



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

November 13, 1973

The Honorable Clayton T. Garrison
Executive Director
Texas Parks and Wildlife Department
John H. Reagan Building
Austin, Texas 78701

Opinion No. H- 150

Re: State and federal
authority under the
Migratory Bird Treaty
Act, 16 U.S.C. §§ 703,
et seq.

Dear Mr. Garrison:

You have requested our opinion concerning the jurisdiction of the Secretary of the Interior and the Texas Parks and Wildlife Department over migratory birds. Specifically, you ask:

"Does the Secretary of the Interior by virtue of the Migratory Bird Treaty, the Migratory Bird Treaty Act, and resulting regulations have authority to close St. Charles Bay to the hunting, taking, capturing or killing of migratory birds?"

You indicate that the "opinion is requested in order to ascertain the jurisdiction of the Department [of Parks and Wildlife] in that portion of St. Charles Bay which has not been closed by previous action of the Secretary of the Interior."

At our invitation, the Secretary of the Interior has submitted a brief on this question. By way of factual background, he indicates that:

" . . . St. Charles Bay is a finger of the Gulf of Mexico extending into the midst of the Aransas National Wildlife Refuge. The refuge is, among other things, the only wintering area for whooping cranes, which, in addition to being migratory birds, are listed as a rare and endangered species. These birds move back and forth across the bay and are threatened with accidental destruction from hunting as well as being frightened and disturbed

by the noise and activity normally associated with hunting. Closing certain areas of the bay was seen as a necessary measure to protect these birds."

The United States has executed conventions with Great Britain (August 16, 1916), 39 Stat. 1702, and Mexico (February 7, 1936), 50 Stat. 1311, for the protection of migratory birds. Pursuant to those treaties, the Congress enacted and later reaffirmed the Migratory Bird Treaty Act, 16 USC §§ 703 et seq., which makes it unlawful to pursue, hunt, take, capture or kill any migratory bird except as permitted by regulations adopted by the Secretary of the Interior. The Secretary has designated part of St. Charles Bay as a closed area in which hunting is not permitted. 21 Fed. Reg. 6513 (1956).

It has long been settled that the enactment of the Migratory Bird Treaty Act was within the power of Congress. Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382 (1920). Therefore, the Act and the regulations promulgated under it are superior to any conflicting law of this State. U.S. Constitution, Article 6, cl. 2. The Secretary of the Interior has broad discretion under the Act. See Sickman v. U.S., 184 F. 2d 616 (7th Cir. 1950) cert. denied 341 U.S. 939, 71 S. Ct. 999 (1951); Lansden v. Hart, 180 F. 2d 679 (7th Cir. 1950) cert. denied 340 U.S. 824, 71 S. Ct. 58 (1950).

The Act does permit concurrent regulation by the State so long as the state laws and regulations are not inconsistent with federal law or provide additional protection to migratory birds. 16 USC § 708. See Uniform Wildlife Regulatory Act, Art. 978j-1, V. T. P. C.

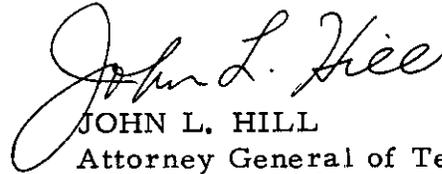
Therefore, in answer to your question, it is our opinion that the Secretary of the Interior may close all or part of St. Charles Bay to hunting. The Texas Parks and Wildlife Department may regulate areas over which the Secretary has not asserted jurisdiction and also may regulate areas the Secretary has closed if its regulations are consistent with the Secretary's or provide additional protection to migratory birds.

SUMMARY

The Secretary of the Interior has authority under the Migratory Bird Treaty Act to prohibit hunting in all or part

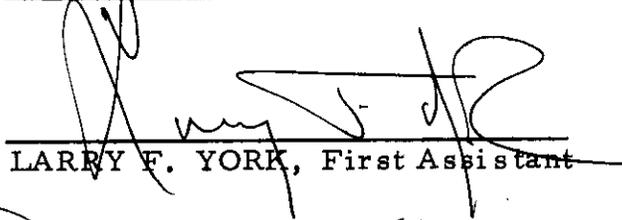
of St. Charles Bay. The Texas Department of Parks and Wildlife may promulgate and enforce rules and regulations over portions of the Bay in which the Secretary has not asserted jurisdiction. It may regulate portions of the Bay covered by the federal proclamation so long as the state regulations are consistent with the federal regulations or provide additional protection to migratory birds.

Very truly yours,

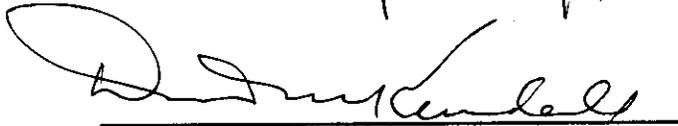


JOHN L. HILL
Attorney General of Texas

APPROVED:



LARRY F. YORK, First Assistant



DAVID M. KENDALL, Chairman
Opinion Committee