



Guadalupe-Blanco River Authority
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Plaintiffs in Whooping Crane Trial Attempt to Link State's Actions to Alleged Mortalities

For more information

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CORPUS CHRISTI — Witnesses on the first day of the federal trial, *The Aransas Project (TAP) v. Shaw, et al*, explained their efforts in trying to connect fresh water supply to whooping crane mortality in the Aransas–Wood Buffalo whooping crane flock that winters at Aransas National Wildlife Refuge. Defense attorneys countered with strong cross examination questioning both the methodology and data used in accounting for whooping crane mortality.

The trial, held in U.S. District Court in Corpus Christi, is the result of a lawsuit filed by TAP in March 2010, which alleged that the Texas Commission on Environmental Quality (TCEQ) violated the “taking” provision of Section 9 of the Endangered Species Act (ESA). That provision prohibits a “take,” which is any activity that kills or harms a listed species, or that destroys its habitat. The TAP lawsuit held that during drought, a reduced amount of fresh water reaching the coastal marshes caused the salinity to rise, thereby preventing whooping cranes from finding sufficient food and water. The suit claims that those conditions in 2008-09 weakened them and led to the deaths of 23 whooping cranes. After filing to intervene, U.S. District Judge Janis Graham Jack granted the Guadalupe-Blanco River Authority (GBRA) defendant intervener status in April 2010.

By 4 p.m., the plaintiffs had presented three witnesses: George Archibald, a co-founder of the International Whooping Crane Foundation; Robert Sass, a professor *emeritus* at Rice University (a chair of biology and ecology); and Katherine Ensor, professor and chair of Statistics at Rice University. In an opening statement, TAP’s attorney Jim Blackburn indicated he would prove causation, and at one point called the state’s water rights system “archaic” and admonished that at stake with the case was “nothing less than the future of the whooping crane.”

On cross examination by attorneys for GBRA, TAP’s expert witnesses admitted to relying on data supplied by retired U.S. Fish and Wildlife (USFWS) employee Tom Stehn, whom had conducted aerial surveys of the whooping crane flock for many years, as the basis for their own expert reports related to the case. Judge Jack asked parties to the lawsuit if anyone had tried to subpoena Stehn. Both sides indicated they had attempted, but internal USFWS rules prevented them from compelling Stehn to testify. The judge then inquired as to whether a trial subpoena was issued for Stehn. All parties joined in issuing a trial subpoena for his appearance. By 3:15 p.m., attorneys had spoken to Stehn, and Stehn indicated that he would head to court. In the meantime, officials were awaiting a position by USFWS on the issue.

One of the TAP witnesses, Sass, who did a statistical comparison of inflow data from the state to Stehn’s mortality data, admitted that Sass took the data as given without checking validity. GBRA attorneys also focused cross examination with Archibald on the aerial count methodology used by Stehn. Archibald indicated confidence in Stehn’s aerial counts over the years. They also focused on significant differences between assumed whooping crane mortalities and USFWS “known” whooping crane mortalities between 1988 and 2011. They contended the plaintiffs would have to prove that 23 cranes actually died in the winter of 2008-09, and that causes such as predator killing, bird diseases/viruses, and injuries were not causes in the purported deaths.

TAP’s initial publicity blitz on the lawsuit led many media outlets to report the assumed 23 whooping crane deaths despite the fact that remains of only two to four cranes could be considered for mortality in Texas that winter. Analysis of the available physical evidence from 2008-09, which includes two intact whooping crane carcasses and fragments of two additional carcasses, are not indicative of deaths caused by lack of adequate food or water. During the cross examination, Archibald admitted after the alleged 23 deaths that 17 adult cranes unexpectedly returned to the refuge the next winter. For half the year, the whooping cranes’ diet consisted of food sources other than blue crab and wolfberries.

Expert witnesses for TAP are expected to continue testifying for the next couple of days. TAP is represented by Houston-based attorney Jim Blackburn, who also represented members of the D.M. O’Connor family in their attempt to block



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GBRA from entering into a contract that would provide surface water for a proposed nuclear power plant that would be located adjacent to O'Connor family property in Victoria County.

The Aransas Project lawsuit seeks remedies that include extensive federal intervention in the way Texas manages its water resources and substantial reallocation of surface water on the Guadalupe and San Antonio rivers.

The GBRA was established by the Texas Legislature in 1933 as a water conservation and reclamation district. GBRA provides stewardship for the water resources in its 10-county statutory district, which begins near the headwaters of the Guadalupe and Blanco rivers, ends at San Antonio Bay, and includes Kendall, Comal, Hays, Caldwell, Guadalupe, Gonzales, DeWitt, Victoria, Calhoun, and Refugio counties.