

TRANSCRIPT

INTERVIEWEE: Jeff Mundy

INTERVIEWER: David Todd

DATE: May 24, 2020

LOCATION: Austin, Texas, by telephone

TRANSCRIBER: Trint, David Todd

REEL: 4013

FILE:

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Google Voice [00:00:00] This call is now being recorded.

David Todd [00:00:03] Jeff, good morning!

Jeff Mundy [00:00:06] Hey David.

David Todd [00:00:06] Good afternoon! What? The time slips away.

Jeff Mundy [00:00:13] And to you.

David Todd [00:00:14] Yeah, well, I'm so glad I get to talk to you two days in a row. Nice to visit.

Jeff Mundy [00:00:21] I know. I'll see if I can remember all the stuff we said yesterday.

David Todd [00:00:25] Well, you know, as I was trying to explain, this is just, not so much of a who, what, when, where, why, but more about your impressions and general memories of it. There will not be a test. I just really appreciate you taking some time to explain your thoughts about this. And with your help, I wanted to just explain a little bit about what we're in for here and out for and see if this appeals to you. So I am going to recite a little bit here if you could bear with me.

Jeff Mundy [00:01:05] Surely.

David Todd [00:01:08] So, with your approval, we are planning to record this interview for research and educational work on behalf of the Conservation History Association of Texas for a book and a Web site for Texas A&M University Press and for an archive, at the Briscoe Center for American History at the University of Texas at Austin. You would have all equal rights to use the recording. And I want to make sure that's agreeable with you.

Jeff Mundy [00:01:42] Certainly. Happy to help.

David Todd [00:01:45] Well, good. Well, thank you very much. Oh, well just a little introduction here to what is happening. It is May 24th, 2020. I'm David Todd. And we are conducting an interview with Jeff Mundy, a trial lawyer who specializes in personal injury and commercial litigation, who has served on the various levels of Audubon, from Houston to Travis to Texas Audubon, on their boards. And recently was appointed to the Low Level Radioactive Waste Disposal Compact Commission and has worked on, and I think this is probably one of the most relevant parts here, a number of important endangered species cases. He's based in Austin, though this interview is being done by telephone.

David Todd [00:02:35] Today, we're hoping to talk a little bit about his role in the litigation to protect the whooping crane in Texas, especially through challenges of water permits that threatened its key foods, including the blue crab and the wolfberry.

David Todd [00:02:51] So with that introduction, maybe we can get rolling. What do you think?

Jeff Mundy [00:02:57] Absolutely. I'm glad you all have an interest in it.

David Todd [00:03:02] Yes, well it's a fascinating topic. We're really pleased and grateful that you can, you know, try to teach us a little about it. I thought a place to start would be to ask you a little bit about your background and your interest in wildlife and conservation, which seems like a major theme in your life.

Jeff Mundy [00:03:22] Absolutely. Born in Texas, lived here my whole life other than a time as an exchange student going to Oxford. But otherwise, my life's been in Texas and as a boy, spent a lot of time in the Panhandle where my dad's family's from and in West Texas. And then when I was about eight or nine years old, my parents bought a home on the bay, on Aransas Bay. And so we, literally every single weekend would spend going to Rockport, going out on the bay and fishing in the summer and duck hunting in the winter. And literally every weekend was out on the water in some form or fashion doing something.

Jeff Mundy [00:04:19] And that grew up hunting and fishing, and in that culture, conservation, which is really strong in Texas back then and there were several people that saw the resources in the, especially in the 70s, all of a sudden really shifting to commercial exploitation. And one of the real triggering events back then was the all of a sudden became very popular to have blackened redfish, which in turn set off a massive amount of gill netting around Aransas Bay, wiped out redfish, and then to a lesser degree, trout. And that sparked the formation of the Gulf Coast Conservation Association. One of the original founders of that was Walt Fondren, who was from Houston and lived across the street from our family. And so my dad was friends with him, became involved in what was then known as the GCCA, Gulf Coast Conservation Association, focusing on coastal conservation issues, primarily fishing. But it rapidly morphed into larger and broader vision.

