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-075

BRIEF OF APPELLEE THE ARANSAS PROJECT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee 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 a non-profit corporation incorporated under the laws of the State of Texas, with its principal place of business in Aransas County, Texas. The Aransas Project is not a publicly-held corporation or other publicly-held entity. The Aransas Project has no parent corporation. The Aransas Project has no stock that could be owned by any publicly-held corporation. TAP members and member organizations are not publicly held or traded. A list of TAP members is found at the following links:

   http://thearansasproject.org/about/member-organizations/
   http://thearansasproject.org/about/members/

2. James B. Blackburn, Jr. of Blackburn Carter, P.C. representing Appellee TAP.

3. Charles W. Irvine of Blackburn Carter, P.C. representing Appellee TAP.

4. Mary B. Conner of Blackburn Carter, P.C. representing Appellee TAP.

5. Jeffery Mundy of the Mundy Firm, PLLC, representing Appellee TAP.

6. David A. Kahne of the Law Office of David A. Kahne representing Appellee TAP.

7. Patrick Waites of Johnson, Deluca, Kurisky & Gould, P.C. representing Appellee TAP.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. Mark L. Walters 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.

15. John R. Hulme 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.

16. David Marshal Coover, III, of the Texas Attorney General's Office, Environmental Protection Division, is Counsel for the State Official Appellants, Bryan Shaw, Toby Baker, Carlos Rubinstein, Mark Vickery, and Esteban Ramos in underlying case pending before the U.S. District Court.

17. Cynthia Woelk, of the Texas Attorney General's Office, Environmental Protection Division, is Counsel for the State Official Appellants, Bryan Shaw, Toby Baker, Carlos Rubinstein, Mark Vickery, and Esteban Ramos in underlying case pending before the U.S. District Court.

18. Guadalupe-Blanco River Authority ("GBRA") – Intervenor Defendant - Appellant.

19. Molly Cagle of Baker Botts LLP, Appellate Counsel for GBRA, Intervenor Defendant - Appellant.

20. Evan Young of Baker Botts LLP, Appellate Counsel for GBRA, Intervenor Defendant - Appellant.

21. Carlos R. Romo of Baker Botts LLP, Appellate Counsel for GBRA, Intervenor Defendant - Appellant.

22. Aaron M. Streett of Baker Botts LLP, Appellate Counsel for GBRA, Intervenor Defendant - Appellant.

23. Edward F. Fernandes of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.

24. Kathy Robb of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.

25. Kathryn Snapka of The Snapka Law Firm, Trial Counsel for GBRA, Intervenor Defendant - Appellant.

26. Andrea W. Wortzel of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.

27. Maida O. Lerner of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.

28. Bruce Wasinger, General Counsel for the GBRA, Intervenor Defendant - Appellant.

29. Christopher Taylor of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.

30. Patricia Acosta of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.

31. Thomas R. Julin of Hunton & Williams, LLP, Trial Counsel for GBRA, Intervenor Defendant - Appellant.

32. Texas Chemical Council ("TCC"), Intervenor Defendant –Appellant.

33. Kenneth R. Ramirez of the Law Offices of Ken Ramirez, Appellant Counsel for TCC, Intervenor Defendant - Appellant.

34. Amy Leila Saberian of Enoch Kever, PLLC, Appellant Counsel for TCC, Intervenor Defendant - Appellant.

35. San Antonio River Authority ("SARA"), Intervenor Defendant - Appellant.

36. Edmond R. McCarthy, Jr. of Jackson, Sjoberg, McCarthy & Townsend, LLP, Appellant Counsel for SARA, Intervenor Defendant - Appellant.

37. David W. Ross, Appellant Counsel for SARA, Intervenor Defendant - Appellant.

38. Amicus Curiae Texas Farm Bureau.

39. Amicus Curiae American Farm Bureau Federation.

40. Amicus Curiae Oklahoma Farm Bureau Legal Foundation.

41. Amicus Curiae Oregon Farm Bureau Federation.

42. Amicus Curiae Wyoming Farm Bureau Federation.

43. Amicus Curiae California Farm Bureau Federation.

44. Amicus Curiae Mississippi Farm Bureau Federation.

45. Amicus Curiae Louisiana Farm Bureau Federation.

46. 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 .

47. Amicus Curiae Texas Water Conservation Association.

48. Lyn E. Clancy of Lower Colorado River Authority, Counsel for Amicus Curiae Texas Water Conservation Association.

49. Amici Curiae City of Kerrville.

50. Amicus Curiae Structural Metals, Inc. d/b/a CMC Steel Texas.

51. 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.

52. Amicus Curiae Texas Public Policy Foundation.

53. Mario Loyola and Josiah Neeley, Counsel for Amicus Curiae Texas Public Policy Foundation.

54. Amicus Curiae City of Victoria.

55. Michael J. Booth of Booth, Ahrens & Werkenthin, P.C., Counsel for Amicus Curiae City of Victoria.

56. Amicus Curiae CPS Energy.

57. Russell S. Johnson, Carl R. Galant, and Regina M. Buono of McGinnis, Lochridge & Kilgore, LLP, Counsel for Amicus Curiae CPS Energy.

58. 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.

s/ James B. Blackburn, Jr.
James B. Blackburn, Jr.
Attorney for The Aransas Project, Appellee.

STATEMENT REGARDING ORAL ARGUMENT

This case has been set for oral argument in the week of August 5, 2013. The Aransas Project believes that the issues in this appeal warrant oral argument and that oral argument would be helpful to the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

INTRODUCTION

Congress enacted the Endangered Species Act ("ESA") to "provide a means whereby the ecosystems upon which endangered species…depend may be conserved... [and to conserve] such endangered species." 16 U.S.C. § 1531(b). Documents from U.S. Fish & Wildlife Service ("USFWS") and other biologists (pre-dating this lawsuit) have long identified the link between freshwater inflows and the Whooping Crane's ecosystem and habitat along San Antonio Bay. Analysis of historical patterns shows a correlation in years of low inflows and high Crane mortality.

