Case No. 13-40317

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ARANSAS PROJECT,

Plaintiff-Appellee

v.

BRYAN SHAW, in his official capacity as Chairman of the Texas Commission on Environmental Quality; BUDDY GARCIA, in his official capacity as Commissioner of the Texas Commission on Environmental Quality; CARLOS RUBINSTEIN, in his official capacity as Commissioner of the Texas Commission on Environmental Quality; MARK VICKERY, in his official capacity as Executive Director of the Texas Commission on Environmental Quality; AL SEGOVIA, in his official capacity as South Texas Watermaster,

Defendants-Appellants

GUADALUPE-BLANCO RIVER AUTHORITY, TEXAS CHEMICAL COUNCIL; SAN ANTONIO RIVER AUTHORITY,

Intervenor Defendants-Appellants

On Appeal from the United States District Court for the Southern District of Texas, Corpus Christi Division, Case No. 2:10-CV-75

AMICUS CURIAE BRIEF OF DEFENDERS OF WILDLIFE IN SUPPORT OF APPELLEE AND AFFIRMATION

ERIC R. GLITZENSTEIN
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009
EGlitzenstein@meyerglitz.com
(202) 588-5206

JASON C. RYLANDER
MICHAEL P. SENATORE
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, DC 20036
jrylander@defenders.org
(202) 682-9400

COUNSEL FOR *AMICUS CURIAE*

June 5, 2013

STATEMENT OF COUNSEL FOR AMICUS CURIAE

In accordance with Fed. R. Civ. P. 29.2(d), *Amicus Curiae* Defenders of Wildlife states that no party or parties' counsel authored any part of this brief or paid any costs associated with its preparation, and no person other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

This brief is submitted with the consent of all parties in accordance with Federal Rule of Appellate Procedure 29 and the rules of this Court.

Respectfully submitted,

/s/ Jason C. Rylander

Jason C. Rylander
Defenders of Wildlife
1130 17th Street, N.W.
Washington, DC 20036
jrylander@defenders.org
(202) 682-9400

COUNSEL FOR *AMICUS CURIAE*
DEFENDERS OF WILDLIFE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Defenders of Wildlife certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 may have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Appellee The Aransas Project ("TAP") is Plaintiff-Appellee.
2. James B. Blackburn, Jr., Charles W. Irvine, and Mary B. Conner of Blackburn Carter, P.C. representing Appellee TAP.
3. Jeffery Mundy of the Mundy Firm, PLLC, representing Appellee TAP.
4. David A. Kahne of the Law Office of David A. Kahne representing Appellee TAP.
5. Patrick Waites of Johnson, Deluca, Kurisky & Gould, P.C. representing Appellee TAP.
6. Appellant Bryan Shaw, also referred to as a State Official Defendant at the trial court, is the Chairman of the Texas Commission on Environmental Quality.
7. Appellant Carlos Rubinstein, also referred to as a State Official Defendant at the trial court, is a Commissioner of the Texas Commission on Environmental Quality.
8. Appellant Toby Baker, also referred to as a State Official Defendant at the trial court, is a Commissioner of the Texas Commission on Environmental Quality. Mr. Baker replaced Commissioner Buddy Garcia.
9. Appellant Mark Vickery, also referred to as a State Official Defendant at the trial court, was the Executive Director of the Texas Commission on Environmental Quality. Mr. Vickery has since retired and been replaced by Zak Covar.
10. Appellant Esteban Ramos, also referred to as a State Official Defendant at the trial court, is the South Texas Watermaster. Mr. Ramos replaced Al Segovia as South Texas Watermaster.
11. Jonathan F. Mitchell, Solicitor General, Evan Scott Greene, and James Patrick Sullivan of the Texas Attorney General's Office, Appellant Counsel for State Official Appellants, Bryan Shaw, Toby Baker, Carlos Rubinstein, Mark Vickery, and Esteban Ramos.
12. Mark L. Walters, John R. Hulme, David Marshal Coover, III, and Cynthia Woelk of the Texas Attorney General's Office, Environmental Protection Division, Counsel for the State Official Appellants, Bryan

Shaw, Toby Baker, Carlos Rubinstein, Mark Vickery, and Esteban Ramos.

13. Guadalupe-Blanco River Authority ("GBRA") – Intervenor Defendant - Appellant.
14. Molly Cagle, Evan Young, Carlos R. Romo, Aaron M. Streett of Baker Botts LLP, Appellate Counsel for GBRA, Intervenor Defendant - Appellant.
15. Edward F. Fernandes, Kathy Robb, Andrea W. Wortzel, Maida O. Lerner, Christopher Taylor, Patricia Acosta, and Thomas R. Julin of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.
16. Kathryn Snapka of The Snapka Law Firm, Trial Counsel for GBRA, Intervenor Defendant - Appellant.
17. Bruce Wasinger, General Counsel for the GBRA, Intervenor Defendant - Appellant.
18. Texas Chemical Council ("TCC"), Intervenor Defendant –Appellant.
19. Kenneth R. Ramirez of the Law Offices of Ken Ramirez, Appellant Counsel for TCC, Intervenor Defendant - Appellant.
20. Amy Leila Saberian of Enoch Kever, PLLC, Appellant Counsel for TCC, Intervenor Defendant - Appellant.
21. San Antonio River Authority ("SARA"), Intervenor Defendant - Appellant.
22. Edmond R. McCarthy, Jr. of Jackson, Sjoberg, McCarthy & Townsend, LLP, Appellant Counsel for SARA, Intervenor Defendant - Appellant.
23. David W. Ross, Appellant Counsel for SARA, Intervenor Defendant - Appellant.
24. Amicus Curiae Texas Farm Bureau.
25. Amicus Curiae American Farm Bureau Federation.
26. Amicus Curiae Oklahoma Farm Bureau Legal Foundation.
27. Amicus Curiae Oregon Farm Bureau Federation.
28. Amicus Curiae Wyoming Farm Bureau Federation.
29. Amicus Curiae California Farm Bureau Federation.
30. Amicus Curiae Mississippi Farm Bureau Federation.
31. Amicus Curiae Louisiana Farm Bureau Federation.
32. Sydney W. Falk, Jr. and Douglas G. Caroom of Bickerstaff Heath Delgado Acosta, LLP, Counsel for Amicus Curiae Texas Farm Bureau, American Farm Bureau Federation, Oklahoma Farm Bureau Legal Foundation, Oregon Farm Bureau Federation, Wyoming Farm Bureau Federation, California Farm Bureau Federation, Mississippi Farm Bureau Federation, and Louisiana Farm Bureau Federation .
33. Amicus Curiae Texas Water Conservation Association.