Jeff Mundy [00:05:34] So I kind of grew up in that culture. And then by the same token, in hunting. Both that fishing community and the hunting community had a very strong ethic of teaching conservation to young hunters and when was a boy growing up in the Panhandle, prairie chickens were abundant. You could just walk across the prairies and flush them up by just walking around. And that becomes important later in my life. I You know, I'd become a lawyer and you know, as many lawyers do, got deep into my career. But then, became interested in birding about the time I was around 30 or so, somebody gave me a book on Connie Hagar, who was a famous amateur naturalist and ornithologist who focused her work on the area around Rockport, and what is now the Aransas National Wildlife Refuge. And she would publish her bird list (this was back in the 40s, 50s and 60s), and created a real national focus on that central Texas coast and the unique bird life and the importance of it to North American continent, both for migrations, also as far as some of the coastal and estuary importance to certain species such as the whooping crane. And when I say literally grew up around whooping cranes, I mean, from time I was a little boy, we would be fishing, been out fishing and crabbing, and you could literally look up and see whooping cranes. Back then, there were, you know, really not very many - was 30s to 40s when I was a young boy. Then

slowly over time, crept up. And then, as you just alluded to, I got involved in, plus I got interested in birding, I became involved in bird conservation groups and started actively getting involved with Houston Audubon. And they were very much, they were small volunteer group at the time, but very active advocates for conservation of coastal resources, focused on birds. And that was in the 90s and went on the board, and as you mentioned, became president, was on that board for six years and was really focused heavily on especially the upper Texas coast, on habitat and wetland issues. But also we were involved in some grant requests in trying to set aside land on the Central Coast to help create new protected habitat for whooping cranes, because whooping cranes were, not were, they are very, very territorial. They have high site fidelity, meaning every year the same family units go to the same territories and they protect them as new young birds hatch and spread out. They go off, leave home, wander off and find their own new habitat. So as their population numbers continue to increase, they needed new territories. And there were a lot of groups focusing on finding new habitat for them to set aside and protect. Houston Audubon was involved in some of the grants and fund raising for that effort. And that was all very quiet and done without a lot of public attention because the areas under a lot of development pressure, and so you don't want drive land prices up. And then also didn't want the local industry, you know, there's some industry like Alcoa and Formosa Plastics that were not real happy about having whooping cranes in their backyard, which might create problems for them. But, in any event, we were slowly adding pieces to the protected habitat through a series of tools, especially conservation easements, and I would, when I was on the board of Houston Audubon, I would handle some cases for them, pro-bono, trying to help with habitat issues. And that's when I really started doing environmental legal work and with my involvement in Houston Audubon.

Jeff Mundy [00:10:07] Then in the years after I came off the board shortly after that and Jim Blackburn was working with the O'Connor Ranch to protect the central Texas coast from some development pressure. The O'Connor family, very conservation-minded, have a very large ranch down there. And I could easily be off a little bit on the numbers, but approximately three to four hundred thousand acre contiguous block of ranch land south of Victoria from Goliad over towards the coast. Port O'Connor, named after their family, where they used to have, long, long ago, you know pre nineteen hundreds, boat docks to drive cattle to be loaded onto ships to be taken to market. But they owned all that coastal prairie and some the coastal areas, it did back then. They are still very conservation-minded. I recall I saw my first Attwater's prairie chicken when I started birding, standing on the side of the highway on Highway 77, looking out over the O'Connor ranch. They used to have them seen from the side of the road back in the 1990s.

Jeff Mundy [00:11:25] So anyway, long story made short, they hired Jim Blackburn to start working on some conservation issues for them. There was a nuclear power plant proposed to be built in that general vicinity, and it was going to take up essentially all of the river water to use as cooling. And the O'Connor ranch has two rivers running through it - the San Antonio River and the Guadalupe River, both of which were on the family's ranch ever since it was founded going back to the Republic of Texas days. But the proposed nuclear power plant was going to suck up all the water out of the river and the little saying goes in Texas, whiskey's for drinking and water's for fighting. And they decide to fight to protect their water resources. That pretty quickly got into a lot of a very contentious posture with the San Antonio River Authority and the Guadalupe Blanco River Authority.

Jeff Mundy [00:12:33] Then, 2008 and '9, there was a very bad drought which caused the freshwater inflows into a Aransas Bay to essentially drop to zero in that, that bay system and estuary system is in between having freshwater and the salinity of the open ocean. It's in

between those two in its normal cycles. And when the drought came, GBRA, and when I say that it's the Guadalupe Blanco River Authority, GBR A would not release any water from behind its dams to maintain freshwater inflows into the estuary. Normally those would be there, absent the dams and then San Antonio River Authority, same thing. They had the ability to release fresh water that they were impounding behind dams and maintain the normal, natural flows, but they chose not to do that. So it cut off all freshwater inflow into Aransas Bay.

