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,
Intervenors Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
CORPUS CHRISTI DIVISION
Case No. 2:10-CV-75

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CITY OF VICTORIA IN SUPPORT OF APPELLANTS

MICHAEL J. BOOTH
FRED. B. WERKENTHIN, JR.
TREY NESLONEY
Booth, Ahrens & Werkenthin, P.C.
515 Congress Avenue, Suite 515
Austin, Texas 78701
Telephone: (512) 472-3263
Facsimile: (512) 473-2609

INTEREST OF AMICUS

Amicus Curiae is a home rule municipality located in the lower Guadalupe River Basin that depends on surface water rights in the Guadalupe River to provide water for the municipal uses of its citizens. Victoria owns vested surface water rights on the Guadalupe River. Victoria has been primarily on a surface water system since 2001, with groundwater as a backup supply. Victoria has over 20,000 acre-feet per year of surface water permitted for withdrawal from the Guadalupe River, which provides Victoria's surface water with small lakes west of Victoria as a reserve. Victoria is the largest city in the Guadalupe River Basin.

The State of Texas has declared that "[t]he water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression and watershed in the state is the property of the state." TEX. WATER CODE § 11.021(a). In order to divert water from watercourse, it is necessary to obtain a permit from the Texas Commission on Environmental Quality ("TCEQ"). Such a permit represents a vested property right when perfected by use. *Texas Water Comm'n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971); TEX. WATER CODE §§ 11.025-.026. Victoria's vested property rights are therefore directly affected by this case and its potential impact on surface water rights in the State. Upholding the district court's severely

and would negatively impact the reliability and value of Victoria's surface water rights, and in turn harm Victoria's strategic plan for future water resources for its residents and businesses. Victoria has a substantial interest in protecting its surface water rights to ensure the continued maintenance, development and growth of its economy.

Amicus therefore joins Appellants in respectfully requesting that the Court reverse the district court's judgment, or remand for a new trial before a different district judge. In support thereof, *Amicus Curiae* respectfully seeks leave to file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

REASONS WHY FILNG AN *AMICUS* BRIEF IS DESIRABLE

At issue in this case are important questions regarding the scope of the Endangered Species Act and its effect on the states' regulation of private property rights. The outcome of this appeal will have a substantial impact on Texas surface water right holders, developers of water projects in Texas, and citizens in the lower Guadalupe River Basin. *Amicus* here, a municipality in the lower Guadalupe River Basin in Texas, represents each of these interests. Victoria's amicus brief provides the Court with a unique perspective and additional argument and legal analysis not found in the parties' briefs, and it is therefore desirable that Victoria's Motion be granted and its proposed brief filed.

CONCLUSION

For these reasons, *amicus* respectfully requests leave that the Court grants its motion to file the attached amicus curiae brief.

Respectfully Submitted,

By: /s/ Michael J. Booth
Michael J. Booth
Fred B. Werkenthin, Jr.
Trey Nesloney
Booth, Ahrens & Werkenthin, P.C.
515 Congress Avenue, Suite 1515
Austin, Texas 78701
Telephone: (512) 472-3263
Facsimile: (512) 473-2609
E-mail: mjb@baw.com

CERTIFICATE OF SERVICE

On May 9, 2013, I served copies of the foregoing motion and attachment on the following counsel via electronic filing with the Court's CM/ECF system:

The Aransas Project – Plaintiff	James B. Blackburn Charles William Irvine Mary B. Conner BLACKBURN CARTER PC Charles Patrick Waites JOHNSON DELUCA KURISKY &GOULD, P.C. David Alfred Kahne John Jeffery Mundy THE MUNDY FIRM PLLC
Bryan Shaw, Buddy Garcia, Carlos Rubinstein, Mark Vickery, Al Segovia – State Defendants Toby Baker, Zak Covar, Esteban Ramos – State Defendants to be substituted pursuant to Fed. R. App. P. 43(c)(2)	Jonathan F. Mitchell James Patrick Sullivan OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS
Texas Chemical Council – Intervenor	Kenneth R. Ramirez LAW OFFICE OF KEN RAMIREZ
Guadalupe-Blanco River Authority – Defendant-Intervenor-Appellant	Aaron M. Street Molly Cagle Evan A. Young Carlos Romo BAKER BOTTS L.L.P.