The Aransas Project's members, which include numerous coastal interests, all desire to preserve a healthy coastal ecosystem along San Antonio Bay for the Whooping Cranes and for their own livelihoods. At present, the TCEQ Officials do not consider the ecological health of the Cranes' habitat—and thus the Whooping Cranes' survival—when allowing unconstrained use of state-owned waters of the Guadalupe and San Antonio Rivers.

Testimony was elicited at trial that imprudent water management "killed" Texas's Nueces Bay, an ecosystem near San Antonio Bay, because too many water diversions and impoundments from the rivers upstream effectively choked the bay, rendering it hyper-saline. There is nothing attenuated about the fundamental biological link of sufficient inflows and a healthy bay and estuary. What happened

to Nueces Bay can happen to San Antonio Bay. A drought did not "kill" Nueces Bay, and it is not a drought that threatens San Antonio Bay and the Crane's habitat.

The aim of the ESA is not to regulate a "take" indefinitely, but to ensure the recovery of endangered species through enforcement mechanisms and cooperative federalism, and then to remove federal protection when the species reaches targeted population goals. The ESA envisions that sometimes certain human activities and species habitat may be at odds. Importantly, the district court's remedy in this case utilized a Congressionally sanctioned process from the ESA (a Section 10 Incidental Take Permit and Habitat Conservation Plan) in order to ensure that these interests are balanced. Habitat Conservation Plans have been used successfully in Texas for other endangered species and water resources, to share water and to creatively balance competing needs—parties to this very lawsuit have been involved in them. This Court need only review the record to see that the district court's judgment was well founded.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES ON APPEAL

(1) Did the district court properly construe the ESA to encompass this lawsuit against the state officials, and does the Act violate the Tenth Amendment?

(2) Did the district court abuse its discretion in declining to abstain from federal jurisdiction under *Burford*?

(3) Are the factual findings of causation clearly erroneous? Did the district court clearly err in determining that Whooping Cranes died in 2008-2009?

(4) Did the district court abuse its discretion in not holding a hearing on a post-trial document offered by GBRA?

(5) Was the district court's remedy regarding an Incidental Take Permit within the scope of the ESA, the court's equitable powers, and the Eleventh Amendment?

(6) Is there a realistic threat of future harm to the Cranes, so as to justify an injunction?

(7) Did the district court's order, naming the "TCEQ" instead of the "TCEQ Officials," violate the Eleventh Amendment?

LEGAL FRAMEWORK

Section 9 of the Endangered Species Act ("ESA") broadly prohibits "takes" of endangered species, including the Whooping Crane. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21. The Supreme Court has construed Section 9 to prohibit "indirect" as well as "deliberate" takes of endangered species. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 700 (1995). The prohibition against "takes" governs the actions, and failure to act, by all "persons," including any "officer, employee, agent … [of] any State." 16 U.S.C. § 1532(13).

The term "take" includes actions that "harass, harm, …wound, [or] kill" protected species. 16 U.S.C. § 1532(19). The term "harm" includes "*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 (emphasis added); *Sweet Home*, 515 U.S. at 708 (upholding definition). The term "harass" means "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

Under Section 10, the ESA authorizes responsible persons to seek an Incidental Take Permit ("ITP") in order to avoid liability for incidental "takes" caused by otherwise lawful activities. 16 U.S.C. § 1539(a). The ITP is issued by

USFWS after the development of a Habitat Conservation Plan ("HCP"), which must be approved by USFWS. 16 U.S.C. § 1539(a)(2)(A); (B). The HCP must include conservation measures designed to "minimize" and "mitigate" the impacts of taking a listed species. 16 U.S.C. § 1539(a)(2)(A)(ii).

In the absence of an ITP or other exemption, the ESA forbids each and every take. 16 U.S.C. § 1538(a)(1). The ESA authorizes citizens to file suit and obtain an injunction against any person found to be in violation of the law. 16 U.S.C. § 1540(g)(1)(A).

STATEMENT OF THE CASE

The Aransas Project ("TAP") seeks to protect from extinction the Whooping Crane, one of the most iconic of all endangered species, by protecting the habitat upon which they depend for their winter survival. During the winter of 2008-2009, twenty-three (or more) Cranes died at the Aransas National Wildlife Refuge (the "Refuge") and nearby areas adjacent to San Antonio Bay. These deaths were 8.5% of the entire flock, a record level of mortality, and part of the historical pattern of high crane mortality in years of low freshwater inflow conditions.

In March 2010, following the Crane deaths, TAP filed suit against five named officials of the Texas Commission on Environmental Quality (collectively "TCEQ Officials"). TAP alleged that the deaths of 2008-2009 and the ultimate vitality of the Whooping Cranes are inextricably tied to the freshwater flowing into the San Antonio Bay. TAP further alleged that the TCEQ Officials' actions in authorizing withdrawals and determining flows in the Guadalupe and San Antonio rivers caused a "take" of Whooping Cranes in violation of the ESA. R.20-53[1]. The Guadalupe-Blanco River Authority ("GBRA"), the Texas Chemical Council ("TCC"), and the San Antonio River Authority ("SARA") were granted intervention.

[1] All citations to the Record use the USCA5 page numbers. The original record uses "R." followed by a page number. The Fourth Supplemental Record uses the form "R4." followed by a page number. All trial transcript citations are in volumes 9-12 of the Fourth Supplemental Record.

An eight-day bench trial was held in December 2011. The district court heard sixteen witnesses from TAP, nine of whom were experts, plus Mr. Tom Stehn, also an expert. The TCEQ Officials presented two witnesses; GBRA, eight; SARA, one. TCC did not put on any evidence. The TCEQ Officials chose not to put on any witnesses regarding the scientific evidence, leaving that task to GBRA, which led the defense at trial.[2] The district court determined that TAP's experts were among the foremost in their respective fields, and made favorable credibility findings.

