

**TRANSCRIPT**

**INTERVIEWEE:** Jim Blackburn

**INTERVIEWER:** David Todd

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

**David Todd** [00:00:04] Good afternoon.

**Jim Blackburn** [00:00:06] Well good afternoon, David, how are you doing?

**David Todd** [00:00:08] Jim! I'm fine, thank you. So nice to hear your voice.

**Jim Blackburn** [00:00:13] Well, same to you. You know, you're always kind of very near to the front of my mind. But not always there. And it's good to have it brought back straight up. So I can remember this guy that just came. Where is he? When did we first encounter? Was it and when you came back from Emory.

**David Todd** [00:00:36] It was, it was in the last century, I think. Oh, it was long ago.

**Jim Blackburn** [00:00:43] There is no question about that.

**David Todd** [00:00:47] Well, it was a happy thing. You've done so many nice things for me. And this is the most recent favor. So thank you.

**Jim Blackburn** [00:00:57] Yeah, no problem. So let's get on with it. What you got?

**David Todd** [00:01:01] Yeah. So I'm hoping that we can have a little conversation today. And so the first thing I wanted to do was to make it clear that we intend on recording this for, for posterity. And so I wanted to just recite a little bit of the plan here so that we make sure that you're on board. And here's the thought. With your approval, we would be planning to record this interview for research and educational work on behalf of the Conservation History Association of Texas, and for a book and a Web site for Texas A&M University Press, and finally, for an archive at the Briscoe Center for American History, at the University of Texas at Austin. You have all equal rights to use the recordings as well. So that's the thought. That's the plan. I was hoping that would be right with you.

**Jim Blackburn** [00:01:59] Certainly OK with me.

**David Todd** [00:02:01] Great, great. Well, let's get started then. It is June 10th, 2020. My name is David Todd. We are conducting an interview with Jim Blackburn, who is an environmental attorney, a professor at Rice University, and an author of several books, including the Book of Texas Bays and A Texan Plan for the Texas Coast. He has been deeply involved in litigation

and negotiations to secure instream flows to support the whooping crane and other coastal wildlife. And he is based in Houston. And this interview is being done by telephone.

**David Todd** [00:02:42] I guess the most pertinent thing here is that Jim is president and has served as attorney for the Aransas Project. And today we'll be focusing on discussing the project's suit against, and later negotiations with TCEQ, the GBRA and I was hoping that you can fill us in on, on many things that have happened there of last decade and more.

**Jim Blackburn** [00:03:11] I'm happy to help.

**David Todd** [00:03:13] OK, well, maybe we can just set a little context and get your origin story. Could you tell us something about your background and your interest in wildlife and conservation?

**Jim Blackburn** [00:03:28] Well, I grew up in the outdoors. I was raised in the Rio Grande Valley. My parents were from central Louisiana. And I think my mother always felt like a colonist down in south Texas. And we migrated back to central Louisiana for about six weeks in the summer, and for most every major holiday, we'd drive the 12 or 13 hours from the Rio Grande Valley back to central Louisiana. And so my uncles taught me to fish and hunt along with my dad and my, my mother's father. And I spent a lot of time outdoors.

**Jim Blackburn** [00:04:05] Then I got older, ended up in law school during the Vietnam War and realized about halfway through law school that I really didn't like law very much at all and I told my wife at the time that, who was putting me through law school. But, you know, I just hated law. She goes, oh, my gosh, you can't hate law. And she was talking to a friend and came back and said, hey, you know, you like the outdoors, why don't you be an environmental lawyer. And I said, Oh, man, that sounds like a great idea. And so I took all the law classes I could, at UT law school in '71, '70, '71, '72 timeframe when there weren't many environmental law classes. But I sort of specialized in environmental law and products in the consumer and international water law. That type of thing.

**Jim Blackburn** [00:04:55] And then I wrote a paper, made the lowest grade in my class. And then I won a national contest with that paper that I kind of used to get a fellowship to come to Rice to study environmental science and engineering, got a master's degree, and have been practicing either environmental law or environmental planning ever since I graduated in 1973. Actually, the degree was in '74, but I finished in '73.

**David Todd** [00:05:27] Well, that's quite a good encapsulation of what you've done early on. And of course, we're skipping over a number of chapters here. But I am so curious, what would you have done on behalf of the whooping crane that I was hoping that you might be able to focus in on, on its life history and its decline and recovery, as you know it.

**Jim Blackburn** [00:05:57] Sure the, the whooping crane is one of the amazing success stories of America and wildlife conservation. I think we were down to 17 or so cranes in the wild flock back in oh, I guess it was late '30s, perhaps early '40s. And in that time period, they were almost extinct.

**Jim Blackburn** [00:06:17] And the Aransas Wildlife refuge was set up by Congress. Franklin Roosevelt was responsible for setting that up and efforts began to be focused on protecting the crane. At that time, they didn't even know where they nested. We knew where they wintered, which was down on the Texas coast, in really the San Antonio Bay, Blackjack

Peninsula area of San Antonio Bay. And over the years, they began to recover and they've expanded and when I first got involved, I believe we were up to about 260, 270 cranes.

**Jim Blackburn** [00:07:02] And in 2008 - 2009, 23 cranes died over the winter. And that was what set off our, that's what our lawsuit was based upon. But the history of that litigation goes back much further. I will say this, that since the lawsuit and that the attention has continued to be focused on the cranes, the cranes are continuing, the flock has recovered and is continuing to expand. And I think by last count, I saw we're up around 400-plus birds. So it is up. It's getting, again, it's a success story. I think the target for recovery is a thousand birds. So we're quite a ways from that yet.

**David Todd** [00:07:48] Okay. So I think you mentioned that that this refuge was was set aside by FDR - Aransas National Wildlife Refuge - near the outlets of Guadalupe River and the San Antonio River, via the Guadalupe. And I was wondering if you could just give us a little picture of what that refuge habitat looks like.

**Jim Blackburn** [00:08:17] Well, during much of the refuge itself is actually brush land, but it's really the edges. It's the, it's the marsh where the whooping cranes reside. And so you've got sort of a kind of a high brushy, high, I mean, that's a very relative term, maybe 20 feet above sea level, a high brushy terrain that then gradates into a prairie area. Then gradates into coastal marsh that rims San Antonio Bay. And then the, I think the bays around the corner there, Mesquite Bay, Carlos Bay are actually the ones that border border the refuge. And then you've got Aransas Bay on the back side. St. Charles Bay comes in a little further inland and kind of ducks from the backside, on the west side of the refuge. And then the Matagorda Island was, became a National Wildlife Refuge. And so that began to be preserved. And that's on the other side of the bay, on the barrier island.

