporations seeking remedies for private and public property damage that resulted from Hurricane Katrina. The residents and landowners (collectively Comer) claimed that the strength of the hurricane and the resulting damage were increased by the rise of sea level attributed to global warming. The suit claimed in particular that the named corporations (collectively Murphy Oil) specifically contributed to heating the Earth's temperature by emitting large volumes of carbon dioxide. The companies have contested these claims every step of the way, claiming that the residents do not have the appropriate legal rights to bring a suit in federal court.

Procedural Roller Coaster

In 2007, a Mississippi federal district court dismissed the original suit (Comer I) holding the

residents lacked standing to sue and that the issue involved presented political questions that could not be resolved by courts. This decision was appealed to the Fifth Circuit, where a panel of three judges reviewed the claim. In 2009, that panel reversed the district court's decision, recognizing that the plaintiffs' nuisance, trespass, and negligence claims were not procedurally barred from being heard. The panel found a plausible link between the defendant's emissions and the property damage resulting from the storm. Then, through a variety of unusual procedural events, the panel decision was vacated and the lower court's dismissal was reinstated in May 2010.

In 2009, that panel reversed the district court's decision, recognizing that the plaintiffs' nuisance, trespass, and negligence claims were not procedurally barred from being heard.

In May 2011, the Mississippi residents re-filed their suit. This time, the residents based their suit on state common law claims. This strategy was taken in response to *AEP v. Connecticut* which was pending in front of the U.S. Supreme Court.² The *AEP v. Connecticut* case dealt with the claims of several states against energy producers wherein the states argued that the greenhouse gas emissions of the energy producers contributed to the states'



External photograph of the U.S. Supreme Court, courtesy of Cometstarmoon Photos.

property losses due to climate change impacts, such as sea level rise. When the Supreme Court's decision in *AEP v. Connecticut* was ultimately handed down, the Court found that due to the increased efforts by the EPA to regulate greenhouse gas emissions under the Clean Air Act (CAA), any federal common law claims based on climate change impacts are preempted.

The 2011 lawsuit (Comer II) was dismissed by the federal district court on March 20, 2012, this time on the grounds of res judicata and collateral estoppel.³ The court found that the suit raised essentially the same issues as the previously dismissed suit (Comer I) and the plaintiffs were not entitled to bring the same suit more than once. The court also made a point to revisit the standing and political question matters that were the basis of the initial dismissal and its subsequent appeal. The court affirmed its earlier Comer I ruling regarding both issues and also agreed with the energy companies' argument that the CAA preempted the claims by virtue of the Supreme Court's holding in *AEP v. Connecticut*.

The residents have once again appealed the district court's dismissal to the U.S. Fifth Circuit Court of Appeals. The residents are hoping that the presiding panel will be as receptive to their claims as the 2009 panel was when it overturned the district court's initial dismissal.

Impending Resolution?

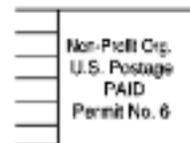
As it did four years ago, the Fifth Circuit will determine whether or not the Mississippi residents will be able to continue their suit against the energy companies. It is unclear what effect the Supreme Court's ruling in *AEP v. Connecticut* will have on the panel's decision. However, judging by the odd and lengthy past of the lawsuit, it is difficult to make a prediction with any plausible degree of certainty. Nevertheless, it appears the parties are finally one step closer to a resolution. 🐟

Endnotes

1. 2013 J.D. Candidate, University of Mississippi School of Law.
2. *AEP v. Connecticut*, 131 S.Ct. 2527 (2011).
3. *Comer v. Murphy Oil USA*, 839 F.Supp.2d 849 (S.D. Miss. 2012).



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