

**In The
Supreme Court of the United States**

—◆—
THE ARANSAS PROJECT,

Petitioner,

v.

BRYAN SHAW, as Chairman of the Texas
Commission on Environmental Quality, et al.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

—◆—
**AMICUS CURIAE BRIEF OF
NATURE CANADA IN SUPPORT OF
PETITIONER THE ARANSAS PROJECT**

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Nature Canada respectfully submits this amicus curiae brief in support of Petitioner.¹



**STATEMENT OF IDENTITY
AND INTEREST IN CASE**

Nature Canada was founded in 1939. It is a national non-profit 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

¹ Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. All parties have consented to the filing of this brief. Those consents have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

international issue. As a Canadian partner of Bird-Life 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. The United States is Canada's oldest partner in the protection of migratory bird species. Both countries are signatories to the 1916 Migratory Birds Convention. This treaty led to the enactment of Canada's *Migratory Birds Convention Act, 1994* S.C. 1994, c. 22, in 1917 and the corresponding *Migratory Bird Treaty Act* (1918), 16 U.S.C. §§ 703-712 in the United States.

This lawsuit implicates the vitality of the United States – Canada partnership to conserve migratory bird flocks. Nature Canada is keenly interested that that partnership remain vital. Nature Canada writes to draw this Court's attention to the United States' international obligations to protect the critically endangered Whooping Crane. The appellate court's decision in this case encumbers the ability of the United States to meet those obligations and erodes the gains of the near-century of efforts on behalf of both Canada and the United States to conserve a wild population of whooping cranes.



SUMMARY OF ARGUMENT

The Whooping Crane is a remarkable species that is on the edge of extinction. Today, the Aransas

Wood Buffalo (AWB) flock is the only breeding wild flock remaining. The AWB flock migrates the North American continent each year, travelling between its winter (Texas Gulf Coast) and summer (northern Alberta, Canada) habitats. Whooping Crane conservation is therefore only possible through international cooperation. Because of the international and domestic legal commitments of both Canada and the United States since the early 20th century, the Whooping Crane population has slowly risen. However, it still remains one of the rarest birds on Earth.

Canadian governments and conservation organizations continue to make substantial efforts to conserve the AWB flock of Whooping Cranes in its northern Alberta habitat. The species is protected under a network of Canadian legislation, and Canadian governments and non-governmental organizations play key roles in Whooping Crane conservation. Canada continues to expect a corresponding effort from the United States and the State of Texas regarding conservation of the AWB flock in its wintering habitat.

The appellate court, here, over-reached its role. 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. The appellate court re-weighed evidence to find facts alternative to those found by the trial court, and abandoned inferences the trial court had fairly drawn from those findings of facts. Rule 52(a), Fed. R. Civ. Proc., was

amended in 1985 specifically to banish this over-reach. It is incumbent on this Court to support the 1985 amendment.

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ARGUMENT

The Whooping Crane is a remarkable species that has almost become extinct, with only one remaining wild breeding flock – the Aransas Wood Buffalo (AWB) flock. As a migratory bird, Whooping Cranes traverse the North American continent from north to south each year travelling between their winter and summer habitats. Whooping Crane conservation is, therefore, only possible through international cooperation. The joint dedication of Canada and the United States to migratory bird conservation since the early 20th century has resulted in the slow climb in Whooping Crane populations. However, the Whooping Crane is still one of the rarest birds on Earth, and continues to face extinction.

Canadian governments and conservation organizations continue to make substantial efforts to conserve the AWB flock of Whooping Cranes in its summer habitat in northern Alberta. The species is protected under a network of Canadian legislation, and Canadian governments 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 international, U.S. and 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 centers, 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 during the winter of 2008-2009 at the Aransas Refuge is, therefore, a staggering and unprecedented setback to Whooping Crane conservation.

The Whooping Cranes' rarity has brought the species under the jurisdiction of Canadian law, beginning with the Migratory Birds Convention Act. Signed between the United States and Great Britain on behalf of Canada in 1916, the Migratory Birds Convention is one of many bilateral conventions pioneered by the United 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 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 by both Canada and the United States 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 Migratory Birds Convention Act and levied a \$3 million dollar fine for depositing hazardous substances in an area frequented by migratory birds. *R v. Syncrude Canada Ltd.*, 12 WWR 524.