**Jim Blackburn** [00:09:22] And so really, the habitat that's most important to the whooping crane is the salt marsh. And they have unique territory that a couple, a pair, come back to every year and the same pair comes to the same habitat. And if if they die, their offspring, I believe, inherit that part. And every year, the hope is that they will bring one, and sometimes two, youngsters down with them. The young cranes, the cranes that were born that year, are have to kind of have cinnamon, kind of an orange, kind of streaked blotches over a white body, whereas the whooping cranes themselves are just gorgeous. Five foot, five and a half foot tall white birds with a red crown and black wingtips.

**Jim Blackburn** [00:10:19] But, so habitat, those territories are incredibly important both to the cranes, but to also the study of cranes because it allowed Tom Stehn, who is the, was the refuge whooping crane expert for 30 years. It allowed Tom to identify that we had lost 23 cranes during the winter of 2008-2009. But since that time, the refuge has changed its census techniques, and it probably would be impossible to pick up the loss of 23 birds today. But at that time, Tom would fly overflights, and basically he would identify at the first of the season which, which territories were inhabited by what birds, identified if there's one or two new chicks, or if there was no chicks with the adult pair. And there's also a group of kind of they're, they're, they're, they are older than one year, but they're not breeding age yet. And there's sort of a gang of kind of second year cranes that kind of hang together. And so that's the gang. And this kind of floats around. But their, the breeding pairs have habitats and they often have young. And Tom was able to identify over the course of 2008-2009, which cranes were missing, and if they were missing more than one overflight, the assumption was that they had perished. The, we actually only found bodies of four cranes, or evidence of perishing. The others just simply disappear.

**David Todd** [00:12:04] And I gather that that these cranes died in large part because of the 2008-2009 drought that you mentioned before. Can you give us a little bit of understanding what the connection was between the drought and their deaths?

**Jim Blackburn** [00:12:21] Sure. There was a horrible drought in 2008, 2009. And whooping cranes during the winter, the bulk of their diet is composed of blue crab. And that was really one of the key issues in the litigation was sort of the life history of the blue crab and the availability and the willingness of cranes to go to alternative food supplies because whooping cranes are omnivorous. They can eat other things. They do eat other things. But blue crab are the key aspect of their diet. And each crane eats about 80 crab per day. They are crab-eating machines. And part of the ritual with the youngster being on the territory with the adults is the adults teaching the young crane how to catch crab. And crabs, you know, I mean, one, they're, they're pretty, pretty tricky. They move quickly. But secondly, they'll fight back. And so it's oftentimes very amusing to watch a young crane trying to capture a crab.

**Jim Blackburn** [00:13:36] But that is a central food source. And so, part of the, and in, during the litigation was one of the more complex scientific cases I've ever been involved in and probably one of the best scientific cases I've ever been involved in, we had to prove a series of connections between freshwater inflows, the availability of crab, and then the impact that the diminished availability of crab had on whooping cranes. And we put that evidence together in a lot of different ways.

**Jim Blackburn** [00:14:07] But the starting point of understanding the case and is to understand the role of freshwater inflows to the estuary. The over-allocation, if you will, of all of our rivers in Texas through the water rights permitting process and the fact that there really wasn't a safety valve at the state or at the management level that would curtail use if the bays were not getting enough fresh water. And so that was really the essence of the lawsuit, was to try to bring these safeguards forward, to not only protect the whooping crane, but to try to ensure freshwater inflows to the bay in the future. And that remains the goal of a lot of work that's ongoing. But that was certainly where the lawsuit came from.

**Jim Blackburn** [00:14:56] And it was really the role of the freshwater inflows in the life cycle of the blue crab and the role of the blue crab in the life cycle of the whooping crane.

**David Todd** [00:15:07] OK, well. And so this lawsuit that you helped file was, was sponsored by something called the Aransas Project. Can you talk a little bit about how that coalition was put together and why?

**Jim Blackburn** [00:15:24] Sure, I probably ought to go back a little bit. The O'Connor ranches, the D.M. O'Connor interests, which have large acreage in Refugio County, kind of south, south of Victoria, the O'Connor family had, had retained a man named Mark Rose, who had at one time been the general manager of the Lower Colorado River Authority, and had retained him to help advise them on water-related issues. At that time, at that time, which was I think probably the early 2000s, things were rather contentious about water on the Guadalupe River and on the San Antonio River, as well as on every other river system.

**Jim Blackburn** [00:16:10] We've actually had problems on every major river system from the Rio Grande all the way up through and to the Trinity River, because Texas is going to, during a drought, Texas is water-short and we'd be issued more permits in all of those rivers than there is water.

**Jim Blackburn** [00:16:28] One day, the O'Connor family awakened to a newspaper article that showed plans to put reservoirs on their property, on their ranch, as well as to have large groundwater projects that would impact their ranches and a diversion project to take water from the mouth of the Guadalupe all the way back up to San Antonio. And that was a joint project of the Guadalupe-Blanco River Authority, the San Antonio Water System, and the San Antonio River Authority. And that, that project led them to, had led Mark Rose to ask me if I would like to work with the family to try to protect their lands and to try to understand this whole issue of water on the Guadalupe River. And so for many years, I was working with the family and we discovered over that time the linkages between freshwater inflows and the bays and estuaries and the health of the bays and estuaries. And that was something we had known, but we really got into it in great detail and realized there was a linkage to the whooping cranes as well.

**Jim Blackburn** [00:17:39] During this time, it was proposed to locate a nuclear power plant, kind of adjacent to the O'Connor ranch. And then we started opposition to that. All of which hinged upon, I mean, water was a key aspect of all of that.

**Jim Blackburn** [00:17:56] And so ultimately, coming out of that was a concern that if something wasn't done in a larger kind of systemic sense, that the bays would decline and the whooping crane would decline. And then we had 2008-2009. And then we had studied and we were anticipating there might be problems. And indeed, 23 cranes were identified as being, essentially, taken under the Endangered Species Act is what we alleged in the lawsuit. And so it became essentially, it evolved into a fight over the estuaries and into protection of the whooping crane.