San Antonio River Authority –	Edmond R. McCarthy Jr. Intervenor JACKSON SJOBERG MCCARTHY & WILSON LLP
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Union Carbide Corporation – Movant	Cristina Espinoza Rodriguez BAKER BOTTS L.L.P.
Texas Farm Bureau – Movant	Sydney W. Falk, Jr. BICKERSTAFF HEATH DELGADO ACOSTA LLP Douglas G. Caroom
American Farm Bureau Federation – Movant	Sydney W. Falk, Jr. BICKERSTAFF HEATH DELGADO ACOSTA LLP Douglas G. Caroom
City Public Service, City of San Antonio by and through The City of San Antonio Public Service Board - Movant	Carl Ryan Galant Russell S. Johnson MCGINNIS LOCHRIDGE KILGORE LLP
City of Kerrville – Amicus	Martin C. Rochelle LLOYD GOSSELINK ROCHELLE & TOWNSEND PC Michael C. Hayes
CMC Steel Texas – Amicus	Brad B. Castleberry Kristen O. Fancher Michael A. Gershon LLOYD GOSSELINK ROCHELLE & TOWNSEND PC

Guadalupe Valley Electrical Co-operative, Inc. – Amicus	Mark C. Davis BRICKFIELD BURCHETTE RITTS & STONE PC
Caldwell County – Amicus	Pro se
City of Port Lavaca – Amicus	Pro se
City of Boerne – Amicus	Pro se
City of Bulverde – Amicus	Pro se
City of Cibolo – Amicus	Pro se
City of Lockhart – Amicus	Pro se
City of Luling – Amicus	Pro se
City of San Marcos – Amicus	Michael John Cosentino
City of Yoakum – Amicus	Pro se
Fair Oaks Ranch – Amicus	Pro se
Foresight Golf Partners Ltd. – Amicus	Pro se
Golf Associates Ltd. – Amicus	Pro se
Guadalupe Basin Coalition – Amicus	Pro se
Guadalupe-Blanco River Authority Customers – Amicus	Will C. Jones, IV THE JONES LAW FIRM
Kendall County – Amicus	Pro se
Royal Marina Holdings, LLP – Amicus	Pro se

Royal Oaks Partners at Fulton Beach, LLP – Amicus	Pro se
SJWTX, Inc. – Amicus	Will C. Jones, IV THE JONES LAW FIRM
Texas Water Conservation Association – Amicus	Lyn E. Clancy
Victoria County – Amicus	Pro se
National Water Resources Association – Amicus	Pro se
Comal County – Amicus	Pro se
Calhoun County – Amicus	Pro se
Guadalupe County, Texas – Amicus	Pro se
City of Wimberly, Texas, Mayor Bob Flocke – Amicus	Pro se
City of New Braunfels – Amicus	Alan C. Wayland LAW OFFICE OF ALAN WAYLAND
California Farm Bureau Federation – Amicus	Sydney W. Falk, Jr.
Oklahoma Farm Bureau Legal Foundation – Amicus	Sydney W. Falk, Jr.
Oregon Farm Bureau Federation – Amicus	Sydney W. Falk, Jr.
Wyoming Farm Bureau – Amicus	Sydney W. Falk, Jr.

East Central Special Utility District – Amicus

Louis T. Rosenberg

/s/ Michael J. Booth
Michael J. Booth

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Michael J. Booth
Booth, Ahrens & Werkenthin, P.C.
515 Congress Avenue, Suite 515
Austin, Texas 78701
Telephone: (512) 472-3263
Facsimile: (512) 473-2609
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 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.

The Aransas Project – Plaintiff	James B. Blackburn Charles William Irvine Mary B. Conner BLACKBURN CARTER PC Charles Patrick Waites JOHNSON DELUCA KURISKY &GOULD, P.C. David Alfred Kahne John Jeffery Mundy THE MUNDY FIRM PLLC
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East Central Special Utility District – Amicus	Louis T. Rosenberg

/s/ Michael J. Booth
Michael J. Booth

STATEMENT OF COUNSEL FOR AMICUS CURIAE

In accordance with Fed. R. Civ. P. 29.2(d), *Amicus Curiae* the City of Victoria ("Victoria") 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.