Jeff Mundy [00:13:45] Well, the consequence of that is that the salinity in the bay actually started climbing rapidly. As the water evaporates, it leaves the salt behind in the estuary system and ultimately over the course of the following summer and winter, the salinity in the estuary system increased to where it was higher salinity, i.e. saltier, in that estuary system than it was out in even the open ocean in the Gulf of Mexico.

Jeff Mundy [00:14:16] That caused the crab population to collapse. And they literally were just, they could not survive in that hypersaline environment. So they literally were killed by the act of the river authorities not allowing freshwater inflows to go into the estuary. The blue crab is one of the two really key building blocks of the food on which whooping cranes rely. They they can eat multiple other things. But blue crabs are far and away their primary food source.

Jeff Mundy [00:14:56] The other one that is a real cornerstone of their diet is wolfberry. Well, as the drought cycled, so the fruit production for the wolfberries fell to essentially none at the same time. So their two real core building blocks were taken away from them. They literally had lack of adequate food sufficiency.

Jeff Mundy [00:15:22] Then the third kind of critical component that sets the stage for the lawsuit was the lack of fresh drinking water, which they do, like all living animals, drink fresh water, need fresh water, just like humans do every single day. People can go a long time without adequate food resources, but only a matter of days without fresh water. And the whooping cranes are the same. So those three components that are just fundamental to maintaining their existence and life, the crabs, the wolfberries and fresh water, were all knocked out from under them. Excuse me.

Jeff Mundy [00:16:06] And so then, that's against the backdrop of the river authorities having this other project along where they're going to take out even more water and impound more water off the bottom. So that sets the stage for an Endangered Species Act case, because what happened next was they literally started starving to death on the refuge. There was a well-known refuge biologist named Tom Stehn, who would fly in a small airplane, like a little Cessna airplane, and he would literally fly up and down every week where all the territories of the cranes were and tally them on his map. And he could keep track of every family and you know how many adults and how many juveniles there were. And juveniles are easily distinguished. They have different coloration pattern than the adults do. They have a rusty head on a white body, so they stick out. So he could count how many adult pairs there were, the male and a female, and then one or two juveniles per territory.

Jeff Mundy [00:17:12] And what he saw over that winter was the number of birds was declining steadily. They started missing from territories and disappearing. And by the time the winter was over, his conservative estimate was that somewhere in the mid thirties of adult whooping cranes had died due to starvation and were missing and it sometimes gets misreported as there was a hard number in the lawsuit, I can't remember off the cuff what it was, let's say 31 or 6 or something. But the actual number he was saying was it was at least

that number. He was calculating only missing adults because the young birds, as I mentioned earlier, start wandering off and looking for alternate territories to set up their own family territory. In talking to Tom, off the record, his real estimate was there was probably more in the range of the more than 50 or even 60 whooping cranes that died over that winter due to starvation, which that doesn't get reported a whole lot. And it wasn't a really key crisp presentation in the trial but his own personal opinion was at least 50 birds, 50 whooping cranes, died due to starvation that winter.

David Todd [00:18:36] And that's out of what, a flock of under three hundred?

Jeff Mundy [00:18:43] Yeah, it was, you know, I can look it up real quick. I want to say, we don't have to guess. We can look that up. And if you want, we tack it on. But if, I will say that, I wished that I looked it up, but it's something like 300, 400 birds. It was a dramatic percentage of the birds, put it that way. It was very real major impact. It was not just a small incidental one or two lost. I mean, every year one or two or three will die for whatever reason. Alligators eat 'em, just one of the, believe or not, one of the more common problems is they go out and there are a lot of alligators and they snap them up, and catch one on occasion.