**Jim Blackburn** [00:18:41] Now, the Aransas project was formed for purposes of litigation. It was, it's an organization that was formed to litigate about the impact of the state of Texas's water permits on freshwater inflows into the San Antonio Bay system and to litigate impacts on the whooping crane. To pursue that, the O'Connors were in. And we went out and found many other corporate, well, basically many other non-governmental organizations, many other governmental organizations, and many individuals that had an interest in either the whooping crane's protection, or in the protection of the health of the estuary. It was a very interesting kind of fight in the sense that the local Chamber of Commerce, for example, in Rockport was very interested in our succeeding because so much of the, of the economy down on the coast is related to the health of the bays. If nobody is catching fish, if the water's too salty, if there are, the whooping cranes are dying. All of that's bad for business. I mean, much of the economy down there is related to both commercial and recreational fishing, it's related to birdwatching. And that's what helps them sell houses. So I mean, so much of that economy, evolved, so in many respects, our argument to the community was an economic one as well as a cultural, spiritual one with regard to the fate of the whooping crane. And we had a large kind of amalgam of groups. Aransas County was a part of the Aransas Project. We had, I think, the city of Rockport, city of Portland Beach. We had both the Republican and Democratic parties of Aransas County that were part of it. We had the local guides club. We had several nature organizations, Matagorda Bay Foundation, was a part. I think the Galveston Bay Conservation and Preservation Association was a part. Coastal Bend Audubon. Et cetera, et cetera. And so we put together a true citizen constituency to fight for the whooping cranes. And that is part of the history of the Aransas Project.

**David Todd** [00:21:07] Well, it is fascinating to hear that you had all these strange or least unusual bedfellows involved in this, this organization and the litigation and also this, that it

seems like there was this private property rights aspect, as well as sort of the economic opportunity for Rockport. Just an unusual kind of environmental band.

**Jim Blackburn** [00:21:36] Well, what I would tell you is that this type of thinking has really set me on the, really the course for the latter part of my career. I mean, so much of what I'm doing today with the carbon sequestration research at Baker Institute, the concept of the Texas Coastal Exchange to pay landowners to sequester carbon dioxide, working with property rights, working with landowners, rather than trying to regulate them to do things, using market forces. All of that thinking comes out of this experience with the Aransas Project, and really the kind of the core thinking behind a strategy, and I credit Mark Rose with that, I credit the O'Connor heirs with that a lot, because, I mean, it's sort of like stewardship and commitment to the land, but that with a very, very real kind of practical economic base. And that is what I think is missing from so much of what I hear environmentalists talking about. And it is something that over the years I have learned and I have great respect for the power of working with economics rather than denying the importance of economic.

**David Todd** [00:22:56] Well, this is fascinating how this has affected your whole philosophy and approach to environmental problems. Before we get too much into that, I was hoping that you could give us a little bit of the, of the nuts and bolts of the lawsuit. And and if you could replay some of the highlights of the, the preparation and trying of the case at district court.

**Jim Blackburn** [00:23:26] Sure, you know. Yeah, it's one thing to be talking about it in abstract. You make the presentation to the various groups. Everybody says, yeah, yeah, OK, that sounds great. And then the hard, cold reality sets in. That you've actually got to prosecute this lawsuit. And I mean, I had had quite a lot of experience by the time I took on the Aransas Project. But so much of the environmental law is administrative law. It's basically, you don't put on all that much evidence in the courthouse. So much of it is really about, it's all about paperwork before the trial, and then when you're at trial, you argue that the papers that have been filed previously. This was a bona fide trial. And so there is going to be live witnesses. There was no jury. And the judge was Judge Janis Jack. So we, we had to issue a notice of intent to sue, but we did that. I will tell you the decision to go or no go filing the lawsuit was quite interesting. And Mark Rose's last words to me was, "Blackburn, you know, you have to have the green light, so don't fuck it up." So those were the words that sent me on my way to federal court. Makes me smile thinking of it and I smiled at the time. It was said with good spirit.

**Jim Blackburn** [00:25:02] But, you know, this is serious litigation. So we issued a notice of intent to sue against the three commissioners of the Texas Commission on Environmental Quality. We issued the, the notice against the executive director of the TCEQ and the Texas quartermaster, which is a unique animal under Texas law. It's one individual that has authority over an entire river or several river systems under Texas water law. All of those individuals were sued in their official capacity. We really can't sue the TCEQ itself and we cannot sue for many types of money. So we were sued, suing for a statement by the judge that would require the preparation of a Habitat Conservation Plan under the Endangered Species Act to protect the whooping cranes. That was what we were seeking. We were alleging that the state of Texas, by the action in allowing the withdrawal of water, that the state of Texas, basically, they took the steps that led to the killing of 23 cranes.

**Jim Blackburn** [00:26:20] There were many legal issues in that statement. There are many legal issues in that statement, I just made. Under the kind of classic interpretation of what is a "take", it is a killing or harming of an endangered species, the physical possession of an

endangered species without a permit. A hunter that goes out and shoots like whooping crane has "taken" a whooping crane. That is illegal under both actually civil and criminal provisions.

**Jim Blackburn** [00:26:52] We're saying the state of Texas was just like a hunter, except they did it through their permitting system rather than through the act, rather than their own act. Stated another way, we were saying they authorized the straws to be put into the river that allowed the water to be sucked out of the river, that diminished the flows to the bay. Those diminished flows caused the estuary to change, became saltier. Blue crab became less abundant and less blue crabs means that some of the whooping cranes, starve to death. There was a series of kind of connections that had to be proven.

**Jim Blackburn** [00:27:34] Now the kind of the first kind of year after the filing of the lawsuit was taken up with a whole series of motions. We had many parties that wanted to join in this litigation. So there were motions to intervene. We had the, Guadalupe-Blanco River Authority filed a motion, San Antonio River Authority filed a motion. The San Antonio water system, the Texas Chemical Council, individual chemical companies, I think might have have filed, and a few others. And so we had hearings over who got to participate. Well it turned out, the Guadalupe-Blanco River Authority, had probably the biggest stake in the litigation because they held most of the permits to withdraw water that had been issued by the state, or at least held some of the largest permits. And so they were allowed to be, become a party to the litigation. San Antonio River Authority was selected by the judge to represent themselves and San Antonio Water System. The Texas Chemical Council was allowed standing to, or allowed party status, and I think a few others were denied status. And, as it turned out, as it developed, the Guadalupe-Blanco River Authority took the lead.