34. Lyn E. Clancy of Lower Colorado River Authority, Counsel for Amicus Curiae Texas Water Conservation Association.
35. Amici Curiae City of Kerrville.
36. Amicus Curiae Structural Metals, Inc. d/b/a CMC Steel Texas.
37. Amy M. Emerson of Lloyd Gosselink Rochelle & Townsend, P.C., Counsel for Amici Curiae City of Kerrville and Structural Metals, Inc. d/b/a CMC Steel Texas.
38. Amicus Curiae Texas Public Policy Foundation.
39. Mario Loyola and Josiah Neeley, Counsel for Amicus Curiae Texas Public Policy Foundation.
40. Amicus Curiae City of Victoria.
41. Michael J. Booth of Booth, Ahrens & Werkenthin, P.C., Counsel for Amicus Curiae City of Victoria.
42. Amicus Curiae CPS Energy.
43. Russell S. Johnson, Carl R. Galant, and Regina M. Buono of McGinnis, Lochridge & Kilgore, LLP, Counsel for Amicus Curiae CPS Energy.
44. Trial Court Amicus Curiae:
    – Guadalupe Valley Electric Cooperative, Inc.
    – Caldwell County.
    – City of Port Lavaca.
    – City of Boerne.
    – City of Bulverde.
    – City of Cibolo.
    – City of Lockhart.
    – City of Luling.
    – City of San Marcos.
    – City of Victoria.
    – City of Yoakum.
    – Fair Oaks Ranch.
    – Foresight Golf Partners Ltd.
    – Golf Associates Ltd.
    – Guadalupe Basin Coalition.
    – Guadalupe-Blanco River Authority Customers.
    – Kendall County.
    – Royal Marina Holdings, LLP.
    – Royal Oaks Partners at Fulton Beach, LLP.
    – SJWTX, Inc.
    – Texas Water Conservation Association.
    – Victoria County.
    – National Water Resources Association.
    – Comal County.

– Calhoun County.
– Guadalupe County, Texas.
– City of Wimberley, Texas, Mayor Bob Flocke.
– City of New Braunfels.
– East Central Special Utility District.

45. Defenders of Wildlife, as *amicus curiae*
46. Jason C. Rylander, Michael P. Senatore, Eric R. Glitzenstein, counsel for *Amicus Curiae* Defenders of Wildlife

Respectfully submitted,

/s/ Jason C. Rylander
Jason C. Rylander

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* certify as follows: Defenders of Wildlife is a non-profit corporation under the laws of the District of Columbia, registered with the Internal Revenue Service as a 501(c)(3) organization. Defenders has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respectfully submitted,

/s/ *Jason C. Rylander*
Jason C. Rylander

STATEMENT REGARDING ORAL ARGUMENT

If the Court allows any other amicus to present argument, *Amicus Curiae* Defenders of Wildlife also wishes to appear and answer the Court's questions.

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Defenders of Wildlife ("Defenders") is a not-for-profit conservation organization recognized as one of the nation's leading advocates for wildlife and their habitat. Founded in 1947, Defenders is headquartered in Washington, D.C., with field offices across the country and approximately 950,000 members and activists. Defenders has a keen interest in maintaining a legal system that recognizes the ability of Congress to protect endangered wildlife under the Endangered Species Act ("ESA") and other federal laws. As an intervenor or *amicus curiae*, Defenders has successfully defended federal wildlife protections in numerous appellate cases at the intersection of environmental and constitutional law, including *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) *cert. denied sub nom. Stewart & Jasper Orchards v. Salazar*, 132 S. Ct. 498 (2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F. 3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001).

SUMMARY OF THE ARGUMENT

The whooping crane is one of the most iconic species in America. Once abundant, the tallest bird in North America with its distinctive whooping call saw its population plummet from as many as 20,000 before human interference to just 15 birds in 1941. Those 15 cranes migrated between the Aransas National Wildlife Refuge in Texas and the Wood Buffalo National Park in Canada. Cooperative efforts of federal, state, local, and international governments helped the crane's wild population expand, but it remains under 300 birds. Despite efforts to introduce whooping cranes to other states, the Aransas-Wood Buffalo flock is the only self-sustaining population in the wild.

Born out of the recognition that individual state management alone was inadequate to protect national interests and treaty obligations in free-roaming wildlife, the ESA was enacted "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The Act's broad purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The entire point of the Act is to recover and ultimately remove these species from the federal endangered species list. § 1532(3).

Effective state management of wildlife can prevent species from ever being listed and once a species is deemed "recovered," its management will generally revert to the state. While a species is listed, however, the states, like private actors, must avoid taking actions that cause further harm to endangered and threatened wildlife. State action therefore can either minimize or prolong the time a species spends under federal protection.

Appellants and Appellant-Intervenors raise various constitutional arguments for why Texas Commission on Environmental Quality (TCEQ) officials should not be enjoined from authorizing actions that have already caused the death of at least 23 imperiled whooping cranes. Appellants' theory that they are immune from ESA liability here must fail based on a plain language reading of the ESA and court precedent. Federal courts are empowered to adjudicate and remedy violations of federal law, and the district court's opinion and calibrated remedy are fully consistent with Congressional intent. In turn, the ESA is consonant with federalism principles and there is no constitutional infirmity in application of the Act here. Congress's authority to circumscribe state actions that harm federally protected species is essential to the ESA's comprehensive statutory scheme to protect and recover America's natural heritage.