Respectfully submitted,

/s/ Michael J. Booth
Michael J. Booth

STATEMENT REGARDING ORAL ARGUMENT

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

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INTEREST OF AMICUS CURIAE

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Victoria's surface water rights, and in turn harm Victoria's strategic plan for future water resources for its residents and businesses. Victoria has a substantial interest in protecting its surface water rights to ensure the continued maintenance, development and growth of its economy.

Amicus therefore joins Appellants in respectfully requesting that the Court reverse the district court's judgment, or remand for a new trial before a different district judge.

SUMMARY OF ARGUMENT

The district court misinterpreted federal law, Texas state law, and the evidence in holding that TCEQ caused a "take" under Section 9 of the Endangered Species Act ("ESA") by failing to curtail existing water rights to protect the whooping cranes. The evidence presented at trial did not prove that 23 whooping cranes actually died in Winter 2008-09. Even assuming that 23 whooping cranes did expire, the plaintiff did not prove that the issuance of surface water rights by TCEQ was the proximate cause of the deaths effectuating an unlawful "take" under Section 9 of the ESA. Moreover, the district court misinterpreted the TCEQ's power over vested surface water rights, holding it liable for a presumed take that it had no power to prevent under Texas law.

ARGUMENT

I. The Evidence Did Not Prove That 23 Whooping Cranes Died

Plaintiff-Appellee The Aransas Project ("TAP" or "Plaintiff") brought this lawsuit against the State of Texas and the TCEQ alleging a prohibited "take" of an endangered species under Section 9 of the ESA, *see* 16 U.S.C. § 1538(a)(1)(B), asserting that 23 whooping cranes died at the Aransas National Wildlife Refuge ("Refuge") in 2008-09. The testimony of Tom Stehn, a former Refuge biologist for the U.S. Fish & Wildlife Service ("FWS"), was the only evidence provided by the Plaintiff in support of its assertion that 23 whooping cranes died at the Refuge during that time.

Mr. Stehn's conclusion was based on his aerial-survey method, personally developed and implemented by him to count the individual birds of the whooping crane flock utilizing the cranes' documented behaviors of site fidelity, site tenacity, and crane territoriality. Mr. Stehn testified that he was able to map specific birds' territories and confirm their absence with weekly aerial surveys. Based on this method, Mr. Stehn determined that in Winter 2008-09, 23 whooping cranes, or 8.5% of the flock, died at the Refuge.

The district court's factual finding that 23 whooping cranes expired is clearly erroneous because it relies solely on Mr. Stehn's flawed methodology. The district court determined that "aerial counts on which TAP relies in presuming at least 23 cranes died in the winter of 2008–2009 is an accurate count and the best evidence available in estimating crane mortality." Yet the district court's own

statements regarding whooping crane behavior presented at the trial invalidates Mr. Stehn's methodology. The district court stated that during the 2008-09 winter, "birds began venturing out of their specific territories in search of food and fresh water." Mr. Stehn's methodology for estimating the whooping crane population is dependent upon cranes occupying their specific territories; however, the district court accepted that whooping cranes were demonstrating unusual behavior in the 2008-09 winter by venturing out of these specific territories due to the drought. The district court cannot have it both ways. It cannot accept Mr. Stehn's methodology that whooping cranes had perished during a certain time period based on assumptions about consistent behavior or whooping cranes, and then determine that the whooping cranes were not exhibiting consistent behavior during that same time period.

Mr. Stehn's methodology also failed to meet the *Daubert* standard for admissibility. *See Daubert v. Merrell Dow Chem. Co.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). The relevant *Daubert* factors in determining reliability include whether the methodology: (1) has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error; and (4) is generally accepted by the relevant scientific community. *Id*. at 593-94. None of these factors were satisfied with respect to Mr. Stehn's methodology. Mr. Stehn's methodology involved declaring a crane death when he did not see a particular bird

on two successive flights, when he saw an adult pair but no juvenile (juvenile assumed dead), and when he saw one adult and a juvenile (adult assumed dead). The district court asserted that "Mr. Stehn's methodology for estimating the AWB crane population have been replicated and subject to peer review. Information related to both peak population and mortality counts have been published by the USFWS in the Whooping Crane Annual Reports." The district court ignores the fact that Mr. Stehn's methodology has not been "tested" and "peer-reviewed" with respect to the specific intent of its use in this case, which is to declare the individual deaths of an endangered species based on aerial surveys. Mr. Stehn's methodology also has no known or potential rate of error as it based solely on his own observations and inferences with respect to the whooping crane flock. Most importantly, Mr. Stehn's methodology is not generally accepted by the scientific community as the FWS has criticized his aerial-survey methodology since his retirement. *See* Aransas–Wood Buffalo Whooping Crane Abundance Survey (2011–12).