**Jim Blackburn** [00:29:04] They had undertaken a study back in the early 2000s called the, oh, gosh, I forget the name of the study right now, but it was a study of the whooping crane. But they were anticipating that this issue about the, about the impact of fresh water being taken from the Guadalupe River. They were anticipating that this might become an issue. And so GBRA had authorized, along with San Antonio River Authority, a study that was headed out of, that was run out of Texas A&M, and that study was to basically evaluate what the whooping cranes, what they used for food, or where their habitats were, doing some computer modeling of the impacts. So they very much had anticipated this type of lawsuit and had a lot of the expertise. And they ended up being the principal defenders of the litigation, even though TCEQ was the primary, or was the named defendants, GBRA ended up doing really much of the heavy lifting and they hired counsel out of Washington, D.C. that represented him in this litigation.

**David Todd** [00:30:29] And then during the trial itself, I understood and I think you mentioned earlier that one of the major pieces of evidence was Tom Stehn's surveys. And was there anything else that you think was, was really key to y'all presenting this case?

**Jim Blackburn** [00:30:52] Yeah, there are several things. I mean, basically, we had to put together a case that was kind of expert following expert following expert. And the International Crane Foundation was a key member of the Aransas Project. And I can't say enough about the International Crane Foundation. They are, they generally had never been involved in litigation before. They were a charter member of the Aransas Project. And George Archibald is the founder, he's a MacArthur Prize winner. He, he is just simply fabulous. And he was our lead-off witness.

**Jim Blackburn** [00:31:31] And, you know, Judge Janis Jack is an incredibly, a very serious, I mean these eyes, these kind of kind of beady eyes, come up over a pair of reading glasses and kind of, kind of staring at you. Her courtroom very, very cold. It is wired for sound everywhere. She can hear you clicking. I mean, I, I sometimes nervously would click my pen. You know. She would say, "Stop that, Mr. Blackburn" She could hear that pin clicking. The, you know, she, she took this case incredibly seriously. She had read, she read everything we filed, which is a thing I, not always the experience I found with, with judges, although federal judges are generally better than state judges with regard to reading things. Judge Jack read everything. She knew these documents better than the lawyers had filed them in many cases. She was fabulous.

**Jim Blackburn** [00:32:32] And George Archibald started off for us in the, in the trial. And he's the one that taught whooping cranes to the breed in captivity. He learned their dance and basically would do a mating dance with the crane and get it all excited about mating and kind of taught him how to mate in captivity. A fabulous guy. I did not ask him to do that in the courthouse. I started to ask him to show the dance, but I just thought that might be a step too far. But I think Judge Jack really was impressed with the quality of some of the lead-off witnesses.

**Jim Blackburn** [00:33:04] And then from there, we went to Dr. Sass from Rice University, and Ron had studied freshwater inflows versus soft Crane, Whooping Crane loss data over the years. And there was a beautiful correlation between, in years with a lot of freshwater inflow, there were not many crane deaths, in years with much less inflow, the crane death went up. And 2008-2009 being the worst year on record from a percentage standpoint, as well as by absolute numbers. So, you know, we began to kind of move from just general knowledge of the cranes. And George Archibald's kind of just talked about the life history. We do know that they, that they, we now know they breed in Buffalo Woods National Park up in Canada. He described that process. He talked about the migration. He talked about the territories. He just laid out crane lifecycle and the importance of crabs in their life cycles, as just the food source at this time. Dr. Sass linked freshwater inflows to crane mortality in a large sense.

**Jim Blackburn** [00:34:15] And then we had Dr. Kathy Ensor come in from Rice University, who is a statistics expert and a I mean Ron Sass is an ecologist. He's a biogeophysicist, biogeochemist. He is an ecologist and he is an incredibly skilled scientist. But he has, his knowledge of statistics is good, but it's sort of rudimentary. Cathy came in and came behind him and showed by three or four different statistical techniques, there absolutely is a linkage between freshwater inflows and crane mortality.

**Jim Blackburn** [00:34:55] So we created the linkage with a big overarching statistical analysis, which I would call general causation. And then we came back and went through, scientist by scientist, with the linkages.

**Jim Blackburn** [00:35:11] Now, there was a huge dispute about Tom Stehn. We kept talking about 23 cranes dying and the defense kept saying, you know, that, your witnesses are relying on Mr. Stehn's data, Mr. Stehn's not here and finally, Judge Jack said, "Well why isn't Mr. Stehn on anybody's list?" And both the defense and myself. We went up to the judge and said, "Your Honor, we have tried to get the Department of Interior to allow us to have access to, to Mr. Stehn. And they will, they refuse to allow us to interview him and wouldn't let him. Just denied us access." And she said, "Prepare me a subpoena and I will get him here. Just do you want him here?" And both of us said, "Yes, we do." And so she asked that, Tom Stehn be subpoenaed. And funny, funny story. We caught him. He was he was served in his hot tub. He



had just been, I think he was in his like third or fourth week of retirement from the U.S. Fish and Wildlife Service.

**Jim Blackburn** [00:36:14] And the next day he showed up in court and the Justice Department initially were, they were prepared to oppose Tom appearing. But I think Judge Jack's stern look kind of convinced the US attorney really probably did want to kind of go down fighting on that front. And so they allowed Tom to testify. But none of us had gotten to talk to Tom. We had his reports and we had all his written data. But I, I did the direct, I handled the direct examination of Tom Stehn. And it's really spooky for a lawyer to undertake a direct examination and not quite know, really not know what the witness is going to say. I mean, you usually have depositions. If it's the other side, or an adverse witness, if it's your own witness, you get to talk with them and kind of work out questions with them. And with Tom, we had no such chance.

**Jim Blackburn** [00:37:07] And I'll never forget, I kind of came down to the payoff question that, you know, Mr. Stehn, do you have an opinion you hold with reasonable degree of scientific certainty about how many cranes perished in 2008-2009? He said, "Yes, I do." And I said, "Well, what is that opinion?" He goes, "Well..." And all of a sudden I could just feel my heart drop. And it was sort of like, "Well. You know, I. (And I was just terrified he was going to say, "Well, I really can't say for sure.").