Jeff Mundy [00:19:29] One of the interesting issues in the trial was the defense kept trying to say, well, you don't have any proof that the birds really died. You don't have any bodies to show us. There were three dead whooping cranes recovered from the field. One had clearly been eaten by an alligator and was a stack of white feathers, where it used to be. And then others were found, carcasses on the ground. And some of the testimony, cross-examination of a witness they had to replace Tom Stehn, who later came in and would change his way of doing survey protocols that man kept saying, well, you have no proof there's a dead body. So you can't really prove anything other than three birds died. But he himself had published numerous studies, which we got into in the trial, that showed in the wild, a a dead bird carcass vanishes within hours, typically sometimes faster than that. Coyotes eat 'em, bobcats 'em, alligators eat 'em, raccoons eat 'em, hawks eat 'em. Everything in the world is looking for a meal out there. And so a dead carcass typically doesn't persist very long in the wild. And we used the man's own studies against him to make that point. The judge was beyond angry, adding, I mean, it was just, it was just absolutely not legitimate science that they were presenting on the other side.

Jeff Mundy [00:21:05] So that really was the crux of the case, is that the two river authorities were manipulating the natural water flows that would go into the estuary system. And because of their act of manipulating the artificial, artificially manipulating the flows, they cut off all flow into the estuary, that caused the food population to collapse. And that's what killed the birds. So that's kind of the overview of the case.

David Todd [00:21:40] And can you, for those of us who are not as skilled with water law as you, explain a little bit about, I guess, the sort of context for the suit against TCEQ, and trying to ask for a water permit that would provide environmental flows, but I guess SB 3, and Section 11 of the Water Code wouldn't permit that?

Jeff Mundy [00:22:08] Well that was their comeback and this is where, it was the intersection of the federal law and the Endangered Species Act, and with the intersection of Texas water law. And one of the issues, is the state of Texas was saying our state law doesn't allow for what you want us to do. Our view was the federal law supersedes the state law, and the Endangered Species Act required them to provide adequate flows to maintain the species. And so that really was one of the interesting, kind of novel, issues in the case. And that's something

that, you know, through my my set of eyes, we, I thought, convincingly proved the deaths of the birds. And then the hard problem became, how do you craft a remedy to cure this and prevent it from happening again? And that's where we got into the tension between the state water laws, where TCEQ was saying they couldn't change the permitting system and leave water in the, in the basin to go downstream for inflows, versus the ESA, which says no, you have to do what it takes to keep the species alive.

[00:23:34] And that's something the judge struggled with. And even in the trial, once we got to that stage in the TCEQ representatives were on the stand, they to their credit, I thought, in stark contrast to the river authority reps, the TCEQ reps, I thought, were very upfront and acknowledged the problem and kind of said, look, it looks like our hands were tied. We don't know what to do. And literally one of them looked over at the judge and said, I honestly don't know what I'm supposed to do. I'm kind of: you tell me, you know. And it was getting into a unique area that was not well defined in the law about how do you cure this problem. And there were so many different problems in Texas water law. I often use the example of my clients, saying Texas water law is unique in that you could have four lawyers sit around the table, you ask the question, the four lawyers give you four starkly different answers about what a law requires or a right is. And each of the four with completely different answers would be 100 percent correct. Our water law has just evolved in a patchwork of Band-Aids rather than a comprehensive, well thought-out system.

Jeff Mundy [00:24:56] And while it's beyond the scope of that trial, there's still tension out there, and I expect in the near future we'll see another case and I've already worked on one where the state of Texas water laws, surface water is owned by the state, but groundwater, below the surface, is owned by the landowners. And in reality, they're both interrelated there, one and the same. But when our laws started evolving more than a hundred and twenty years ago, they, at that time did not understand the science of the connection between surface waters and ground waters. And now we do. But the law's evolved in such a strange patchwork system that the law doesn't recognize the science. And so we have lots of conflicts between surface water flows, like were presented in the whooping crane case, versus groundwater flows where a groundwater owner still generally has the right to pump as much as they want, subject to the rule of capture. And there are certain areas where it's regulated by groundwater districts, but I fully expect we will see a case dealing with that problem sooner than later. And the Texas Legislature really got to get involved and deal with it. I hope 100 years from now when someone is listening to this tape, going, I can't believe these guys lived in a time when the law was so crazy that they thought the surface and the ground water was different. But that's where we are in 2020 right now, still. And that's why, though, in the whooping crane case that the defendants were the river authorities that controlled the river and TCEQ, which controlled the overall permitting system for the surface waters and surface flows.