Mr. Stehn's later findings also directly refute his determination that 23 whooping cranes died in the 2008-09 winter. Stehn found 264 cranes to be present in December 2009, 17 more than Stehn's expectations based on his previous theory that 23 had died. This alone shows that Stehn's methodology, the only evidence

relied on by the district court to prove a take of 23 individuals occurred pursuant to Section 9 of the ESA, is severely flawed.

II. Even If Deaths Occurred, TCEQ Action Was Not The Proximate Cause

Assuming for the sake of argument that the Plaintiff did prove that 23 whooping crane deaths occurred in the 2008-09 winter at the Refuge, the evidence did not prove that TCEQ action was the proximate cause of these deaths. TAP alleged that the TCEQ defendants had violated Section 9 of the ESA, effectuating a "take" of 23 whooping cranes by failing to properly manage freshwater inflows into the San Antonio and Guadalupe bays during the 2008–2009 winter. TAP's "causal chain" links together as follows: (1) the TCEQ defendants' water management practices during 2008–2009 drastically modified the whooping cranes' critical habitat at the Refuge making it hyper-saline; (2) these hyper-saline conditions caused a reduction in the availability of wolfberries and blue crabs, the cranes' primary food resources; (3) the lack of food and freshwater caused the cranes to become emaciated and to engage in stress behavior; (4) emaciation led to an increase in illness and disease susceptibility; and (5) the whooping cranes' unusual stress behaviors, including leaving the safety of their site territories, contributed to increased predation, causing the death of 23 whooping cranes during the 2008-09 winter season, constituting a "take" under the ESA. After going through TAP's casual chain, one wonders whether Edward Lorenz should have

retitled his famous 1972 paper, "Predictability: Does the Flap of a Butterfly's Wings in Brazil ~~Set Off a Tornado~~ Kill 23 Whooping Cranes in Texas?"

Justice O'Connor, in *Sweet Home*, directly addressed the issue faced in this case between proximate causation and the ESA:

> Even if [the ESA] does create a strict liability regime (a question we need not decide at this juncture), I see no indication that Congress, in enacting that section, intended to dispense with ordinary principles of proximate causation. Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 712, 115 S.Ct. 2407 (1995) (O'Connor, J., concurring).

How proximate causation is analyzed according to Section 9 of the ESA when applied to water rights is a matter of great social and economic importance to Texas (and other states). An overbroad application of the ESA could radically threaten the operations and future of many Texas water programs in a misguided effort to sustain and protect ESA-listed endangered species.

Proximate cause requires some direct relation between the injury asserted and the injurious conduct alleged; a link that is too remote, purely contingent, or indirect is insufficient. *See Hemi Group, LLC v. City of New York*, 559 U.S. 1, 130 S.Ct. 983, 989 (2010). A federal court has already confronted this proximate causation issue in relation to agency action associated with water supplies and the effects on endangered species. *See Alabama v. U.S. Army Corps of Engineers*, 441

F.Supp.2d 1123 (N.D. Ala. 2006) ("*Alabama Mussels*"). In *Alabama Mussels*, 4 ESA protected mussel species were highly dependent on water levels in the Apalachiocola River, and the State of Florida sued the Army Corps of Engineers alleging an unlawful "take" under Section 9 of the ESA for the Corps operation of Woodruff Dam. *Id.* at 1125. Even though the evidence suggested a take occurred, the Court determined that the evidence did not establish the Corps' actions in implementing its reservoir operations for drought periods and the take of the species.