In sharp contrast, the district court found credibility problems with the experts presented by GBRA: they were caught lying on the witness stand, for example, with respect to the source of their data. *E.g*. R4.6060 (Porter claimed he selected raw data after scientific review), 6089-90 (but raw data actually provided to him by GBRA counsel). They retreated from assertions made in their expert report. R4.6347-49 (SARA witness Davis). The district court expressed open concern about their scientific methodologies, for example, Dr. Slack and his graduate student Greer. R4.5971-77. The district court's observations regarding the lack of credibility of many of GBRA's witnesses was a key feature of trial. R4.777-78. Moreover, TCEQ and GBRA did not call two expert witnesses that they had designated to rebut TAP's witness. *See* R4.249, 267. Some of TAP's

[2] This brief refers to Intervenors as "GBRA" because SARA and TCC barely participated at trial.

witnesses were thus only subject to cross examination, and no countervailing expert. Very importantly, the district court was able to observe these salient aspects of trial because of its vantage point as trier of fact.

Following trial, the TCEQ Officials and GBRA moved to disqualify the district judge. After the motion was denied, they filed a writ of mandamus before this Court, and it was denied within 24 hours of briefing.[3] The issue of disqualification was fully briefed in Cause No. 12-40454, and rejected; this Court can reference it for any confusion implicit in GBRA's Brief.

Following the recusal attempt, nearly a year after trial, GBRA moved to submit into evidence a post-trial document from USFWS discussing certain potential changes in methods to count the Cranes. R4.7371. The district court carefully reviewed the document, determined it was (in the document's own words) "preliminary," lacked underlying data, and many of the opinions in the document contradicted testimony by GBRA's own experts during trial. R4.7822-33. GBRA witness Dr. Conroy was known to be communicating with the authors of the document. R4.7524, 7552, 7554. The district court reasonably declined to

[3] The TCEQ and GBRA challenged the district judge's membership in the Maine Audubon Society, an organization without connection to the parties, except an interest in birds and a shared mailing list. However, "[j]udges are not soulless automatons.... [the] fact that a judge's interests overlap with those of a litigant does not ordinarily raise questions about her ability to act impartially in her capacity as a judge." *Armenian Assembly of Am. v. Cafesjian*, 783 F. Supp. 2d 78, 90 (D.D.C. 2011). No statute or case requires recusal on the basis of a judge's hobby or organizational affiliation, including racial, religious, or cultural ones—ties that are stronger than a birding organization. Case law is in uniform agreement.

reopen trial, but weighed the document and made specific fact findings in the opinion. R4.7822-33.

The district court ultimately ruled that the TCEQ Officials caused a "take" in violation of the ESA. The district court enjoined the issuance of new permits, except for public safety and welfare, until the court received "reasonable assurances….that such permits will not take Whooping Cranes." As one way to provide such assurances, the court also ordered TCEQ Officials to seek an Incidental Take Permit pursuant to Section 10 of the ESA that would lead to development of a Habitat Conservation Plan with USFWS. R4.7855-57. The Defendant-Appellants timely appealed, and this Court subsequently stayed the injunction, set an expedited briefing schedule, and set the case for submission during the August sitting.

STATEMENT OF FACTS

The Whooping Crane is a magnificent bird, and has long captured the public's imagination with its deep whooping call and five-foot tall frame. It is treasured by crowds of tourists who travel to Aransas to view them, the businesses that depend upon the tourism economy, and TAP's members. R4.5228-29, 5498-500, PX380-381. The Whooping Crane is also valued as a bellwether species, an indicator of the ecological health of this portion of the Texas Coast, where fisherman, shrimpers, recreational users, and many others make up a sizable coastal economy.

Whooping Cranes face extinction. R4.6395, 4209. The only remaining wild flock of Whooping Cranes is called the Aransas-Wood Buffalo ("AWB") flock, because it migrates between the Wood Buffalo National Park in Canada in the summer, and the Aransas Refuge in the winter.[4] After 70 years of conservation efforts, the Cranes remain at vulnerably low numbers: under 300 birds in the wild. R4.4199, 4209. As GBRA's own expert agreed, this number is precariously low. R4.6395. To put the number in context, the next rarest species of crane, the Japanese Crane, has 2800 birds. R4.4209. The USFWS has set a target population of 1,000 Whooping Cranes in the AWB flock, at which point USFWS would support down-listing the species from "endangered" to "threatened." R4.5797,

[4] Experimental flocks exist, but to date, they have not been successful. R4.7799 n. 65; 4210-12.

PX11 at 37-38 (App'x 1). As this is an international species, a bi-national Recovery Team has been established with Canada to attempt to reach this goal. R4.4197. The Cranes are not just a Texas species, but Texas serves as one of the trustees to protect Cranes.

The Refuge and surrounding areas adjacent to San Antonio Bay provide the essential and critical habitat for the Cranes. However, the Cranes' habitat depends on freshwater inflows from the Guadalupe and San Antonio Rivers, and is acutely threatened. Indeed, GBRA alone has two pending permits awaiting approval by TCEQ Officials to divert and consume 264,000 acre feet of additional freshwater—which is more water than was consumed in each of 2008 and 2009. *See* GBRA Mot. Emergency Stay at 4-5 and App'x Tab 8 (identifying No. 12378 for 75,000 acre-feet, No. 12482 for 189,484 acre-feet), PX101 (amounts diverted in 2008 and 2009) (App'x 18).

I. The inextricable link between freshwater inflows and the Cranes' habitat and survival has been known for years.

The vital importance of freshwater inflows for the Cranes' habitat, and thus the Cranes' survival, is well recorded in documents pre-dating this litigation. The International Whooping Crane Recovery Team (comprising both Canadian and U.S. members, R4.4197-98) prepares the Whooping Crane Recovery Plan, which is in turn approved by the U.S. Government (USFWS). PX11. According to the Recovery Plan, updated in 2007, well before this lawsuit:

> Freshwater inflows starting hundreds of kilometers inland, primarily from the Guadalupe and San Antonio rivers, flow into whooping crane critical habitat at Aransas; *these inflows are needed to maintain proper salinity gradients*, nutrient loadings, and sediments that produce an ecologically healthy estuary … *Inflows are essential to maintain the productivity of coastal waters and produce foods used by the whooping cranes*. Coastal waters with low saline levels are maintained by these instream flows, providing drinking water for cranes that would otherwise fly inland for freshwater.