Jeff Mundy [00:26:45] I should add there's one other good piece of the puzzle that's worth noting. I remember when this happened, but there's a woman named Dianne Wassenich. Don't know if you interviewed her, David. If you hadn't, you should. But she lives in San Marcos. Still does. And many years ago she got the idea, in the wake of all these problems on the coast, to put in for a water permit and applied for the water permit. And she got up a bunch of people to raise money to pay for it, fully fund it, pay the same rates everybody else would. And then she put on her permit application (you have to give a purpose for which you're going to use the water) and she put on there, she was going to leave it in the river and just let it flow to the coast. And the Legislature immediately responded in the very next session and amended the water code and said that was not a permissible use for which a permit could be granted. You couldn't, you couldn't buy a permit with the intention of just

leaving it in the river and letting it flow to the ocean. And so that gives you a little bit of the mindset of where the Legislature has been. And that's still the law even today. And that's one of the other things that set the stage for this whooping crane trial. And Dianne's effort with that first permit application she just filled out as a citizen led to the creation of the San Marcos River Foundation, which is often referred to as Smurf.

Jeff Mundy [00:28:21] So, you know, there's a couple different pieces of background context that set the stage and then the whooping cranes dying that winter from lack of water flows really was the spark on the powder keg. And I wish that I could tell you now there's been a great solution, it'll never happen again. But it hadn't. Sadly, the state, the state fought it bitterly and took it up on appeal. And I know we'll talk a minute about what happened at the 5th Circuit. But the state appealed it and among their points was causation, saying it was not foreseeable that their acts would cause this event and the Fifth Circuit granted their appeal on that point.

David Todd [00:29:14] Could we, before we get too much into the circuit appeal, could you talk just a little bit about the district court injunction to you know, I guess go through the Incidental Take Permit and Habitat Conservation Plan? I think that was..

Jeff Mundy [00:29:30] Yeah. The judge, I said that, it was interesting that at the end of the trial, everybody, other than the river authorities, was kind of on board saying there's a problem, we need to do something and the hard part was trying to craft a remedy and the judge was wrestling with the tension of what could a federal court order state officials to do and tried to shoehorn it into the framework of what relief is available under the Endangered Species Act, which was the only cause of action we were pursuing. And. It really, I can tell you. You really all I would tell you, I would talk to Jim Blackburn, because I don't want to overstep his toes because this really was the culmination of his whole entire career was this case and trying to come up with a remedy that would sort of cure this problem, not just for the whooping cranes, but for all of the coastal inflows. And this is a tension on every single river in Texas where the people on the coast sort of get the last drops left over from what trickles down a river. And normally the U.S. Fish and Wildlife Service can authorize the what we call the "take" of a endangered species, and put conditions on somebody, let's say golden cheek warblers in the Hill Country, they can authorize somebody to bulldoze golden cheek warbler habitat, but in exchange, they have to set aside other habitat to offset it and help protect the species in the long run. The root problem in the whooping crane cases, that it's the way the state water law was set up for controlling surface water with these river authorities and permits and the state owns it, is what authority does the federal government have to issue a mandate to a state government to order them to redo their permitting system differently? And that was the real simplified version of what she was faced with in trying to craft a remedy to say, quit over-selling your water. You know, you need to redo your system and make sure there's can be an adequate amount of flows going to the coast to maintain this estuary system. And that's what she was trying to get at. And it's not an easy, it really is just an incredibly challenging problem to try to work through that. And I think that's, that problem in that context is kind of what I think also sets the stage for the state's appeal to the Fifth Circuit.

Jeff Mundy [00:32:37] And, then the Fifth Circuit taking what I would view as kind of the easy way out to avoid stepping into that thorny problem of federal government versus state government, how do you deal with sovereign immunity between the two governmental entities and concepts of federalism and constitutional boundaries? And that's why I think, honestly, the Fifth Circuit, rather than trying to address that issue, realizing it is so, there's so many big legal issues embedded in that, that's why I think they kind of took the easy way to say, you

know what, we're going to kill this whole case on something - it's a fact-driven question about whether or not there's a foreseeability component of what we say, proximate cause between the permitting vs. the birds dying. And the Fifth Circuit, just make it real simple so we don't get deep into the appeal, but real simply, proximate cause has two components, which is cause-in-fact, can you join dots in a chain of events where there's a logical sequence from this event to that event. That's part of it. And then you prove that, which we did. And I don't think they really challenged that.