> The court is not convinced that the predicament faced by these protected mussels violates the anti-taking provision of the ESA. The court is not convinced that the predicament faced by these protected mussels rests at the feet of the Corps. Instead, the weight of evidence points to other causes for the exposure of the mussels and harm to their habitat. No one disputes that the ACF basin suffers from severe drought conditions. Evidence from FWS indicates that drought conditions have become more severe than droughts were in the years prior to the constructing of dams on these affected rivers. While the presence of these dams may have contributed in some ways to the effects of this year's drought, Florida offered no evidence on this point. Because of decreased rainfall and increased evaporation, the amount of water available in the ACF basin has fallen sharply. The court cannot hold the Corps responsible for the absence of rain. *Id*. at 1134.

This situation mirrors the present case. No parties dispute that Texas during the winter of 2008-09 was suffering from the effects of a severe drought. Each link in TAP's casual chain can be attributed to the drought, or some other factors other

than the TCEQ defendants' management of the water rights in the San Antonio and Guadalupe River Basins.

TAP alleged that the TCEQ defendants' water management practices during 2008–2009 drastically modified the whooping cranes' critical habitat at the Refuge making it hyper-saline. However, there was no direct evidence that showed that diversions by surface water rights caused the waters to be higher in salinity. The evidence actually showed that restricting every surface water right and allowing all freshwater inflows to pass would only impact average salinities by 1 ppt. Additionally, the evidence linking water diversions to higher salinity, presented by TAP's witness Mr. Trungale, was questionable. Mr. Trungale's models did not differentiate between streamflow and release stored water, resulting in an overestimate of the amount of streamflow diverted. This, in turn, would overstate the improvement in salinity that would have occurred if diversions by water right holders had been curtailed.

The other links on TAP's casual chain are also at least as much or more attributable to drought than to the TCEQ defendants' management of surface water rights. Availability of food supply, lack of freshwater, and leaving specific site territories can all be attributed to prolonged lack of rainfall. Like the Corps in *Alabama Mussels*, this Court should not hold the TCEQ responsible for the absence of rain.

III. District Court TCEQ's Power Over Vested Surface Water Rights

Victoria agrees with Part II. C of Intervenors Defendants-Appellants' ("Intervenors") brief captioned "the district court erred by holding that TCEQ causes "takes" by failing to exercise nonexistent authority to curtail existing water rights to protect the cranes." On this issue, the district court apparently based its determination of the nature of water rights in Texas and TCEQ authority to curtail existing water rights on testimony rather than construction of Texas laws regarding water rights. The district court's view is that TCEQ has unlimited (or plenary) power over surface water and water rights, which is contradictory to established Texas law.

In Texas, a water right is a usufructuary right most frequently granted on a perpetual basis. The holder of a water right has a vested right. *Texas Water Comm'n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971). Once granted by the state, a water right has long been recognized as a vested right of the holder that once granted cannot be further restricted, so long as the holder's use if beneficial and non-wasteful. *Id.; see also* State's Brief, p. 21, fn. 4. The state's power over water once it has been appropriated is and has always been limited. TCEQ and the Texas Legislature have always recognized the limited power of the state to diminish a water right after it is granted. *See* Intervenor's Brief p. 58-59; *see also* F. Skillern, Texas Water Law, Vol. 1, ch. 3, pp 65-66 (1998).

CONCLUSION

The District Court's opinion would be very detrimental to the City of Victoria, and it is not likely that it would result in significant environmental benefits. The court's opinion is based on the judge's wholesale adoption of findings of fact and conclusions of law proposed by TAP. As stated in this brief, some of the critical findings of fact are not supported by competent evidence. Key conclusions of law, particularly with respect to the ability of TCEQ to curtail existing water rights not containing environmental flow conditions to provide environmental flows, are based on erroneous statements of the law in Texas. For these reasons, as well as the reasons stated in the State and Intervenor's briefs, the court should overturn the District Court's opinion, or remanded for a new trial before a different district judge.