PX11 at 20-21 (emphasis added) (App'x 1); *see* R4.4221-27. The Recovery Plan also discussed the cause of reduced inflows: "Upstream reservoir construction and water diversions for agriculture and human use reduce freshwater inflows. Many existing water rights are currently only partially utilized, but greater utilization is expected over time. *Water rights continue to be granted on the Guadalupe, and some sections of the river are already over-appropriated*." PX11 at 21 (emphasis added).

Following publication of this 2007 Recovery Plan, the Executive Director of the Texas Parks and Wildlife Department signed in concurrence with its findings and opinions. R4.4221-22, 5331-32; PX11 (App'x 1).

In 2009, in a document entitled the Spotlight Species Action Plan, the USFWS discusses the threatened destruction and modification of Crane habitat. In this USFWS Action Plan, threat "A.2" states:

> At Aransas National Wildlife Refuge (NWR) and throughout the central Texas coast, decreases in freshwater inflows from water diversions and reservoir construction add to the following threats: reduction in available main food items at Aransas NWR, the blue crab

> (Calinectes sapidus) and wolfberry (Lycium carolinianum) [and] increased intervals when winter marsh salinities exceed the threshold of 23 parts per thousand (ppt) thereby decreasing the availability of fresh drinking water for the cranes.

PX25 at 1 (App'x 2), *see* R4.5533-36. Pointedly, increased diversions, and reduction of freshwater inflows, are again specifically identified as a threat to the Cranes' habitat.

Even earlier, as another example of the well-recognized need for freshwater inflows, the State of Texas published a study in 1998 specifically calling for a guaranteed minimum annual inflow of 1.1 million acre feet to the San Antonio Bay. R4.5103-04; PX 382 at 2 (App'x 3). Although this State study did not specifically concern the Whooping Crane, the study's importance was in connecting sufficient inflows to a healthy bay ecosystem. Officials of the State of Texas know that inflows matter to a bay's ecosystem. The issues presented by this lawsuit were foreseen.

II. Twenty-three Whooping Cranes died in the 2008-2009 winter, following the historical pattern of low-inflows causing high Crane mortality.

The USFWS has officially determined the peak population and mortality of Whooping Cranes at the Refuge every winter dating back to the 1950s. R4.4749. It is a widely accepted conclusion that there was a high level of Whooping Cranes mortality in the winter of 2008-2009. The official USFWS count is twenty-three. As GBRA witness Dr. Conroy admitted, no one (experts, agencies, scholars) ever

challenged the USFWS counts until his critiques as part of his litigation consultant position. R4.6398-99.

For 29 years, and until his retirement in 2011, the counts were conducted by a former USFWS refuge biologist and International Whooping Crane Coordinator, Tom Stehn. R4.4748-49. Stehn provided testimony that, for 2008-2009, twenty-three Whooping Cranes died and that this was a "conservative" number. R4.4781-84, 4958; PX31 (App'x 10). He extensively testified regarding his methods and conclusions, and the district court heard additional testimony from other witnesses on the reliability of Stehn's counts, including from a Whooping Crane scientist who flew with Mr. Stehn.

The high mortality of the Cranes in the winter of 2008-2009 is part of a pattern of years of low-inflows and high Crane mortality. Similar high mortality during low flow years occurred in: 1988-89, 1989-90, 1990-91, 1993-94, 2000-01, and 2005-06. PX74 (App'x 11), 76 (App'x 12). The winter of 2008-2009 stands as the worst. *Id*.

Two of TAP's experts—Dr. Ron Sass (Rice Professor Emeritus, now at the Baker Institute) and Dr. Kathy Ensor (Chair of Statistics at Rice University)—found a statistically significant correlation between high winter Whooping Crane mortality and low freshwater inflows. As discussed by Dr. Ensor, statistics can support a finding of causation in biological systems, when paired with a biological

explanation for that causation. R4.4381-82. These statistical correlations support and affirm the causal link and biological explanations that were described by TAP's other experts. No opposing experts provided any other potential explanation of the statistically significant findings, and none gave any statistical support for their speculations on alternative causes of Crane deaths.

III. The TCEQ Officials' authorization and control of withdrawals of state-owned water of the Guadalupe and San Antonio Rivers adversely altered the habitat, causing Crane deaths in 2008-2009.

Numerous witnesses provided testimony to prove the "take." First, there were witnesses, including TCEQ's own, addressing the TCEQ's regulatory authority over the Guadalupe and San Antonio Rivers. R4.5368 (state ownership), 5316 (supervisory powers), 5323, 5326 (TCEQ oath of office), 5328-29, 5377 (emergency powers), 5166-68 (Watermaster powers).[5] Second, there were witnesses testifying on the change of the estuarine habitat of San Antonio Bay when the water diversions adversely modified the Crane habitat, by increasing salinity. Third, witnesses explained that high salinities negatively impact essential food and water sources for the Cranes. Other witnesses discussed how the adverse habitat modification led to Cranes' behavioral changes, injury and death. This

[5] These witnesses included former TCEQ Commissioner Larry Soward; then-current TCEQ Executive Director Mark Vickery; recently retired Watermaster Al Segovia; TCEQ Special Counsel for Office of Water Todd Chenoweth; and Margaret Hoffman. Of course, the testimony by the witnesses is buttressed by the legal authority explicit in the Texas Water Code. *See generally* Tex. Water Code §§ 5.013(a)(1); 5.102; 5.120; 11.021; 11.022; 11.081; 11.121-.124, 11.142; 11.143; 11.171-.186.

evidence was buttressed by the historical patterns as analyzed by Drs. Sass and Ensor. These elements are discussed in Part III of the Argument on "take."