Jeff Mundy [00:33:56] But what they did challenge was the fact that they could not foresee. Proximate cause has the second prong in its thing that the event complained of must have been foreseen from the act of the actor. And so the state and these river authorities were saying, look, we could not foresee that the way we do our permitting system would cause whooping cranes on the coast to die. And that's the Fifth Circuit picked up on that. But that's what they reversed on. I think, real world lawyer, you know, if you ever got these judges, you know, they're all off the bench. And ten years we got them off the record, not to be quoted, I think they would all probably say, you know what, this problem with how you craft remedies and the tension of state versus federal government interrelationships and constitutional boundaries is just too big, too complex, too many issues. So they punted on that foreseeability policy. And well y'all had no evidence on the foreseeability. I will tell you, as a lawyer in the case, we actually did have evidence of that and that was actually in the record presented to the judge. But what was so interesting is in the trial level, it really was not a big question. It just didn't get a lot of attention because everyone kind of, sort of glossed over. It's like, yeah, where we knew this could happen. And there was actually an exhibit where I can't remember which one of the river authorities had, I want to say GBRA, had an exhibit, you know, an internal memo years before this predicting exactly this problem.

Jeff Mundy [00:35:31] And also the whooping crane recovery plan that's developed by the Fish and Wildlife Service also had a section in it identifying the need for freshwater inflows to maintain the estuary health. So the evidence of foreseeability really was there, but the Fifth Circuit just kind of turned their head the other way. So we don't see anything and took the easy way out. So that's really the Reader's Digest of why the appeal went down like it did, in my view.

David Todd [00:36:04] You know it's interesting to me, kind of reeling it back a little bit, but you were talking about Diane Wassenich's SMRF petition, and you'd think that would have been enough to put everybody on notice that there was a problem. And that was...

Jeff Mundy [00:36:19] Absolutely.

David Todd [00:36:20] '03, I guess. Forewarned.

Jeff Mundy [00:36:21] Yeah. That's five years before this happened and the Legislature responded in the next session to it and took that away, the permit as a basis or a purpose for a permit. I mean the state, the state absolutely had knowledge of it and it was foreseeable like one of the river authorities had it, and then it's in the recovery plan. So I think everybody, very legitimately, was aware of the risk and they still are. I'll say the risk is still here today.

Jeff Mundy [00:36:54] One of the interesting responses to the case was Tom Stehn was retiring at the time this was occurring, and he'd always done these surveys, literally going out and counting every single bird in the territories and could map 'em out literally. He had maps of where every family unit lived. After he retired, they did not hire a replacement for him to

continue to conduct the survey like he had done weekly from an airplane. Instead, they brought in a man, a biologist from out of state who was used to doing duck census analysis. And the way duck populations are, surveys are conducted, they'll fly a transect and they will go out literally in airplanes. They were gonna fly 10 miles and count how many ducks we see on this 10-mile transect. And we'll take that and say, OK, if we see a thousand ducks on this 10-mile stretch, we'll analyze how much habitat there is similar to this and say, if there's 10, if there's a hundred miles of suitable habitat and we found a thousand ducks in that 10-mile stretch, we'll multiply it times a hundred miles of habitat and say there's 10,000 ducks. And so they changed the survey protocol to use this duck counting method and say, OK, we flew a transect and we counted a hundred whooping cranes. There's five times that amount of habitat available. So we're going to say there's 600, five, six hundred whooping cranes now. And the numbers we see population-wise today are a result of this duck census method, which is absolutely not a valid methodology for counting whooping cranes. They're very patchy in their distribution. They need all the correct components, just like you find it the Aransas refuge. And so they are patchy in distribution. So what changing that survey protocol did was essentially assure there will never be a repeat of this lawsuit because it's impossible using that duck counting method to say this number of birds disappeared from their territories over a winter season. And so I really was at the time very critical. The judge was also very critical of the Fish and Wildlife Service for changing to that. But it appeared to us to be a very deliberate decision to change methodologies, to make sure there would never be the sequel lawsuit in the future, where we would come back and correct the, quote, deficiencies they found with the trial record we had from that case.

Jeff Mundy [00:39:51] I think we definitely you've given the show like that.

David Todd [00:39:55] Just because you couldn't allege a particular take, it was sort of a statistical analysis, and you get some probability and be very hazy and fuzzy. Is that the problem?

Jeff Mundy [00:40:05] Exactly the problem.

Jeff Mundy [00:40:11] Yeah. Whereas..