Defenders submits this brief to explain the Act's program for protecting imperiled species and the specific importance of habitat protection to

Congress' goals. The brief discusses the role that states actors can and do play in habitat conservation planning. Finally, we will briefly demonstrate why Appellants' legal arguments must fail and address options for remedy that are consistent with constitutional principles and the intent of the ESA.

ARGUMENT

I. The Endangered Species Act's Structure and Purpose Depends Upon the Cooperation of All "Persons" in Protecting Species and Habitat

a. The ESA Is a General Regulatory Scheme Specifically Designed to Address Habitat Loss, the Leading Threat to Species

The Supreme Court has called the ESA "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995) (quoting *TVA v. Hill*, 437 U.S. at 180). The Act begins with a congressional finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation" 16 U.S.C. § 1531(a)(1), and that "these species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." § 1531(a)(3).

Habitat loss and degradation is the leading cause of endangerment for as much as 85% of imperiled species. David S. Wilcove, et al., *Quantifying Threats to*

Imperiled Species in the United States, 48 BIOSCIENCE 607, 609 (1998); *see also* Edward O. Wilson, THE DIVERSITY OF LIFE 243-80 (1992). It follows, therefore, that "habitat protection is a prerequisite for conservation of biological diversity and protection of endangered and threatened species." NATIONAL ACADEMY OF SCIENCES, SCIENCE AND THE ENDANGERED SPECIES ACT 7 (1995). The ESA "in emphasizing habitat, reflects the current scientific understanding of the crucial biological role that habitat plays for species." *Id.*

The role of habitat preservation in the conservation of threatened and endangered species is evidenced throughout the ESA. 16 U.S.C. § 1531(b). Section 4 requires the Service to list threatened and endangered species based solely on the best scientific and commercial data available, to timely designate "critical habitat" for listed species, and to develop and implement recovery plans for such species. § 1533. The very first statutory factor for consideration of listing a species is "the present or threatened destruction, modification or curtailment of its habitat or range." § 1533(a)(1)(A). Likewise, Section 7 requires federal agencies to consult with the federal wildlife agencies to ensure their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species" or result in "the destruction or adverse modification" of their critical habitat. § 1536(a)(2).

Section 9 of the ESA extends the Act's protections for species and their habitat to federal, state, local, and private actors alike. Section 9(a)(1)(B) makes

it unlawful for "any person" to "take any [endangered] species within the United States or the territorial sea of the United States." § 1538(a)(1)(B). A person also may not "solicit another to commit, or cause to be committed," a "take" of listed species. § 1538(g). Under the ESA, a "person" includes "any officer, employee, agent, department, or instrumentality … of any State, municipality, or political subdivision of a State." § 1532(13). As the Supreme Court has countenanced, "taking" a species includes not just directly capturing, killing, or injuring members of a listed species; it also includes indirect "take," such as harm that may result from loss or degradation of habitat. *Sweet Home*, 515 U.S. at 696-708 (interpreting § 1532(19) and 50 C.F.R. § 17.3).

Section 10 is an important feature of the ESA for achieving species conservation while accommodating economic growth and development. The most significant of Section 10's provisions, and the focus of the district court's remedy in this case, is the Incidental Take Permit, which is available to federal, state, municipal, and private actors through the Habitat Conservation Planning process. As described below, the ITP/HCP process has become an increasingly common and successful means of reconciling potential conflicts under the ESA. Simply put, it provides for exemptions from the ESA's take liability provisions in exchange for participation in efforts to stave off the extinction of species.

b. Section 10's Habitat Conservation Planning Process Is an Essential Part of the ESA's Program for Avoiding Species Extinction

The original ESA provided no exemption for liability under Section 9's take prohibition. In 1982, in response to innovative conservation planning efforts that allowed responsible development to proceed in the habitat of an endangered butterfly, Congress strongly endorsed a flexible approach for state and private actors to avoid Section 9 liability for otherwise lawful actions that may unintentionally take listed species. *See* Douglas P. Wheeler & Ryan Rowberry, *Habitat Conservation Plans and the Endangered Species Act in* ENDANGERED SPECIES ACT: LAW, POLICY & PERSPECTIVES 222 (Donald C. Baur & Wm. Robert Irvin eds. 2010). The result, Section 10(a), allows non-federal parties to pursue an "incidental take permit" provided that they submit for FWS approval a "habitat conservation plan" for affected species. 16 U.S.C. § 1539(a)(2). The process requires applicants to describe in the HCP the potential impact to species and what steps they will take to "minimize or mitigate such impacts." § 1539(a)(2)(A)(ii). The Service, in turn, must ensure that the proposed taking will be minimized and mitigated "to the maximum extent practicable," § 1539(a)(2)(B)(ii), and that the taking will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild," § 1539(a)(2)(B)(iv).

As the FWS explains, the HCP process has become "an increasingly utilized and successful way to provide private owners of natural resources with the creative flexibility and certainty they need to plan their activities while providing protection for listed species." U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK, Foreword (Nov. 4, 1996). As of May 2013, more than 690 HCPs covering many millions of acres of habitat have been developed by state, local and private actors in conjunction with the Service. U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLANS REPORT, *available at* http://ecos.fws.gov/conserv_plans/PlanReport?region=9&type=HCP&rtype=2&hcpUser=&view=report. While allowing many activities to proceed in listed species habitat that would otherwise be prohibited by section 9, the HCP process has also been "[e]ffective to highly effective in achieving its purpose of avoiding, minimizing and mitigating the effects of development on endangered species and their habitats." DAVID CALLIHAN, ET AL., AN INDEPENDENT EVALUATION OF THE U.S. FISH & WILDLIFE SERVICE'S HABITAT CONSERVATION PLAN PROGRAM ii (Sept. 2009).

c. State Agencies Have Played a Vital Role Both in Using the ITP/HCP Process to Avoid Section 9 Liability and in Furthering the Protection of Listed Species.