IV. Incidental Take Permits, based on Habitat Conservation Plans, often have been used successfully by state agencies, including in Texas.

At trial, TAP sought to show how this lawsuit is well suited for a Habitat Conservation Plan, which is the planning document prepared in connection with an Incidental Take Permit under Section 10 of the ESA. TAP provided two witnesses: David Frederick, an ex-USFWS employee who worked on HCPs, and Dr. Andrew Sansom, of the Texas Rivers Institute, who is familiar with Texas's HCP for the endangered species dependent on the Edwards Aquifer. R4.5457-60, 5525.

Mr. Frederick explained that an HCP would enable the TCEQ to achieve goals related to inflows, protecting economic interests of stakeholders, and also protecting the Cranes. R4.5526, 5538-39. Dr. Sansom testified that the HCP for Texas's Edwards Aquifer could serve as a guide for a Whooping Crane HCP. R4.5464. For example, aquifer and springflow levels were set that triggered specific management actions and a specialist was hired to run the program. R4.5466-68. Many of the stakeholders in the Edwards HCP are the same stakeholders present in this litigation. R4.5460-61, PX112 (App'x 20). In sum, TAP demonstrated that HCPs have been used by state agencies in Texas to successfully mitigate harms to endangered species. GBRA's witness, Dr. Sunding,

also testified to the success of HCPs, buttressing the testimony of TAP's witnesses. R4.6479.

STANDARD OF REVIEW

Findings of fact in bench trials are reviewed for clear error; legal conclusions, de novo. *French v. Allstate Indem. Co*., 637 F.3d 571, 577 (5th Cir. 2011). Because GBRA's brief is largely a factual attack, and the TCEQ argues "many factual issues remain in dispute," it is worth highlighting the clear error standard in more detail.

An appellate court reviews the record to determine whether a district court's account of the evidence is plausible; and, where the evidence can support findings either way, a choice by the trial judge between two permissible views of the weight of the evidence is not clearly erroneous. *Theriot v. Parish of Jefferson*, 185 F.3d 477, 490 (5th Cir. 1999);. "[A]n appellate court is not free to reweigh the evidence or to re-evaluate credibility of witnesses or to substitute for the district court's reasonable factual inferences from the evidence other inferences that the reviewing court may regard as more reasonable." *Glass v. Petro-Tex Chemical Corp.,* 757 F.2d 1554, 1559 (5th Cir. 1985) "The fact that a trial judge totally rejected an opposed view impeaches neither his impartiality nor the propriety of his conclusions." *Glass*, 757 F.2d at 1559 (citation omitted).

The presumption of correctness that attaches to a trial judge's factual findings "is stronger in some cases than in others." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984). The Supreme Court has stated the same clearly erroneous standard applies to both findings based on documentary evidence and findings based entirely on oral testimony, but this presumption of correctness "has lesser force in the former situation than in the latter." *Id*. Similarly, while the standard remains the same regardless of the length of trial, this presumption of correctness "tends to increase when trial judges have lived with the controversy for weeks or months [rather than] just a few hours." *Id*.

Further, "due regard" is given to the trial judge's opportunity to observe the demeanor of the witnesses. *Bose*, at 499-500. "[T]he burden of showing that the findings of a district court are clearly erroneous is heavier if the credibility of witnesses is a factor in the trial court's decision." *French*, 637 F.3d at 577 (quoting *Canal Barge Co. v. Torco Oil Co.*, 220 F.3d 370, 375 (5th Cir. 2000)); *Theriot*, 185 F.3d at 490. An appellate court "cannot second guess the district court's decision to believe one witness' testimony over another's or to discount a witness' testimony." *Canal Barge*, 220 F.3d at 375; *Real Asset Management. v. Lloyd's of London*, 61 F.3d 1223, 1227 (5th Cir. 1995).

The circumstances for heightened deference all exist here: this is a record based largely on oral testimony, over eight days. The district court was faced with

competing experts, and rendered a decision based on the weight of the evidence and judgment concerning witness credibility. Adverse credibility findings were made against GBRA's witnesses, which factored into the court's decision.

SUMMARY OF ARGUMENT

Most cases are not about the possible extinction of a species, but this one is. The only wild, self-sustaining flock of Whooping Cranes numbers less than 300 birds. GBRA's own witness testified that, at these numbers, the species remains at risk of extinction. Despite GBRA's comment that the species is thriving—remarks which stand in contrast to testimony of its own expert—all the evidence demonstrates that the species and its habitat were, are, and remain in danger.

1. Liability for a governmental regulator fits within the language and purpose of the ESA, which is to protect endangered species' ecosystems and habitats. The ESA holds state officials accountable, just as it does federal officials and individual persons. The TCEQ's authority and control over the surface waters makes them the legal cause of the take. Section 9 liability for a governmental regulator is founded in precedent from this Circuit, *Sierra Club v. Yeutter*, and all other circuits to address the issue.

The Tenth Amendment prohibitions do not apply where Congress has validly regulated state officials' acts that "take" an endangered species in a statute of general applicability. The anti-commandeering doctrine does not prevent federal

courts from ordering state officials to comply with an otherwise constitutional federal law. The district court can enjoin the TCEQ officials from allowing the use of state-owned water in a manner that causes a take, without commandeering the officials. The district court can also order that a Section 10 Incidental Take Permit be obtained, without specifying the contents of the Habitat Conservation Plan.

2. The district court did not abuse its discretion in declining to abstain under *Burford*. Neither Senate Bill 3 (S.B.3) nor any other state forum purports to address endangered species, or the Whooping Cranes' survival, making this case readily distinguishable from *Sierra Club v. City of San Antonio*, where a Texas forum existed to protect the endangered species of the Edwards Aquifer. The TCEQ's interest in their water policy is not the linchpin of an abstention inquiry, and a generalized policy interest, or possibility of conflict with state policy, has been explicitly rejected in Supreme Court *Burford* jurisprudence. TAP's claims involve federal questions that the federal court is best suited to adjudicate.