**Jim Blackburn** [00:37:40] He said, "Well, I know 23 cranes died. I think that probably were more than 23 cranes, but 23 is all I can say with any type of, degree of assuredness."

**Jim Blackburn** [00:37:51] And then he went through, it turned out he had made a map and he had identified the habitat, the, they didn't see, the areas that each of these crane families came to. He had them numbered. And he went through every one of those territories and identified which cranes were missing, the four cranes that were found dead. He identified where they came from. And it was just one of the most amazing kind of tour de force of an expert, just absolutely knocking the ball out of the court. And to this day, I, my hat's off to Tom Stehn for being a truly fabulous government employee and expert. And I just think the world of him. And, you know, his testimony was absolutely pivotal.

**Jim Blackburn** [00:38:46] Because then Dr. Felipe Travis-Ramirez, who was our expert on the cranes that could talk about the cranes, came in and he had actually observed the cranes during 2008-2009. And and he talked about how the cranes were, their, their behavior had changed. He had done his Ph.D. dissertation on whooping cranes, and he could testify about their feeding pattern and the fact that the cranes require kind of, quote unquote, "fresh" water. Once the, I think the salinity rises above 20 parts per thousand, maybe 25, the cranes have to come inland to freshwater ponds to, to get fresh water, to flush the salt out of their system. They can work with estuarine water as long as it's in the 15 to 20 parts per thousand range. So once you get saltier than that, and this water was getting up into 30, 35 parts per thousand, they can't use the estuarine water. When they fly into these ponds that are in the prairie, kind of between the brush and the marsh, there are alligators in those pods. And one of the dead cranes was found in the mouth of an alligator, literally in the mouth of an alligator. The four dead, two of the four dead cranes were autopsied or necropsied, I think is what they call it. And they were found, they were found that they were, emaciation associated with hunger was part of the cause of death for two of the four. The other the other two were too deteriorated, deteriorated to be able to necropsy.

**Jim Blackburn** [00:40:22] So we really got into the science of kind of the behavior of the cranes and the fact that their behavior was modified because they had to go find other water source, water sources. And they were running out of food sources. One of the survival techniques is that the young kind of cinnamon-colored juvenile gets run off of the home territory because there's not enough crabs to support three cranes. And it's part of a triage decision that's made. And these youngsters were being chased out of territory. I have a, an image of a cinnamon-streaked crane walking down the middle of the road that goes through the brush country up in, up in, kind of the uplands of the, of the refuge that somebody had shot driving by. That was a dead bird walking. That bird did not survive the night because bobcats, coyotes, or whatever are going to kill that bird. Whooping cranes cannot survive in the brush. But those youngsters were being forced out of their territories and, and they had nowhere to go. So many of the fatalities were with youngsters of that season.

**Jim Blackburn** [00:41:40] And so we got all of that type of testimony. And then we brought in Joe Trungale from Austin to do some computer modeling to show the results of all of the permits that were, had been issued and were utilized, that if you use water, you have to record how much you were through. And then we, we knew what the salinities were. And so he he kind of calibrated his models to the salinities and withdrawals. And then if you put all those withdrawals back in then you would know how much water would have come to the bay during that drought. We modeled that. And so that would be a condition without withdrawal. And then we modeled actually the full value of the permits and what that would do.

**Jim Blackburn** [00:42:25] And it was just an amazing sequence of images that showed the salinity just frankly, moving in from the Gulf. They, it came in through, through the Pass Caballo. It came up through the, I forget the name of the bay right now, there at Port O'Connor, and came around the corner into San Antonio Bay, and went up into the mouth of the Guadalupe River under the worst-case condition. And we had we had that for three years - 2007, 2008, 2009, I believe, all three years. And you could just see the impact, visually, of the taking of the water, which was kind of the crux of the case.

**Jim Blackburn** [00:43:10] And then Paul Montagna from the, from the Harte Research Institute - he's probably the best estuarine ecologist I've ever encountered - he came in and basically his testimony was, "Yeah, when you change the salinity, to the extent it was changed, crabs are not going to be the abundant. Crabs are abundant up until about 25 parts per thousand salinity, and then it's just a precipitous decline. Crab swim out of that water. They swim to other areas. They swim to find fresher water. And I mean, that's the thing about crabs. They're mobile." So are finfish. You know, the once the, once the baitfish kind of decline, speckled trout move out. So nobody was catching fish during the time that the cranes were dying and there weren't, there weren't a lot of crabs around. So Paul tied that down.

**Jim Blackburn** [00:44:11] The other thing is the site had done a study of Nueces Bay and they had found that Nueces Bay, had been essentially. Excuse me. They study was under the freshwater inflow law that had been passed, which I don't have a lot of, I don't hold a lot of confidence in that it is going to do us a lot of good. But it did cause some very nice studies to be done. And the study on Nueces Bay found that the two dams on the Nueces River decreased the freshwater inflow into Nueces Bay, to the extent that the today or at the time which would have been 2011 when we filed the lawsuit, 2014 when we were in trial. And by that time, the study had been published and the study showed that Nueces Bay was ecologically dead, that the freshwater inflow reduction was so extensive in Nueces Bay that it had actually killed the Bay. And Dr. Montagna could bring that to the court and say, "Look, this is what happened

right down the coast in Corpus Christi. It's going to happen in San Antonio Bay if we don't do something."

**Jim Blackburn** [00:45:18] And so his testimony, along with Tom Stehn's, and colleagues and practically very expert was important. Every expert we had was just great. And we finished up with Andy Sansom and Dave Frederick. Andy talking about really the fact that there were innovative methods to work through and to find solutions to this problem. Dave Frederick talking about the really, how a Habitat Conservation Plan under the Endangered Species Act would be just excellent and and so kind of with that we rested our case.

**Jim Blackburn** [00:45:52] And the write-up of the decision, which came about a year later, in that decision, Judge Jack really is complimentary about the case that was put on by the, by the plaintiffs, by the Aransas Project. She said she really never had as high quality of experts. George Archibald had had won the MacArthur Prize. I think Ron Sass won one two thousandth of the Nobel Peace Prize. He was a founding member of the Intergovernmental Panel on Climate Change. And I mean, the judge was very impressed with that. And then both both Andy and Dave Frederick had won the, I forget the name of the award, the highest award available to people that work in the area of Fish and Wildlife. I mean, these are high quality experts. Paul Montagna is just fabulous. And so I think she was really impressed.