Conservation of imperiled species cannot be accomplished on federal lands alone. Two-thirds of listed species have more than 60% of their habitat

on non-federal lands. U.S. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 1 (1994). "[M]any of the problems that endangered species face cannot be solved without the use of powers, including land use controls and water rights administration, that are within the domain of state and local governments." Jean O. Melious, *Enforcing the Endangered Species Act Against the States*, 25 WM & MARY ENVTL. L. & POL'Y REV. 605, 605-6 (2001). Not surprisingly, therefore, Congress specifically contemplated an important state role in the HCP/ITP process. *See* H.R. Conf. Rep. No. 97-835, at 30 (1982) (anticipating that "comprehensive conservation plans … would be developed jointly between the appropriate federal wildlife agency and the private sector or local and state governmental agencies").

In practice, states have been involved in many of the HCPs prepared to date, particularly those that cover a broad region or involve multiple species. "States participate in HCPs as applicants because they are landowners, or because the state is a useful entity for coordinating the efforts of many jurisdictions, groups, and private landowners over a broad geographical scale." Melious, *supra*, at 622. In Texas, HCPs have become a well-accepted tool for addressing conservation and development needs for both public and private actors. The Texas Parks and Wildlife Department is a partner to the Edwards Aquifer HCP covering water withdrawals from the aquifer. PX112; R4.5471-

74. Hays County, Texas, recently fashioned a regional HCP that protects two endangered birds while promoting responsible economic and infrastructure development. http://www.hayscountyhcp.com. The biologically diverse Texas Hill Country, composed of a wide swath of the Edwards Plateau west of the Balcones Escarpment, is now home to more HCPs than any other region of the United States. Luela P. Roberts, U.S. FWS, *Deep in the Heart of Texas*, *available at* http://www.fws.gov/endangered/what-we-do/bulletins/deep-in-the-heart-of-texas.html.

Washington State developed a "Forest Practices ITP/HCP" to insulate itself from liability for authorizing logging and water withdrawals that affected a number of listed species, and it participated in the development of the Cedar River Watershed HCP covering the water withdrawals from the Cedar River by the city of Seattle.[1] The Montana Department of Natural Resources and Conservation submitted an HCP and received an ITP for the incidental take of species resulting from timber harvesting and related activities.[2] The Michigan and Wisconsin Departments of Natural Resources each developed HCPs to "integrate[ ] diverse land uses with conservation objectives by outlining

[1] *Forest Practices HCP* (Dec. 2005), *available at* http://www.dnr.wa.gov/BusinessPermits/Topics/ForestPracticesHCP/Pages/fp_hcp.aspx; *Cedar River Watershed HCP* (April 2000), *available at* http://www.seattle.gov/util/EnvironmentConservation/OurWatersheds/Habitat_Conservation_Plan/AbouttheHCP/Documents/index.htm.

[2] *Montana DNRC Forested State Trust Lands HCP* (Sept. 2010), *available at* http://ecos.fws.gov/docs/plan_documents/thcp/thcp_899.pdf.

measures to avoid, minimize and mitigate take of Karner blue butterfly."[3] In Wisconsin, the state's Department of Natural Resources is the primary applicant and holder of the ITP. The state-wide permit applies both to state-owned and privately-owned lands that support the butterfly.[4]

II. TCEQ Officials Were Properly Found Liable for Violations of the ESA

a. State Officials Can Be Held Liable Under Section 9 When They Authorize Activities That Cause "Take" of Listed Species

Although the ITP/HCP program has been successful in accommodating the interests of state entities whose actions affect listed species, it is equally clear that such entities may be subject to Section 9 liability. Appellant's blanket assertion that "state officials do not violate the Endangered Species Act by issuing state-law permits," TCEQ Br. 13, is unfounded in the law and contravenes two decades of case law on the subject.[5] In *Sierra Club v. Yeutter*, this Court found the U.S. Forest Service liable under Section 9 when its authorization of clear-cutting by third parties impaired the red-cockaded woodpecker's "essential behavioral patterns, including sheltering." 926 F.2d

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[3] *Michigan Karner Blue Butterfly HCP* (Jan. 2009), *available at* http://ecos.fws.gov/docs/plan_documents/thcp/thcp_945.pdf; *see also Wisconsin Statewide Karner Blue Butterfly HCP* (updated May 2010), *available at* http://dnr.wi.gov/topic/ForestPlanning/documents/KBB-HCP-Final-052710.pdf.

[4] *Id.*

[5] Notably, the state owns the water resources at issue. Tex. Water Code § 11.021.

429, 438 (5th Cir. 1991). Consistent with the definition of "harm," 50 C.F.R. § 17.3, the *Yeutter* ruling reflects the ecological realities that human activities may harm wildlife through habitat modification. Two years earlier, the Eighth Circuit found EPA officials liable under Section 9 for their decision to register strychnine, which resulted in poisonings of endangered species. *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1988).

Consistent with this precedent, the First Circuit enforced Section 9 against state officials who licensed commercial fishing operations, including use of gillnets and lobster pots, that were likely to lead to "taking" of the endangered northern right whale. *Strahan v. Coxe*, 127 F.3d 155, 156, 163 (1st Cir. 1997). The *Strahan* court was satisfied that, on the facts before it, causation was "not so removed that it extends outside the realm of causation as it is understood in the common law." *Id.* at 164; *see also Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1247–53 (11th Cir. 1998) (finding sufficient causal connection between Volusia County's inadequate beachfront lighting ordinances and "harm," as related to standing, citing *Defenders v. EPA* and *Strahan* to note that "at least two circuits have held that the regulatory acts of governmental entities can cause takes of protected wildlife").