The parallel U.S. legislation has similarly been used to hold companies liable in American courts. *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).

Whooping Crane protection under the Migratory Birds Convention Act is supported by federal and provincial legislation in Canada. The *Canada National Parks Act* S.C. 2000, c. 32 designates and protects National Parks, classifies areas of natural significance as Wilderness Areas in National Parks, and imposes positive obligations on the government to maintain the natural ecology of National Parks and prohibit detrimental human interference in National Parks. The Act further requires that “maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the minister. . . .” The Whooping Crane Nesting Area and Summer Range in Wood Buffalo National Park is a prime example of a designated 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) S.C. 2002, c. 29 which, like the U.S. *Endangered Species Act*, 16 U.S.C. §§ 1531 *et seq.*, establishes a regulatory regime for the recovery of species that are extirpated, endangered, threatened, or of special concern as a result of human activity.

These protections under Canadian, U.S., and international law are the very reason why the Whooping Crane did not go extinct in the 20th century. With a population of only 300 or so, the Whooping Crane is still endangered; continued enforcement of international and domestic law is essential to the survival of this species.

II. Canada has put decades of work seeking to bring the Whooping Crane back from the brink of extinction. The failure of the Texas Commission on Environmental Quality (TCEQ) 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. The Canadian refuge is part of a 6,487 square mile protected wetland complex in Wood Buffalo National Park that is carefully protected from human interference.²

Because the AWB flock is the only truly wild flock of Whooping Cranes, it is uniquely important in Whooping Crane conservation. 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

² 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 a globally significant Important Bird Area, and "a wetland of international importance" under the RAMSAR Convention.

Florida and was granted additional funding by the Canadian Government in April 2013 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 that traverses great 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; 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

Birds Convention and national legislation to ensure the safety of the AWB flock in its summer habitat in Wood Buffalo National Park. Nature Canada asks that this court consider the international obligations of the United States with respect to the conservation of this iconic North American species.

III. The Fifth Circuit Court of Appeals inappropriately reweighed or disregarded findings of fact by the District Court

The District Court held that the evidence “demonstrates that the water management activities of the TCEQ officials caused a ‘take’ of Whooping Cranes by altering their behavior through habitat modification, depriving them of food and water resources, and, ultimately, leading to malnourishment and death.” App. 240. The District Court clearly found the Petitioner’s experts “world renowned experts in their respective fields,” App. 151, and their evidence to be credible, while finding that most experts of Intervenors had “limited experience and insignificant evidence of whooping cranes in particular.” App. 152.

These District Court findings were specific and turned, in large part, on the credibility of witnesses whose testimonies provided the bases for the findings.

The appellate court, however, did not accord the trial court's fact findings the deference that R. 52(a), Fed. R. Civ. Proc. requires they be accorded.³ The appellate court re-weighed the evidence before the trial court and reassessed the quality of the inferences the trial court drew from that evidence. This type of appellate over-reach was the systemic problem the 1985 amendment to R. 52 sought to banish. As the Rules Advisory Committee for the 1985 amendment explained, abandoning the "clearly erroneous" standard for review of trial court findings of fact undervalues "the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority."

To the general policy justification presented by the Rules Advisory Committee, Nature Canada would add: long-running, science-intensive efforts, such as those undertaken by Nature Canada and its United States allies to conserve migratory bird species, are

³ The facts at issue, here, are garden-variety adjudicative facts. Their proof is not subject to the higher "clear and convincing" standard courts generally demand of "constitutional" facts. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513, 104 S. Ct. 1949, 1967, 80 L. Ed. 2d 502 (1984).

aided by, and not infrequently depend on, the concentrated attention of deeply engaged trial-court judges. The decision of the appellate court here legitimates reallocation of judicial authority, and that is a significant harm to Nature Canada, ultimately, and to a broader set of litigants that utilize sound science in their presentation of scientific facts to trial courts. The appellate court error in this case requires correction by the Supreme Court under its supervisory power to ensure that trial courts remain the fact-finding tribunals.



CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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