**Jim Blackburn** [00:46:54] And then the defense put their case on. And they did not do well from the beginning. They basically, they were too much controlled by their lawyers and they didn't let the scientists do their work, didn't let the scientists kind of take off on their own. And it was apparent in cross-examination that there are a lot of problems in the, in the technical case being put on by the, by the government, to the extent that in Judge Jack's opinion, she just rips up their experts up one side and down the other. And, you know, you might include her opinion as sort of an attachment to, to, to this audio, but her opinion is just scathing. And so. It took us a year, but after a year, she ruled that the State of Texas had indeed taken 23 whooping cranes and she ordered, among other things, for the state to prepare a Habitat Conservation Plan, which was just a dynamite victory. It sent shockwaves, it sent shockwaves all over the water world of Texas. And frankly, I think it was beyond what anybody had ever expected to get out of the Aransas Project. Except for those of us who were involved, who felt it was a solid case from the beginning and we knew the science. And so, I mean, it was really a case for science came through.

**Jim Blackburn** [00:48:24] Now, it was a very different story at the court of the, the Fifth Circuit Court of Appeals. And I'll be happy to talk about that in a minute. But are there any questions you want to go into about the actual trial?

**David Todd** [00:48:37] No, no, this is, is fascinating and I've just been scribbling away. Don't, don't take my silences as indifference. I'd love to hear about what happened then when her ruling was appealed to the Fifth Circuit.

**Jim Blackburn** [00:48:53] Well, the Fifth Circuit's very different animal than Judge Jack. Judge Jack wrote a very good opinion. It was very studious. She was very careful. She, I mean, for example, when one of the witnesses said she kind of ripped into pretty, pretty seriously. There were 80 hours of videotape of cranes feeding and she watched all 80 hours as part of her post-trial work. Those, those 80 hours had been entered into evidence. We only, we only showed a few of those hours, actually a few minutes, a few excerpts from, you know, 80 hours. She went through every hour. And so she had really done her homework.

**Jim Blackburn** [00:49:38] And what it ultimately came down to on appeal was, on the one hand, the 5th Circuit had to be careful if they were against what the Judge Jack had done and they were. They didn't like the idea of the federal court telling the State of Texas what they had to do with their water rights, which is very much of a state's rights issue. The Fifth Circuit was very, very careful not to, on the one hand, make an outlandish legal ruling that would have created or at least a strong legal ruling that would have created a conflict with another ruling by a Court of Appeals such that the Supreme Court would be hearing the case.

**Jim Blackburn** [00:50:24] And, you know, the Fifth Circuit is rarified territory for me. I don't practice at the Fifth Circuit very much, but I did make the argument and we spent a lot of time preparing for it. We knew that it was going to be difficult. When we were scheduled for hearing, we were originally scheduled for a Monday and we had a three-judge panel, as is the case. And then we got a notice that our, our hearing had been rescheduled for Thursday. And one judge that was on the panel was dropped and, and Judge Edith Jones joined the panel on that Thursday. And Judge Jones is a very powerful judge, a very smart judge, and an incredibly conservative judge. And she ended up writing the opinion that overturned Judge Jack's decision. And it was a very strange decision in that it was, it was more of a fact-based opinion. And really, the Court of Appeals is not supposed to review the facts. They're supposed to review the law and apply the law to the facts that the trial judge has looked at. But as it turned out, the opinion that she wrote is very, was very much an interpretation of the evidence and whether there was sufficient evidence on causation to basically be able to say that the State of Texas caused the problem.

**Jim Blackburn** [00:51:48] The final results coming out of the Fifth Circuit was an opinion that overturned Judge Jack. We filed a motion for rehearing and we got four strong votes for overturning the Fifth Circuit decision because what the Fifth Circuit did was improper in that they did a factual interpretation rather than a legal interpretation. But there was only, I think it was eleven to four votes, something like that, against us. So we lost the motion for rehearing. But those four negative votes, four votes against the Fifth Circuit, we thought that might give us an angle to go to the U.S. Supreme Court. We petitioned the U.S. Supreme Court and they ultimately refused to hear the case. So kind of, I guess, about the end of 2015, 2016 time period, we had lost the case.

**Jim Blackburn** [00:52:43] And it turned out the lawyer for GBRA, were changed. The law firm that handled the trial was replaced by the Baker Botts law firm on appeal to the Fifth Circuit, and it was a very, I think, astute move by GBRA, right. And they brought in Molly Cagle as the lead counsel. And I have tremendous respect for Molly Cagle. She put together a first-rate team. They had two former Supreme Court clerks on the team. I mean, if, they were first-rate. State of Texas brought in the solicitor general of the State of Texas. I mean, everybody - it was a lot more seriously, what would you say, a lot more seriously attended than perhaps the trial court was. At any rate, after we finished, I had occasion to talk to Molly and I said, "Molly, what do you think the chances are that we could actually talk about doing something differently in the Guadalupe River system?" And I said, "You know, we are going to be destined to fight over this for a long time. Why don't we try to work something out?" She went and talked to Bill West, the general manager of the GBRA. And she called me back and said, "Why don't you come have lunch with us in Seguin and let's talk about it."

**Jim Blackburn** [00:54:03] And then that led to kind of another saga and this chapter, which is really the chapter beyond the litigation. And again, I'll pause here for a second, David, if you've got any questions, please ask them. Otherwise, I'll go into how the GBRA settlement kind of unfolded.

**David Todd** [00:54:25] Yeah, no, I'm really fascinated by how this sort of cooperative approach has worked for you since 2016.

**Jim Blackburn** [00:54:34] The meeting in the Seguin - Bill West, the general manager, Molly Cagle, the lawyer, and I met at a hotel restaurant in Seguin, and we basically, just kind of, you know, people that. We were sworn enemies. And that was a very hotly-contested trial. It was hotly contested Court of Appeals appeal. I mean, we were, we were giving everything we had. I can honestly say I have never felt that I had kind of expended myself as to the extent that I did on this litigation. It was it was an incredible experience. It was also a very rewarding experience. It was very hard and hard fought. At any rate, what Bill and I decided was that there was room for us to work together for the future of San Antonio Bay, for the future of the whooping cranes and for the future of the Guadalupe-Blanco River Authority. Because, I mean, they were fighting for what they considered to be their, their economic and hydrologic life. I mean, all that GBR is about, really, is about water rights and about providing water to big industry, to municipalities. I mean, that's part of the economic development plan of the State of Texas. And that's, that's their reason for existing as a governmental entity.