Numerous district courts have also held state officials liable under Section 9 for authorizing activities that harm listed species. *See, e.g., Animal Protection Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1081 (D. Minn. 2008) (finding

prospective injunctive relief in the form of an ITP an appropriate remedy for State Department of Natural Resources who violated the ESA by "authorizing and allowing" trapping and snaring activities that took Canada Lynx); *United States v. Town of Plymouth, Mass.*, 6 F. Supp. 2d 81, 82 (1998) (issuing injunction requiring local government to implement specific monitoring and mitigation requirements, when Town's allowance of ORV use on beaches caused take of piping plovers "by killing one chick, and by substantially interfering with the breeding, nesting, and feeding habit" of the birds); *Pac. Rivers Council v. Brown*, 2002 U.S. Dist. LEXIS 281211 *4, 19-22 (D. Or. Dec. 23, 2002) (finding Oregon State Forester exacted a take where "State Forester's approval is a prerequisite to certain logging operations, and the State Forester has repeatedly approved logging operations that result in take of threatened salmon"); *Cascadia Wildlands v. Kitzhaber*, 2012 U.S. Dist. LEXIS 168459 *6-8 (D. Or. Nov. 19, 2012) (enjoining timber sales and future logging activities in marbled murrelet forest habitat sites, following determination that plaintiffs had established a plausible claim for relief against District Foresters for causing take through planning and authorization of timber sales); *Seattle Audubon Soc'y v. Sutherland*, 2007 U.S. Dist. LEXIS 55940 (W.D. Wash. Aug. 1, 2007) (finding plain language of the ESA to make states and state officials liable when they "cause to be committed" take).

Appellants concede that a state official could be liable for direct take, TCEQ Br. 19, but they entirely reject the concept of liability for authorizing harmful actions even though it has been uniformly endorsed by this Court and all courts that have confronted the issue. Appellants go so far as to suggest that the ESA does not even prohibit states from issuing hunting licenses to kill endangered species. TCEQ Br. 15-16. Appellants attempt to support their novel reading of the Act by citing Section 9(g) to suggest a distinction between the "mere licensing" of an activity by state officials and the perhaps more insidious "solicitation of a 'take'" which even they must concede would be prohibited. *Id.* at 20. Appellants cite no case law to suggest that this distinction is legally significant. Moreover, the full text of Section 9(g), which Appellants fail to address, states that "[i]t is unlawful for any person subject to the jurisdiction of the United States to *attempt to commit*, solicit another to commit, or *cause to be committed*, any offense defined in [Section 9]." 16 U.S.C. § 1538(g) (emphasis added). Under this expansive provision, any "person," including a state, may be liable for an activity that *causes* a take. Plainly, a state official who issues a license to hunt a listed species – or, as here, who authorizes a water withdrawal that depletes the essential habitat on which whooping cranes are dependent for their survival – is "causing" a take within the plain meaning of the Act and its patent purpose.

To support their position, Appellants rely on a *dissenting opinion* in a Tenth Circuit case addressing whether federal law preempted a county ordinance opening federal land to off-highway vehicle use. *Wilderness Soc'y v. Kane County*, 581 F.3d 1198, 1235-37 (2009) (McConnell, J., dissenting). But Appellee's claims do not raise preemption issues, and *Wilderness Society* did not involve the ESA or even whether state officials could be liable for violating federal law. That federal statutes do not necessarily conflict with non-federal laws whenever state and local governments fail to "pass ordinances forbidding all conduct that is forbidden under federal law," *id.* at 1237-38, is simply not called into question in this case. Neither the ESA nor the lower court's ruling applying it requires the state's legislature to pass specific ordinances enforcing federal prohibitions. Rather, they simply provide that state actors may not affirmatively authorize specific conduct that foreseeably harms listed species.

The proposition that agency officials are liable under Section 9 when they license or authorize actions that cause takes is well established in ESA jurisprudence. If, as here, a state agency approves licenses or permits in a manner that causes a take, the state agency may be liable.

b. Enjoining TCEQ From Violating Sections 9 Of The ESA Does Not Commandeer State Officials

The "anti-commandeering" rule, extending from the Tenth Amendment, dictates that "Congress may not usurp the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program, but must exercise legislative authority directly upon individuals." *New York v. United States*, 505 U.S. 144, 145 (1992) (finding the "take title" provision of the Low-Level Radioactive Waste Act of 1985 violated the Tenth Amendment by coercively requiring states to take ownership of waste by a date certain or have their regime preempted by Federal law). The Supreme Court has invoked this rule sparingly, however, and has refused to apply it in cases where federal statutes merely circumscribe State activities under generally applicable requirements of federal law, as opposed to directly controlling the way in which states administer their own regulatory programs. *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988); *accord Reno v. Condon*, 528 U.S. 141, 150-51 (2000).

Printz v. United States struck down the Brady Handgun Violence Prevention Act for affirmatively requiring state law enforcement officers to complete extensive background checks and perform other duties per specific statutory requirements, thus amounting to "forced participation of the State's executive in the *actual administration of a federal program.*" 521 U.S. 898, 903, 918 (1997) (emphasis added). But while Congress may not command states "to

administer or enforce a federal regulatory program," *id.* at 935, the Court emphasized that there remains a "duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law," such that "all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid," *id.* at 913. Indeed, in *New York*, the Court found no constitutional impediments to federal courts requiring state officials to comply with federal law, as such judicial enforcement is readily distinguishable from a scenario where an act of legislation by Congress commands a state to enact and enforce a federal program. 505 U.S. at 179.

Appellants' reliance on these cases for the proposition that "the district court unlawfully commandeered the State's executive by requiring it to maintain the state-law prohibitions on water use established in TEX. WATER CODE § 11.121," TCEQ Br. 29, is thus inapt and distorts the manner in which the judgment actually affects the TCEQ officials. *New York* and *Printz* dealt with broad federal statutes which by their plain terms imposed positive commands on the "states as states" to use their limited resources to implement detailed federal regulatory regimes.