3. GBRA's factual case, as well as TCEQ's legal defenses, collapsed at trial. GBRA attempts to re-try this case de novo on appeal—putting forth every factual argument that the district court weighed and rejected. For GBRA's version of the facts to be correct, however, not only would TAP have to be wrong, but also so would USFWS, Texas Parks and Wildlife, the Canadian government, scores of scientists (including three distinguished lifetime Whooping Crane scientists), and

the district court. This is not plausible. On this record, with the overwhelming weight of credible evidence supporting TAP's case, and the adverse credibility findings made against GBRA's witnesses, GBRA cannot overcome the clear error standard of review.

TAP did not invent the causal theory of this case. It has been known for years, and is documented in papers from USFWS and the State of Texas. Scientists and governmental personnel have all acknowledged that the Whooping Cranes' habitat and vitality is absolutely linked to freshwater inflows from the rivers to San Antonio Bay—inflows which are determined by the acts of officials from the TCEQ. The causation is not multi-stepped, but a single step: simply, the TCEQ Officials' acts adversely altered the Cranes' habitat, causing behavioral changes, injury, and death. This constitutes a "take." 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3. At trial, TAP proved the casual connection with both meticulous biological proof and also statistical analysis of the historical pattern of low inflows and high Crane mortality.

4. Having found liability for a 'take' the district court was obligated to enjoin those acts that caused it. Here the district court's relief was narrowly tailored and restrained. Rather than enjoining *all* water diversions, or a subset of all water diversions, the district court enjoined only the issuance of new permits, to preserve the status quo and not make the situation worse. The ITP/HCP process is

provided for in Section 10 of the ESA and used with success in Texas with respect to endangered species of the Edwards Aquifer. The ITP remedy is well within a district court's equitable powers, and nothing in the ESA limits those equitable powers. There was copious evidence at trial that a Whooping Crane HCP would allow Texans to work cooperatively to balance interests and share water—whether through water conservation, the use of return flows, canceling un-used permits, adjustments to the salt-water barrier (a peculiar feature at the mouth of San Antonio Bay), or any other of a suite of mechanisms.

5. The thrust of this litigation is the Crane's future survival. The record is replete with evidence showing "imminent" (not "hypothetical") harm, in the context of Article III standing, and "an ongoing violation" of federal law, in the context of the Eleventh Amendment. Among other evidence, the TCEQ continues to issue new permits on a river that the USFWS has called "over-appropriated". Indeed, GBRA has two pending permits for a tremendous amount of water, 264,000 acre feet. GBRA Mot. Emergency Stay at 4-5 and App'x Tab 8.

ARGUMENT

I. The TCEQ Officials, who authorize and control use of state-owned water, can be sued for violations of the ESA.

The surface waters in Texas are owned by the State of Texas. Tex. Water Code §§ 11.021(a), Tex. Water Code § 11.0235(a), R4.5313, 5368, DX397 at 4. The TCEQ Officials license, authorize, and manage every single diversion of surface water, either through permit, rule or sometimes, statute. R4.5165, 5316, 5366-67. The legal authority is explicit in the Texas Water Code, *see generally* Tex. Water Code §§ 5.013(a)(1); 5.102; 5.120; 11.021; 11.022; 11.081; 11.121-.124, 11.142; 11.143; 11.171-.186; and in 30 Texas Administrative Code Chs. 297, 298 & 304. The district court found, and the undisputed record supports, that legally and factually the acts of TCEQ Officials determine how much water is diverted, stored, and used, and how much remains in the rivers to flow into the Bay. [6] R4.7843, 7856.

TCEQ Officials have explicit conditions in each permit making it subject to TCEQ rules and "to the right of continuing supervision" of State water resources exercised by the Commission. R4.5315, 5319, 5365, PX12, 379; DX268–270, 295, 306. Thus, the TCEQ Officials have authority to decide the total amount and location of diversions (through permits), and for each specific diversion, the

[6] There is an exception to TCEQ oversight—a class of users called the "domestic and livestock" or D&L do not have to obtain authorization, so long as they withdraw small amounts per year. R4.5158.

Watermaster decides whether to authorize it, or not. R4.5166 (Segovia) (stating that water permittees "obligation would have been to call our office before you start to take the water… we would either let you, give you permission to take it, or if we were enduring droughts, we could either curtail you or ask you to stop."),[7] 5216; Tex. Water Code § 11.327.[8] Nothing in TCEQ Officials' brief disputes these findings on their authority.

TCEQ's involvement goes much deeper than the simple "issuance of permits," *e.g.*, TCEQ Br. at 7, 11; GBRA Br. at 40-41, which is a static decision at one point in time. Their authority over the Guadalupe and San Antonio Rivers is comprehensive, controlling, and ongoing. The issuance of permits does matter to the extent the TCEQ Officials continue to issue new permits on the Rivers, and USFWS years ago called the Guadalupe River "over-appropriated." PX11 at 21 (App'x 1). Discussions from GBRA and Amici about the prior appropriation doctrine are a red herring. That doctrine only matters when TCEQ Officials must

[7] Individual water diverter does not meet the definition of an independent intervening cause. This term is defined as "one [] which is not stimulated by a situation created by the actor's conduct. An act of a human being or animal is an independent force if the situation created by the actor has not influenced the doing of the act." Restatement (Second) of Torts § 441.

[8] TCEQ has recently adopted a rule that confirms its authority, during times of water shortage, for the South Texas Watermaster to cancel or modify declarations of intent to divert or impound water, order pass-through and releases of impounded water, order diverters to limit or cease diversions, or take any other action "necessary to ensure that downstream senior water rights, demands for domestic and livestock purposes, minimum streamflow requirements, minimum release requirements, and other conditions, are administered in accordance with the laws of Texas." 30 Tex. Admin. Code § 304.21(c)(5). These laws include Texas Water Code § 5.102(a), which grants TCEQ Officials powers to perform "any acts" "authorized" or "implied" by the Water Code or "other laws."

act to choose between different permittees seeking to divert the same water at the same time.[9] Here, extensive case precedent, including from this Circuit, and the ESA's language and purpose, support the liability of TCEQ Officials.