**Jim Blackburn** [00:56:00] On the other hand, I think they recognized, they, they, the lawsuit brought up issues that should have been brought up years before, and had never been, frankly, heard. They'd been talked about, but nothing had ever happened. And I think the idea that a federal court did what Judge Jack did, I think you cannot overstate the importance of Judge Jack's opinion, even after being overturned. I think you can still mention the whooping crane case in certain circles and it will send shudders through people in the room. It was a landmark decision. And Judge Jack, I mean, to this day, the future of cranes in Texas is really riding on Judge Jack's shoulders. And the thing that's really, I think, important about kind of beginning to work out a compromise is that, in a way, both sides had to agree to give up something. I mean, Judge Jacks had issued an order where we could have gone back to court if GBRA was not doing what it was supposed to, or State of Texas was not doing what it was supposed to under the order. And I mean, and Judge Jack would have been there to listen under a contract or under a settlement agreement, if you will. You know, you've kind of got to start all over in the court system. It most likely would have been at the state court level rather than federal court. It's just a very different proceeding. So on the one hand, you don't have that oversight of the federal court, on the other hand, what you have is the, can't, to me, it's hard to force a government entity in the State of Texas to do something it doesn't want to do.

**Jim Blackburn** [00:57:46] And what this was, was a indication by the government entity that they were willing to work. And so we worked out an agreement. I think in February of, I'm going to say 2016. But I need to double check my dates from all of that. In February and then Bill West resigned as general manager about two months later. And I'm sitting here thinking, oh, my gosh, we've done all of this stuff. And then a new executive director, Kevin was brought in to become the executive director and all of a sudden, the whole dynamic shifted and that became so important that whether, you know, it became so uncertain as to whether or not we could continue this agreement.

**Jim Blackburn** [00:58:44] And let me try to see if I could pull up some of these dates real quick to make sure I'm right on all of this. Give me one second.

**David Todd** [00:58:54] Sure.

**Jim Blackburn** [00:58:54] I've got all of this. I should have pulled this off before I said now. But I've been thinking. There it is. Let's see, where is this? Excuse me a second, everything I'm pulling up is wrong. Yeah, it was in February 2016 when that was first put together. And, and, trying to, and then the second agreement was in, in I think it was probably October of 2016 and that was actually, that agreement was worked out at a ranch in Columbus, Texas, that was, owned at that time by your mother, David. That's where that historic agreement was, was really worked out and was ratified shortly thereafter. And the thrust, the thrust of the agreement. Give me one more second. This is causing me to, to think of some things I haven't thought about in a while.

**Jim Blackburn** [01:01:20] Kevin Patterson and Jonathan Stinson became the, Kevin was the, the new executive director of GBA, and Jonathan was his number one assistant. And Kevin and Jonathan ended up being great partners to continue really the agreement that Bill West had set up. And what we, what we discovered was that they were very much willing to continue with the agreement. And so at the end of 2016, we had agreed to go forward with essentially the second phase of the agreement, and let's see if I can, there were really four areas that we, had, that we had agreed to kind of work on.

**Jim Blackburn** [01:02:11] We agreed that we would study a concept for fresh water inflow, which is really kind of a key concept that emerged from the litigation, which is the idea of a kind of a sanctuary of last resort. You know, when we litigated, I was looking to get enough water to keep the bay, the estuary salinity kind of average all the time. That's probably an unrealistic goal. But that was the numbers we had to work with and that would have required about a million acre feet of inflow a year. So there are many years when there's not a million acre feet. So we knew it was unrealistic. But the idea of having a sanctuary area up in the top part of San Antonio Bay and keeping that sanctuary area fresh enough to really maintain the, the estuary during times of drought is really kind of a management concept that emerged by agreement that's to prevent what happened in Nueces Bay from occurring. So that was our first agreement that we would work to kind of, that was one of the first part of the agreement we reached in the latter part of 2016 was that we would work together to, to kind of come up with that kind of nursery sanctuary concept.

**Jim Blackburn** [01:03:37] The second thing is we would jointly study the delta of the Guadalupe River and try to understand both how the water flows through it, because it's a very complicated system of channels that have been cut, plugged up, filled in, messed with for literally 50 years, 100 years, and try to understand better how that water flows occurs.

**Jim Blackburn** [01:04:04] Third, to evaluate the needs of whooping cranes for habitat expansion, most likely through purchase and set-aside of land, perhaps expansion of the Aransas Wildlife Refuge or other wildlife management areas.

**Jim Blackburn** [01:04:19] And then fourth, to look at the concept of the Texas Coastal Exchange, which I was developing at that time, to see if restoring the prairie from the, from the kind of the mouth of the Guadalupe all the way back up to the Balcones Fault. If we were to restore those prairies, could we increase the base flow of water in the Guadalupe River, and essentially create water that would be available in low-flow conditions and that would happen by the, if we restored native prairie, the root systems are much deeper. The water penetrates, the rainfall penetrates better into the soil. Much more of the rainfall is retained within the soil, rather than is generated as stormwater runoff at the time of the storm. And we could not only reduce flooding downstream, but increase the seepage into the Guadalupe and into all the different tributaries over the course of a year,.

**Jim Blackburn** [01:05:18] That one, we've probably done the least amount of work on so far, but that is still inside of kind of the quiver. But the other three issues - the whole idea of this minimum freshwater inflow to maintain a sanctuary area at the top of the San Antonio Bay, the whooping crane habitat expansion, and the delta work - those ideas are being, you know, were being, were being actively pursued. And by 2017, we got a grant from the Mitchell Foundation that helps to kind of understand a little better kind of the work that we had ahead of us.

**Jim Blackburn** [01:05:57] And then Kevin and Jonathan made the decision to bring in Nathan Pence to really manage their efforts under the GBRA half of the agreement and more generally, there's some other endangered species issues on the Guadalupe. There's a bunch of endangered mussels. They either have been designated or will be designated. There are endangered salamanders up in the Hill Country. And Nathan had been running the Habitat Conservation Plan for the Edwards Aquifer Authority over in New Braunfels that came out of litigation by the Sierra Club, where you had a Habitat Conservation Plan was ordered by the court to ensure the continuation of the flow of springs at San Marcos, New Braunfels, particularly, and there are endangered species in those springs. Interestingly, GBRA was a party to bringing that litigation, but they would benefit by the spring flows bringing water to them. But anyway, they hired Nathan, and Nathan was brought in to basically run the GBRA/TAP agreement and to look at these other issues.