The ESA may be enforced against state officials and agencies via judicial order when the Act's take prohibition is violated, as the ESA itself wields no affirmative directive at states, as states, commanding them to implement the

ESA regulatory scheme.[6] Rather, Section 9 imposes a broad prohibition on "take," which as discussed, is generally applicable to activities by private entities, state agencies, and state officials that cause harm to a listed species. 16 U.S.C. §§ 1532(13); 1538(a)(1)(C); 50 C.F.R. § 17.3. Application of this requirement to TCEQ officials does not equate to the State's legislative and administrative processes being hijacked by the ESA.[7]

In *Reno v. Condon*, the state of South Carolina argued that a federal rule regarding driver's license data commandeered its licensing programs. Rejecting comparisons to *New York* and *Prinz*, the Supreme Court held that the Driver's Policy Protection Act regulated states, not as states, but as owners of a

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[6] Appellants' reliance on Judge Kozinski's concurrence in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), is totally misplaced. *Conant* held that doctors have a First Amendment right to communicate information to their patients on the use of medical marijuana. Although the federal policy at issue penalized doctors (not states or even state officers) for recommending marijuana, Judge Kozinski alone viewed the case as implicating the Tenth Amendment as well as the First. In his view, federal rules "commandeered" a state scheme for distribution of medical marijuana that was "closely calibrated" to exempt only those patients who consulted a physician. *Id.* at 645-46. Appellants, arguing broadly that the Texas may "legalize" takes of endangered whooping cranes through the vehicle of the Texas Water Code, TCEQ Br. 17, cannot possibly say that they have "carefully calibrated" the number of illegal takes that will occur, or that their water permitting scheme is the appropriate medium for any such decisions to take place.

[7] Although Appellants argue that state water law is a unique area warranting state sovereignty, states have always had to manage their water in accord with federal laws, including Clean Water Act and the ESA. Federal courts routinely require states to modify their water programs to come into compliance with federal law. *See*, e.*g.*, *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257 (9th Cir. 1984); *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS 101940 (E.D. Cal. Dec. 14, 2007); *Westlands Water Dist. v. Dep't of the Interior*, 850 F. Supp. 1388 (E.D. Cal. 1994); *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983).

database. 528 U.S. 141, 151 (2000). The DPPA did not require state legislatures to enact any new laws as did *New York*, and it did not require state officials to assist in the positive enforcement of federal law as did *Printz*. As the *Reno* court explained: "any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." 528 U.S. at 150-51 (quoting *South Carolina v. Baker*, 485 U.S. at 514-15). This case is not unlike *Reno*, in that TCEQ officials are being regulated as owners of water resources to come into compliance with federal law, thus the drivers' license hypothetical does not help Appellants.

The Appellants respond that "when state officials are *forbidden to license* an activity, it logically follows that they are *compelled to prohibit* that activity under state law," Appellant Br. 35. However, compliance with Section 9 does not impose a positive obligation to act on state officials; rather, it merely requires them *not to act* in a way that would take listed species. If the state wishes to avoid future liability under Section 9, it can cease authorizing water withdrawals that adversely impact federally-protected whooping cranes or it can seek a permit under the cooperative, flexible Section 10 process governing incidental takes.

Moreover, Appellants' argument fails to recognize that the Court order does not place a complete ban on issuance of permits, nor a ban that continues in perpetuity. TCEQ is only enjoined from issuing future non-emergency permits until it obtains an ITP. The precise obligations of any ITP/HCP would have to be developed by TCEQ officials in coordination with the FWS. Such a remedy is reasonably designed to address the continuing violation of the Act. *See, e.g., Strahan v. Coxe*, 127 F.3d at 164; *Animal Protection Inst. v. Holsten*, 541 F. Supp. 2d at 1080-81.

At bottom, courts must distinguish between genuine threats to sovereignty that commandeer state legislatures and federal laws and judicial orders that require states to comply with generally applicable federal laws. A finding of liability under Section 9 for acts that cause actual take of endangered species in no way resembles a "commandeering" of state regulatory power. Accordingly, Appellants are mistaken that a "difficult constitutional question" has been presented. The district court's decision is consonant with ESA jurisprudence and the Supreme Court's Tenth Amendment cases.

III. The District Court Did Not Err in Finding Proximate Cause Between the State Officials Actions and Take of Whooping Cranes

To a large extent, Appellants' constitutional arguments often blur into a discussion of proximate cause. That state officials *may* be liable under Section 9 for direct or indirect actions that cause take of endangered species is

unremarkable and amply supported by statute and precedent. Rather, Appellants' liability rises and falls on a factual question: did the act of issuing water diversion permits *cause* take of listed species in violation of Section 9? Whether plaintiffs met their burden of proving take liability is not an abstract constitutional question but a more run-of-the mill matter of proof. Guided by the text of the ESA and the Supreme Court's opinion in *Sweet Home*, the district court's factual conclusions on the issue are entitled to deference and its legal conclusions are not in error. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687(1995).

At trial, TAP provided myriad studies pertaining to the effect of decreased fresh water instream flows, caused by permitted water diversions, on whooping crane survival. *See* Mem. Op. 45- 87. The district court agreed "that TCEQ's actions and inactions in managing water diversions along the San Antonio and Guadalupe River systems caused 'harm' to the endangered Whooping Cranes, by actually injuring and killing 23 birds." Mem. Op. 12 (citing 50 C.F.R. § 17.3). This holding is consistent with *Sweet Home*'s guidance on Section 9 causation because there exists both proximate cause and foreseeability. 515 U.S. at 708-13.

According to the Appellants, the "plaintiff seems to be suggesting that no chain of causation is too complex to establish proximate cause, once state officials have licensed an activity that eventually results in harm to an

endangered species." TCEQ Br. 41. But TAP suggests nothing of the sort. What is relevant is not the length of the chain but whether an action demonstrably results in harm to species. *See generally Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) ("A proximate cause is not ... the same thing as a sole cause."), *cert. denied*, 513 U.S. 1110 (1995). Section 9 prohibits "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; *Sweet Home*, 515 U.S. at 687. With imagination, one can interpolate many steps in any causal chain, as Appellants creatively do, but the path remains clear and linear. Whooping cranes rely on a specific freshwater aquatic habitat for nourishment. TCEQ water permits, by diminishing instream flows to the Aransas National Wildlife Refuge, altered this habitat causing take of at least 23 cranes.