A. The ESA's plain language and its purpose allow this suit.

The Endangered Species Act defines "person" to include "any officer, employee, agent, … of the Federal Government, [or] of any State." 16 U.S.C. § 1532(13). The ESA makes it unlawful for a person to "take" an endangered species, and also to "cause" a take "to be committed." 16 U.S.C. § 1538(a)(1)(B); § 1538(g). The officials of the regulatory agency are the proper parties to sue when they cause a "take" of Whooping Cranes.

This lawsuit is properly against the TCEQ Officials, although the TCEQ Officials seek to deflect their position as Defendants. *See, e.g.*, TCEQ Br. at 15 ("The permit holder remains bound to obey all federal legal requirements."); *id*. at 16 ("If a TCEQ permit holder decides to take water from the rivers in a manner that violates the [ESA], he will face remedies provided by federal law."). The

[9] Similarly, assertions that water rights are vested property rights are off point. Texas water permit holders (including certificates of adjudication) have only "usufructuary" rights, that is, the right to use the property of another. *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 649 (Tex. 1971); *Lower Colorado River Auth. v. Texas Dept. of Water Res.*, 638 S.W.2d 557, 562 (Tex. App.—Austin 1982), *rev'd on other grounds*, 689 S.W.2d 873 (Tex. 1984) ("The first characteristic of the appropriative right, whether evidenced by a certified filing or by a permit, is that the holder possesses merely a usufructuary right, that is, a right to use a particular part of State water."). The usufructuary right to appropriate water is only perfected when the water is diverted and in fact beneficially used. Tex. Water Code § 11.026; see also *Lower Colorado River Authority*, 638 S.W.2d at 563.

fallacy that only water permit holders could or should be sued for ESA violations permeates their brief. *See e.g.*, TCEQ Br. at 18 ("If a TCEQ permit holder acts in a manner that violates the ESA, then that is a matter for the federal authorities to resolve."). But all precedent rejects the TCEQ's narrow read, and to adopt that argument would frustrate the ESA's purpose.

The first stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To this end, federal regulations forbid "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. This expressly forbids all acts that modify or degrade habitat. *See* 46 Fed. Reg. 54748, 54750 (Nov. 4, 1981) ("In addition, the phrase 'or omission' was deleted since the Service feels that 'act' is inclusive of either commissions or omissions which would be prohibited by Section 9."). Thus, a party's adverse modification of the habitat—however caused—is liable under the Act.[10]

[10] The ESA promotes the recovery of the species through protection of its habitat until the removal of federal protection (by de-listing the species) once the species is thriving and the recovery goals are obtained. 50 C.F.R. § 424.11(d)(2) ("The principle goal… is to return listed species to a point at which protection under the Act is no longer required"). At less than 300 birds, the Cranes are not close to recovery goals. R4.5797

The Supreme Court has recognized that, if a private party caused the "draining" of a pond, they would be liable if habitat damage caused a "take." *Sweet Home*, 515 U.S. at 713. The district court found that the TCEQ officials, by their acts to authorize and control "draining" of state-owned water, themselves harm crane habitat. This is not seeking to impose a "duty to rescue." TCEQ Br. at 23. This is seeking to enforce the ESA's central obligation to stop habitat destruction. Here, the TCEQ officials caused the draining of state-owned waters, killing Whooping Cranes.

B. All courts addressing the issue have approved ESA liability for governmental regulators, especially with governmental ownership.

Relying on the plain language in the ESA, courts in many circuits have found that State and Federal officials may be liable for a Section 9 "take" based on actions authorized by their regulatory activities. *E.g., Animal Welfare Inst. v. Martin*, 623 F.3d 19, 25-26 (1st Cir. 2010) (state); *Loggerhead Turtle v. Cty. Council of Volusia Cty.*, 148 F.3d 1231, 1249 (11th Cir. 1998) (county); *Strahan v. Coxe*, 127 F.3d 155, 164, n.2 (1st Cir. 1997) (state); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991) (federal); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1988) (federal); *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 99-100 (D. Me. 2008) (state); *United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 92 (D. Mass. 1998) (city); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d

1073, 1078-79 (D. Minn. 2008) (state); *Seattle Audubon Soc'y v. Sutherland*, 2007 WL 1300964, *25 (W.D. Wash. May 2, 2007) (state). This line of jurisprudence is well settled, and no Circuit has rejected regulator liability.

1. This Circuit upheld liability for a Section 9 "take" based on a federal agency's licensing the use of natural resources that damaged the species habitat.

This Circuit allowed ESA lawsuits against governmental regulators in *Sierra Club v. Yeutter,* 926 F.2d 429 (5th Cir. 1991). That case involved a challenge to U.S. Forest Service actions that allowed tree-cutting in the sensitive habitat of an endangered woodpecker, where private third-parties cut the trees in a National Forest. *Id*. at 431-32. Because the case was brought against a federal agency, it involved both Section 7 and Section 9 violations of the ESA. *Id.* at 433. With regard to Section 9 liability, the same provision on which TAP relies, the district court specifically determined that the federal regulator's licensing practices caused significant habitat modification, harming the essential behavioral patterns, degrading the foraging habitat, and thus taking a protected species in violation of the ESA. *Id.* at 433, 438-39.

This Court in *Yeutter* affirmed that the U.S. Forest Service did violate the Section 9 of the ESA, because the licensing practices caused a "take" by impermissibly altering the woodpecker's habitat. *Id.* at 439. The *Yeutter* case has a complex subsequent history, returning several times to the Fifth Circuit on other

issues, but at no time did the court reverse its holding on Section 9 liability for the governmental regulator.[11]

Like *Yeutter*, the TCEQ Officials have control and authority over the government-owned natural resources that they regulate. Both the Forest Service and the TCEQ Officials authorized third parties to harvest/withdraw these natural resources through a regulatory process. In both circumstances, the regulated harvests or withdrawals alter the habitat of an endangered species and cause a "take" – for which the regulator is liable.