**Jim Blackburn** [01:07:15] And I think it was in probably the spring 2019 that the board of directors of the Guadalupe-Blanco River Authority, on the recommendation of Kevin Patterson and Nathan Pence and Jonathan Stinson and others, they basically voted to go forward with the preparation of a Habitat Conservation Plan that would go the entire length of the Guadalupe that they had jurisdiction over to consider all of the endangered species issue and to incorporate the four goals of the GBRA/TAP agreement into a comprehensive Habitat Conservation Plan for the river system.

**Jim Blackburn** [01:08:03] So essentially, what Judge Jack had ordered the State of Texas to do, through voluntary agreement the GBRA agreed to do in the spring of 2019. Pursuant to that, Nathan has prepared a request for funding to the U.S. Fish and Wildlife Service to actually fund the development of this Habitat Conservation Plan. And all indications are that that grant will be awarded in the summer/fall of 2020 and we will begin work on a Habitat Conservation Plan. In fact, we'll begin work on a HCP, regardless. But with, with adequate funding, it will be done much quicker, more quickly.

**Jim Blackburn** [01:08:48] Bottom line is, we're getting in 2020 something that we were trying to get in, through a court decision in 2014. It's taken a while longer. But but now there is, it is with the full cooperation of the GBRA. I did have someone tell me that the way we're doing it is by far the better way, because if all of this had been done under court order, it is likely that there would have been continued resistance from both the state and GBRA to ever doing this correctly. It was an interesting statement about how you can win by losing. Which is kind of what happened. And I think the key thing is you have to be ready for it and you have to be open to it. This is not a classic victory, but in a way it is probably the best victory I've ever gotten and in that everybody hopefully will have their goals met.

**David Todd** [01:09:48] What a story, with it's over a dozen years and shifting from from just really a lot of confrontation to one strategy, I guess, of cooperation and, and some sort of a

win-win, it seems for GBRA and TAP and for all the parties involved. What sort of lessons do you take from this?

**Jim Blackburn** [01:10:14] Well, I think a couple of I think, first of all, they have to know that you can fight. I don't think, I mean, I could not have walked up to the State of Texas, to GBRA, prior to going through Judge Jack's courtroom, prior to basically showing them we knew how to litigate. Prior, you know, without having done that, I don't think we would have ever gotten somewhere. So I think you have to be able to fight and you need to be willing to fight. And I think the other side needs to know that.

**Jim Blackburn** [01:10:44] Now, having said that, you don't have to fight. And that's what few lawyers truly understand, that you really don't have to do it. They just have to know you can do it. I think the good lawyers get that. A lot of lawyers dismiss that. I think it's all about showing, showing their prowess every time they get a chance to. And that's just not the case. You know, it's just there, there needs to be kind of a quiet confidence about it. You know, "You're going to make me go to trial? OK. We'll do it. But you don't want to do that. Do you really?" You know, it's more that type of attitude. But they've got to believe it. I think that's one lesson.

**Jim Blackburn** [01:11:27] I think the second lesson is that you have to realize that you're not going to get exactly what you want, in the way you want it. There are other parties involved. And I think it's the lesson that we don't have a very good understanding of at the Congressional level right now is that everything is my way or, you know. Or you're a bad guy. You know, I mean, my way, or you know, I'm out of here. That's not the way this works. There are two very, very well-represented, very well-articulated sides. Doesn't mean that both are equally right. But it does, also doesn't mean that they're all wrong either. And it's kind of working in that kind of gray area that is so tricky and really so important.

**David Todd** [01:12:22] What a story! thank you so much. I'm sure there are more chapters still to unfold, but thank you so much for telling us about this long rich story. Is there anything you wanted to add?

**Jim Blackburn** [01:12:37] I'd just say it was the best legal experience of my career, both in terms of, I think, the excellence of the case. We put together these fabulous experts I got to work together. But also in a way, the experience of working with particularly Molly Cagle on the other side and really being up against being, I love to be up against really good lawyers. And we were up against some great lawyers at the Fifth Circuit. And, you know, it's just in a way almost the finest experience you can have on one level and then on the other level to be able to come up with a resolution that truly works. I mean, that's the best thing of all. I mean, I think, I think people are still kind of shaking their head, trying to figure out how we got here. And I'm not sure I can totally explain it, other than I think, you know, it was kind of the right people's minds met at the right place at the right time. But it's probably more than anything being aware that something like that was available and could happen, and I would say that a lot of the type of thinking that allowed me to make this move comes out of another long story, which is down at Formosa Plastics in the late 80s and early 90s.

**David Todd** [01:13:59] When you worked with Diane Wilson, I guess.

**Jim Blackburn** [01:14:02] That's right. And with those settlements that ended up being very controversial at the time, but that really paved the way for that type of thinking that led to the GBRA/TAP agreement. I'm not sure I would have felt the comfort, the confidence to go



forward with the GBRA/TAP type of agreement, if I had lived through those experiences with Formosa.

**David Todd** [01:14:26] Those are lessons you don't learn in law school.

**Jim Blackburn** [01:14:30] None of this you learn in law school, I think. I think a law school, on one level, I'm very critical of the education you get in law school. I think that there's a lot of politics in law school. I think that, I don't know, I'm just no great fan of, at least the law school I was exposed to. But then I, you know, that's not that's not where I've spent my time.

**David Todd** [01:14:58] Well, this story you told today is a great lesson. Thank you so much for sharing it. I know you have a lot of other things on your plate.

**Jim Blackburn** [01:15:08] Yeah, I've got to go get a haircut.

**David Todd** [01:15:13] Don't we all!

**Jim Blackburn** [01:15:15] I'm venturing out for the first time. So we'll see how that goes.

**David Todd** [01:15:19] All right. Well tidy up. And thank you so much, Jim. Always a great chance to talk to you.

**Jim Blackburn** [01:15:25] Same here, David. You bet. Take care.

**David Todd** [01:15:27] Take care. Bye