Appellants worry a finding of liability in this case could put the state's Department of Motor Vehicles at risk of a Section 9 lawsuit or undermine general proximate causation requirements in other cases. The concern is misplaced. Even assuming that some number of listed species may perish by automobile, one cannot say it is foreseeable that any particular person receiving a license will commit the act, when, where, or how often. Indeed, millions of Texas drivers will drive millions of miles without ever encountering an endangered species or even coming in close proximity to one. By sharp

contrast, TCEQ's water permitting scheme – by specifically approving the withdrawals of water from natural systems on which whooping cranes depend for their survival – foreseeably causes a direct, predictable (and predicted), adverse habitat modification that has already killed and injured whooping cranes and that could not occur without the Agency's involvement. Permits for diversion of state-owned water are given to a limited number of qualified users who then are subject to significant oversight by the TCEQ. *See* Tex. Water Code §§ 11.023 (outlining purposes for which water may be diverted); 11.025 (scope of appropriative right); 5.013(a)(1) (granting legal authority to Commissioner to issue, adjudicate, enforce, and cancel water rights). Moreover, the Texas Water Code includes a so-called "use it or lose it" provision granting TCEQ the authority to revoke permits for ten years of nonuse.[8] § 11.172. Here, the state knows exactly who is withdrawing water, where they are withdrawing it, how much they are withdrawing, when they will make the withdrawals – and that it is happening in a manner that places a highly endangered species at grave risk.[9]

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[8] Appellants also argued that they lacked authority to alter water permits, but the District Court rejected those arguments in pretrial, finding TCEQ to have plenary authority over water permits and water diversions. Mem. Op. 17 (citing D.E. 270 at 11).

[9] Other courts have rejected the drivers' license hypothetical, pointing out that at least in some cases the hypothetical depends on a licensee's lack of due care or intentional act. *Strahan v. Coxe*, 127 F.3d at 164; *Animal Protection Institute*, 541 F. Supp. 2d at 1079. Incidental or even intentional take of species by automobile would no more present

Justice O'Connor's concurrence in *Sweet Home* limits the FWS's "harm" regulation to "significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals" 515 U.S. at 709 (O'Connor, J., concurring). This case, however, does not involve "hypothetical or speculative" take and thus is unlike *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), which Justice O'Connor criticized. In *Palila* there were no dead birds; here there is significant evidence that the state-authorized water diversions killed at least 23 whooping cranes. As the district court stated, findings on the lethal impact of depleting fresh water flows "were not surprising, and simply confirmed what the International Whooping Crane Recovery Team, FWS, and Texas Parks and Wildlife Department officials had observed and warned about in prior years: decreased freshwater inflows correlate with higher crane mortality."[10] Mem. Op. 48; *see also* PX11 at 20-21 (App'x 1); R4.4221-27. Both *Strahan* and the district court opinion are consonant with Justice O'Connor's view:

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liability for the state of Texas under the ESA than would the use of a vehicle by a licensed driver to commit acts that are illegal under federal or tort law–for example, drug smuggling. These illegal activities would never give rise to civil or criminal liability by the State DMV because the limits of proximate causation and foreseeability would not allow it. That is a far cry from state officials' authorization to use a state-controlled resource in a manner that has, and will again, predictably impair the essential habitat of a federally protected species.

[10] "The Whooping Crane International Recovery Plan of 2007, published by the USFWS, recognizes that, in Texas, the largest threat to the AWB flock's survival is the reduction in freshwater inflows." Mem. Op. 48-49.

> Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences. The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts. But I note, at the least, that proximate cause principles inject a foreseeability element into the statute, and hence, the regulation, that would appear to alleviate some of the problems noted by the dissent.[11]

Sweet Home, 515 U.S. at 713. In finding that "TCEQ's actions and inactions in managing water diversions along the San Antonio and Guadalupe River systems caused 'harm' to the endangered whooping cranes, by *actually injuring and killing 23 birds,*" Mem. Op. 12 (emphasis added), the district court holding fits comfortably within the general proximate cause and foreseeability limitations anticipated by Justice O'Connor, and therefore her concurrence is of no help to Appellants.

IV. The District Court's Remedies Were Appropriate and Narrowly Tailored and, in Any Case, May Be Easily Refined to Address Any Concerns

The district court was correct to order declaratory relief, as authorized by 28 U.S.C. §§ 2201 & 2202, and injunctive relief, which is the appropriate remedy for violations of the ESA. The district court similarly possessed the

[11] In her only illustrative hypothetical, Justice O'Connor distinguishes between an overly attenuated scenario with uncontrolled intervening factors (a farmer whose fertilizer is lifted up by a tornado and deposited in a nearby wildlife refuge) and one in which liability would be proper (a farmer who drains their pond, killing endangered fish). *Id.* at 713. The foreseeability of tornados (and the impact that follows) is many degrees less than the latter scenario, which as here involved the draining of water habitat.

authority to order TCEQ officials to obtain an incidental take permit under the ESA, but if this Court takes issue with that remedy, it can remand the case for consideration of alternative remedies without disturbing the judgment.

The ESA expressly authorizes injunctive relief for violations of the ESA's "take" prohibition. 16 U.S.C. § 1540(g)(1). Indeed, under the ESA, federal courts may be required to issue injunctions to prevent further "takes." *TVA v. Hill*, 437 U.S. 153 (1978); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982) ("The purpose and language of the [ESA] … compelled that conclusion."). The Eleventh Amendment does not immunize ongoing violations of the ESA or any other federal law. *Alden v. Maine*, 527 U.S. 706, 747 (1999) ("suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land"); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (Eleventh Amendment "does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law"). Here the district court found that TCEQ officials caused the take of whooping cranes and that take was likely to continue if the agency did not alter its practice of issuing water diversion permits. Mem. Op. 121. Absent the injunction, there is no evidence TCEQ will take action to protect whooping cranes from harm related to excessive water diversion. Indeed, further permits on the San Antonio and Guadalupe Rivers are pending, including two for GBRA totaling 264,000 acre

feet. Appellees Br. at 12. Given the facts presented at trial, new authorizations for water withdrawals will foreseeably harm whooping cranes. Injunctive relief was proper.[12]

The court also found that "this case is well-suited for an ITP and corresponding HCP." Mem Op. at 121. Citing testimony of experts who appeared before the court, Judge Jack noted that

> the preparation of an HCP would require the TCEQ defendants to address freshwater flows, and reduce and mitigate adverse impacts of water diversions and related practices on the AWV crane population. The HCP would identify how the TCEQ defendants would achieve goals related to inflows and protection of the AWB cranes. The HCP process allows flexibility by protecting economic interests of stakeholders while also protecting the endangered species. (citations omitted).