Respectfully submitted,

By: /s/ Michael J. Booth
Michael J. Booth
Fred B. Werkenthin, Jr.
Trey Nesloney
Booth, Ahrens & Werkenthin, P.C.
515 Congress Avenue, Suite 1515
Austin, Texas 78701
Telephone: (512) 472-3263
Facsimile: (512) 473-2609
E-mail: mjb@baw.com

Dated: May 9, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Amicus Curiae City of Victoria was sent this 9th day of May, 2013 via electronic filing with the Court's CM/ECF system:

The Aransas Project – Plaintiff	James B. Blackburn Charles William Irvine Mary B. Conner BLACKBURN CARTER PC Charles Patrick Waites JOHNSON DELUCA KURISKY &GOULD, P.C. David Alfred Kahne John Jeffery Mundy THE MUNDY FIRM PLLC
Bryan Shaw, Buddy Garcia, Carlos Rubinstein, Mark Vickery, Al Segovia – State Defendants Toby Baker, Zak Covar, Esteban Ramos – State Defendants to be substituted pursuant to Fed. R. App. P. 43(c)(2)	Jonathan F. Mitchell James Patrick Sullivan OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS
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San Antonio River Authority – Movant	Joseph Michal Klise CROWELL AND MORING LLP
Union Carbide Corporation – Movant	Cristina Espinoza Rodriguez BAKER BOTTS L.L.P.
Texas Farm Bureau – Movant	Sydney W. Falk, Jr. BICKERSTAFF HEATH DELGADO ACOSTA LLP Douglas G. Caroom
American Farm Bureau Federation – Movant	Sydney W. Falk, Jr. BICKERSTAFF HEATH DELGADO ACOSTA LLP Douglas G. Caroom
City Public Service, City of San Antonio by and through The City of San Antonio Public Service Board - Movant	Carl Ryan Galant Russell S. Johnson MCGINNIS LOCHRIDGE KILGORE LLP
City of Kerrville – Amicus	Martin C. Rochelle LLOYD GOSSELINK ROCHELLE & TOWNSEND PC Michael C. Hayes
CMC Steel Texas – Amicus	Brad B. Castleberry Kristen O. Fancher Michael A. Gershon LLOYD GOSSELINK ROCHELLE & TOWNSEND PC

Guadalupe Valley Electrical Co-operative, Inc. – Amicus	Mark C. Davis BRICKFIELD BURCHETTE RITTS & STONE PC
Caldwell County – Amicus	Pro se
City of Port Lavaca – Amicus	Pro se
City of Boerne – Amicus	Pro se
City of Bulverde – Amicus	Pro se
City of Cibolo – Amicus	Pro se
City of Lockhart – Amicus	Pro se
City of Luling – Amicus	Pro se
City of San Marcos – Amicus	Michael John Cosentino
City of Yoakum – Amicus	Pro se
Fair Oaks Ranch – Amicus	Pro se
Foresight Golf Partners Ltd. – Amicus	Pro se
Golf Associates Ltd. – Amicus	Pro se
Guadalupe Basin Coalition – Amicus	Pro se
Guadalupe-Blanco River Authority Customers – Amicus	Will C. Jones, IV THE JONES LAW FIRM
Kendall County – Amicus	Pro se
Royal Marina Holdings, LLP – Amicus	Pro se
Royal Oaks Partners at Fulton	Pro se

Beach, LLP – Amicus	
SJWTX, Inc. – Amicus	Will C. Jones, IV THE JONES LAW FIRM
Texas Water Conservation Association – Amicus	Lyn E. Clancy
Victoria County – Amicus	Pro se
National Water Resources Association – Amicus	Pro se
Comal County – Amicus	Pro se
Calhoun County – Amicus	Pro se
Guadalupe County, Texas – Amicus	Pro se
City of Wimberly, Texas, Mayor Bob Flocke – Amicus	Pro se
City of New Braunfels – Amicus	Alan C. Wayland LAW OFFICE OF ALAN WAYLAND
California Farm Bureau Federation – Amicus	Sydney W. Falk, Jr.
Oklahoma Farm Bureau Legal Foundation – Amicus	Sydney W. Falk, Jr.
Oregon Farm Bureau Federation – Amicus	Sydney W. Falk, Jr.
Wyoming Farm Bureau – Amicus	Sydney W. Falk, Jr.
East Central Special Utility	Louis T. Rosenberg

District – Amicus

/s/ Michael J. Booth
Michael J. Booth

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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/s/ Michael J. Booth_____
Michael J. Booth
Attorney for Amicus Curiae
The City of Victoria

Dated: May 9, 2013