David Todd [00:40:11] I interrupted you.

Jeff Mundy [00:40:14] No, I was just going to say that that, you know, Tom Stehn could say, here's my map of where these birds live right here on this map, this territory, these birds disappeared or there used to be three and now there's one. There's used be two adults and a juvenile. Well, now there's only one adult and one juvenile. A month later, there's only one adult left, after that, there's nobody left. So he could very clearly, week by week, map out these birds were disappearing. And so the statistical methods that they use now - range transects - makes it impossible to have that granular level of detail about birds disappearing from their territories and therefore use that to prove take. And I, I absolutely believe and I would swear under oath any day, anywhere, in court, that the Fish and Wildlife Service changed that method, at the behest of the state, to assure there would never be a repeat of this lawsuit.

David Todd [00:41:19] Data matters.

Jeff Mundy [00:41:21] It is the root foundation of the case. All cases are built on the facts. And if they took away the, the thing that we used to try that case, it just cannot be repeated. Now, at least with their current methodology and there was a lot of I'm telling you internally at Fish

and Wildlife there was a lot of criticism about that change and it just... The refuges should not be driven by politics. It should be driven by science. Whatever the Endangered Species Act was supposed to be created to protect, whooping cranes is on that list. I mean, they are one of the core species that should be protected by the Endangered Species Act. You can argue about a cave spider or newt darter or whatever. But the public and Congress, when they passed the law, absolutely would say whooping cranes, that's something that the intent was there to protect. And it's just beyond disappointing to see what's happened.

David Todd [00:42:32] So some of this has been in the past tense. Can you bring us up to date at all on what has happened since the appeal and the sort of closure of the suit?

Jeff Mundy [00:42:47] Well, the, the water wars, I will call them the water wars, continue to this day. And I've been talking with Jim and getting at the rule of capture. And that's something we are still working on. In 2015, we filed a lawsuit for TESLA, Trinity-Edwards Spring Protection Association, to fight a water permit application that's going in to, or seeking to go in, around Wimberley and fall down five million gallons of water a day, put it in a pipeline, export it out east of I-35. And when we first filed that lawsuit, the core suit was to try and stop that project. The water developer was using the rule of capture, saying, I can buy least a thousand-acre ranch over here. I'm going to pump as much water as I can off of it. It's not regulated. And that the whole discussion unto itself about that case, the long, long case made real short to the bottom line, is the water developer agreed to have a groundwater district take jurisdiction over them, push their permitting through the permitting process. And that permit fight is still going on right now.

Jeff Mundy [00:44:19] But the rule of capture is one of the root problems that sets the stage for a lot of these water fights. And the state of Texas just absolutely has got to heavily revamp its water law and bring surface water and ground water into one coherent, logical system. The other problem, and just on a big, big wide scale, is no politician, and this is true for both parties, no politician wants to be the person saying we don't have enough water for people to keep moving here. There's no room left in the inn. So politicians all just keep saying, come on, we want more people, we want more businesses. And the western two-thirds of this state, water is highly limited. Essentially using I-35 as the breakline. You know, east of I-35, sometimes there's too much water and they deal with flood events around Houston, just chronically battling too much water. You get west of that, out west of Columbus, you're familiar with, and especially west of Austin, and water is a scarce resource. And politically, we're going to have to take a real hard look and be realistic and say there is a finite limit to how much water is available. And we can't just say there's unlimited ability to grow, keep adding people and keep adding businesses. And I can tell you, most of it's driven through litigation right now. The politicians just don't want to have a dialog that would put any boundaries on water production. The groundwater districts that are being created, and I can just give you a quote from the Barton Springs Edwards Aquifer Conservation District, in fighting the ElectroPure permit fight. I met with their manager back when we started that lawsuit five years ago, and he said, very plainly, we have never one time denied a single application for a water permit to produce water in this district. And what we do is tend to cut back the amount that we give on them. But right now, their mindset is still to give out unlimited permits to anybody that walks in the door and asks for one. And we have got to get past that mindset, just say there are boundaries and that's got to happen, and right now it's just a mindset that has not yet changed. That's true for surface waters, true for groundwater.