Id. Indeed, this is an ideal case for an HCP. As discussed in Section I *supra*, states have a critical role to play in fashioning regional HCPs. A state-led HCP could address many of the issues in this case: TCEQ officials could avoid, minimize or mitigate future take of whooping cranes while still providing a mechanism for managing and fulfilling water use by agricultural and other users.

In an effort to avoid liability, Appellants claim they are not proper defendants and suggest plaintiffs should have instead sued all 700 water-permit

[12] Notably, the court did not enjoin existing water permits even though to do so would have been within its power and would further the goals of the ESA; the injunction is limited only to future water permits, and even then the state retains the discretion to issue permits on an emergency basis.

holders in the region, *i.e.*, those who the state agency has expressly permitted to use a state-controlled resource in a manner that is depleting the whooping cranes' habitat. While such a class action might be possible under the ESA, and individual water users could also potentially be found liable under Section 9, such an action would be far more costly for all stakeholders, as well as the court system itself. In any event, it is simply unnecessary since state officials are also bound by the take prohibition in Section 9.

The Texas legislature recently granted the state Comptroller and TCEQ defendants the authority to "develop or coordinate the development of a habitat conservation plan" and to "apply for and hold a federal permit issued in connection with a habitat conservation plan." Tex. Gov't Code § 403.452(a)(1)-(2). *See* Mem. Op. 106-07. In addition, the Comptroller may "implement, monitor, or support the implementation of a habitat conservation plan or candidate conservation plan developed by the comptroller or the development of which is coordinated by the comptroller." Tex. Gov't Code § 403.452(a)(6). This authority was granted to executive officers of the state in order to "promote compliance with federal law protecting endangered species." § 403.452(a). As the district court held, this provision provides additional support for the proposition that, far from being commandeered, TCEQ officials are expressly authorized by the state legislature to pursue HCPs to address endangered species issues. Mem. Op. 107.

In this Court's order granting an emergency stay, Judge Higginson suggested that Appellants were likely to succeed on their claim "as to the affirmative obligation the permanent injunction imposes to seek and Incidental Take Permit within 30 days." Order Granting Mot. to Stay (Mar. 26, 2013) (Higginson, J., specially concurring). If after review of the HCP process and the arguments in support by Appellees and their *amici* this Court still finds this remedy to be *ultra vires*, the Court should remand the decision solely to reconsider how to refine the remedy, which could easily be modified in a manner that poses no possible infirmity. For example, instead of ordering Appellants to obtain an ITP, the district court could afford them a reasonable time within which to do so and, if they do not, could entertain further injunctive relief at that time. The Court need not upset the district court's finding of liability for TCEQ officials, nor even its injunction against new water withdrawals. The Court need only address any concern resulting from the specific order that TCEQ seek an ITP within 30 days.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be Affirmed.

Respectfully submitted,

/s/ Jason C. Rylander

JASON C. RYLANDER
MICHAEL P. SENATORE
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, DC 20036
jrylander@defenders.org
(202) 682-9400

ERIC R. GLITZENSTEIN
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009
EGlitzenstein@meyerglitz.com
(202) 588-5206

COUNSEL FOR *AMICUS CURIAE*
DEFENDERS OF WILDLIFE

CERTIFICATE OF SERVICE

On this 5th day of June, 2013, a true and correct copy of the foregoing *Amicus Curiae* Brief of Defenders of Wildlife was filed with the electronic case filing (ECF) system of the U.S. Court of Appeals for the Fifth Circuit, which currently provides electronic service on the counsel of record.

/s/ Jason C. Rylander

James B. Blackburn, Jr.
Charles W. Irvine
Mary B. Conner
Blackburn Carter, P.C.
4709 Austin St.
Houston, Texas 77004
Counsel for Plaintiff-Appellee The Aransas Project

Edmond R. McCarthy, Jr.
Jackson, Sjoberg, McCarthy & Wilson, LLP
711 West 7th St.
Austin, Texas 78701

David W. Ross
General Counsel
San Antonio River Authority
Law Offices of David Ross, P.C.
115 E. Travis St., Suite 1630
San Antonio, Texas 78205
Counsel for Intervenor Defendant-Appellant San Antonio River Authority

Kenneth R. Ramirez
Law Offices of Ken Ramirez
111 Congress Avenue, 4th Floor
Austin, Texas 78701

Amy Leila Saberian
Enoch Kever PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701
Counsel for Intervenor Defendant-Appellant Texas Chemical Council

Jonathan F. Mitchell, Solicitor General
Office of Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Counsel for Defendants-Appellants State Officials

Molly Cagle
Evan Young
Carlos R. Romo
Baker Botts LLP
98 San Jacinto Blvd.
Austin, Texas 78701-4078

Aaron M Streett
Baker Botts LLP
910 Louisiana St.
Houston, Texas 77002-4995

Edward F. Fernandes
Christopher H. Taylor
Hunton & Williams LLP
111 Congress Ave., Ste. 1800
Austin, Texas 78701

Kathy Robb
Hunton & Williams, LLP
200 Park Avenue
New York, NY 10166
Counsel for Intervenor Defendant-Appellant Guadalupe-Blanco River Authority

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Dated: June 5, 2013 */s/ Jason C. Rylander*
Jason C. Rylander

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/s/ Jason C. Rylander
Jason C. Rylander

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