Jeff Mundy [00:47:07] Surface water is controlled by the state, in what appears to be a logical system, but kind of the same problem, they hand out unlimited permits. And what we found in

the whooping crane trial didn't become a big focal point of the trial, though we found in discovery was, on paper, these districts, or river authorities, have sold off and allocated dramatically more water than what's really in the river. And so when you had these drought events and they start having to curtail people's actual use of water, it becomes a harsh reality. See, hey, there's not as much water out there in the river as what they're handing out for permits.

Jeff Mundy [00:47:50] And I think you're going to see more lawsuits and you know, I'll certainly will be happy to be on the front edge of them. Jim Blackburn has spent a lifetime career fighting for it and there's a handful of others that are in it. It's very challenging litigation if you're trying to be on the environment side of these cases and help the animals and the birds and the fish and the crabs, they don't have a strong voice. And what's sad is even the people on the coast like you just look at crab. It's just an economic resource. People love to go to the restaurant and have some shrimp or have oysters or have crabs but, you know, we have to keep these coastal systems healthy to produce that seafood we rely on. And there's a tension between the people on the coast and that economic resource, versus people in, say, San Antonio. They want to keep building more neighborhoods and keep growing unlimited growth. And the politicians, and I put it on both parties, not one or the other, but both of them, somebody's got to have the courage to stand up at some point and just say we need a reality check here, folks. It's just the way we're growing unchecked and handing out permits unchecked, it's got to change. So that's that's where we are. And I think where we're headed.

David Todd [00:49:15] It's interesting that I guess earlier talking about the sampling protocol that will replace Tom Stehn's transects, that he was following and it seems like maybe we're in a similar situation now where the water flow counts maybe that the river authorities and the TCEQ permitting are just not realistic. They're not accurate.

Jeff Mundy [00:49:44] They're not.

David Todd [00:49:44] Is that a fair thing to say?

Jeff Mundy [00:49:46] Absolutely a fair thing to say. I mean, it's, they honestly are drifting into the realm of fiction at this point. It's just wishful thinking. They just, politicians are coming up with answers. They say, this is what we want the answer to be. And you'll go write a report and tell us how to get there. It's, we've just got to have a fundamental change where somebody just says there is not the water out there, that y'all say there is.

Jeff Mundy [00:50:18] These drought events are what really are going to trigger the public conscience. Honestly, I remember the 2011-12 drought, you probably do too, where some municipalities out west of Austin, northwest of Austin, their municipal water wells went dry. And all the sudden they were having to truck waters into smaller areas. So I think that was the first warning sign. And we'll have another drought like that. The old saying is, Texas weather is one long drought interrupted by a periodic flood. So if we keep adding more and more people, if it's going to be harsher and harsher each time we have a drought.

David Todd [00:50:58] So it sounds like you'll use the big hammer, the Endangered Species Act, federal power to try to push through a change in water law here in the state. And that was, I guess, had mixed success. And so it sounds like you're expecting it to require Mother Nature and maybe some political pressure to change things.

Jeff Mundy [00:51:24] Yes, sir. Yes, sir. Very well stated.

David Todd [00:51:30] Well, you have run through a lot today. Is there anything you wanted to add about what you learned from the whooping crane, and water issues, wolfberries and blue crabs?

Jeff Mundy [00:51:44] Well, I can tell you that there are a lot of people in this state that care deeply about natural resources, about wildlife, about water and I think the general public's mindset is in the right place. The problem we have is political fortitude to stand up and openly admit that we have a finite resource. It's not an unlimited ability to just keep turning on the faucet at will. And so I think the general public at the ground level, grassroot level, is probably there. But what we need now or some political leaders in both parties to have the courage to stand up and admit what's blatantly apparent to a lot of folks at this point.

David Todd [00:52:40] Well, nicely said. Thank you so much.

Jeff Mundy [00:52:45] Well, thank you. I appreciate your project in capturing this.

David Todd [00:52:51] Well. Thank you so much for your time. And I hope we can visit again, because every time I get to talk to you, I learn a lot. And I think this will be good for the archives. Thank you so much.

Jeff Mundy [00:53:03] You're very welcome, David. Thank you.

David Todd [00:53:06] Take care.

Jeff Mundy [00:53:06] I'll say this for the record, I hope somebody's listening to this one hundred years from now, if somebody ever does, I hope you all figured out the solution politically at that point. So that's my footnote to all of this.

David Todd [00:53:19] All right. That's the endnote. Thank you so much. Take care, Jeff.

Jeff Mundy [00:53:24] Bye.

David Todd [00:53:24] Bye now.