Nowhere do the TCEQ Officials explain why their adverse modification of the Crane habitat does not fall within the authority of *Yeutter*. Instead, the TCEQ tries to distinguish between state regulators (sued under Section 9) and federal regulators (who can be sued under Section 9 and under Section 7). This critique is not supported because only Section 9 is at issue here, and this Circuit addressed Section 9 independently in *Yeutter*. *Id.* at 439. The structure for liability under Section 9 does not depend upon whether the regulator is a federal or state official. Instead, Section 9 makes both federal and state officials liable as "persons" in the same manner. For this reason, the Fifth Circuit case *Yeutter* was cited approvingly

[11] The subsequent *Yeutter* history includes *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994) (intervention); *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994) (other statutes); *Sierra Club v. Glickman*, 67 F.3d 90 (5th Cir. 1995) (scope of injunctive relief and standard of review); *Sierra Club v Peterson*, 185 F.3d 349 (5th Cir. 1999) (other statute); *Sierra Club v. Peterson*, 228 F.3d 559, 561 (5th Cir. 2000) (other statute).

by the First Circuit as precedent for the holding in *Strahan*. 127 F.3d at 163. If the regulator liability holds against the federal governmental agencies, which the *Yeutter* case demands, then it holds against the state agencies as well.

2. Courts in other circuits have held state officials liable in their capacity as regulators.

State regulators can be liable under the ESA in diverse factual scenarios. The common requirement for liability is that the officials authorize activities that, when conducted by third parties as specifically permitted by the State, will foreseeably result in a "take" of a listed species. *Strahan*, 127 F.3d at 163-64 ("[It was] not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the [state] without risk of violating the ESA by exacting a taking."); *Loggerhead Turtle v Cty. Council*, 896 F. Supp. at 1181-82 (allowing driving in the habitat); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. at 1080 (licensing and regulations over trapping). Fortunately it is rare that regulatory actions cause takes, but in every case the Courts agree regulatory actions are subject to limits under the ESA.

In this well-settled line of case law, the courts looked to whether the governmental agency owned the natural resource; whether the agency had a permitting scheme over a natural resource; and/or whether the agency had regulations governing the resource. *E.g. Yeutter*, 926 F.2d at 431-32 (ownership and management); *Strahan*, 127 F.3d at 163-64 (licensure and regulations);

Defenders of Wildlife v. EPA, 882 F.2d at 1301 (licensure). Whatever legal reasoning is used, the TCEQ Officials' actions fit squarely within the lines of cases; indeed, all three factors—(1) authorization to use (2) state-owned resources (3) subject to extensive regulatory control—exist in this case.

In *Strahan v. Coxe*, the Supreme Court denied certiorari. 525 U.S. 978 (1998). As part of the certiorari petition, the United States was asked to submit a brief, and did so. The Government supported the plaintiff's theory of the case, stating that the Massachusetts agency "authorized the specific conduct that presents a significant risk of harm." United States as Curiae, 1998 WL 34103625, *17 n.7 (App'x 21).[12] The United States also discussed that the *Strahan* decision was consistent with other appellate court decisions "against governmental regulatory action that was found to cause the death or injury of a listed species by expressly authorizing specific conduct that is reasonably likely to kill or injure members of the species, especially where the agencies are managing or protecting public resources." *Id*. (citing *Yeutter* and other cases).

Notably, one of TCEQ's cited commentators, J.B. Ruhl, supports liability for governmental regulators in fact situations identical to the present case. Ruhl opines that, when the regulator is a "proprietary owner" of the natural resource, then this is a "legitimate basis" for liability. J.B. Ruhl, *State and Local Government*

[12] This Court may take judicial notice of public court records that are not in dispute. *Bauer v. Texas*, 341 F.3d 352, 362 n.8 (5th Cir. 2003).

Vicarious Liability under the ESA, 16 NAT. RESOURCES & ENV'T 70, 73 (2001). Approving of the *Yeutter* case, Ruhl says pointedly: "As owner of the land, the federal, state, or local governments ought to be held responsible for the effects of proprietary and quasi-proprietary functions in which it engages." *Id*.

State water ownership here underscores why this case presents a stronger basis for liability as a regulator than those of the Massachusetts officials in *Strahan*. Indeed, the presence of all three factors makes this case for liability as strong as any previously approved by the courts, and the TCEQ officials cannot distinguish any of the great weight of case law against their position. Even according to Ruhl, there exists a "simple and obvious reason to hold the government liable" based on the proprietary functions in which the agency engages. *Id*. At the very least, here as in *Yeutter*, ESA liability exists when the regulator's actions concerning government-owned resources actually kill (or injure) endangered species.

C. The ESA contains none of the limitations presented by the TCEQ Officials.

The TCEQ officials seem to argue that they only can be liable for a "take" if TAP proves some kind of agency relationship. *See* TCEQ Br. at 19 (citing *Poly-America v. NLRB*, 260 F.3d 465, 480 (5th Cir. 2001), which describes the agency relationship as "the apparent authority of the employee to act on behalf of the principal"). However, the governmental liability approved in *Yeutter*, and *Strahan*,

and all the other above-cited cases, makes clear that government agencies can be liable under the ESA even without that kind of agency. Those cases are consistent with the ESA's plain language, which spells out that liability is not limited to actions in an agency relationship. 16 U.S.C. § 1532(13) (including "agent" of the state as a liable person, but not limited to that). It would therefore be redundant to read the "take" or "cause a take to be committed" language as being only about agency. Basic principles of statutory construction counsel that words in a statute are not read to render terms redundant. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574 (1995).

Nor is the "cause a take to be committed" language limited to only "compelling" a third-party to act. *See* TCEQ Br. at 23. Plainly, the third-party tree cutters in *Yeutter* were not "compelled" to act by the Forest Service, and yet the Fifth Circuit determined that Forest Service was liable for a Section 9 "take." Both the Forest Service and the TCEQ Officials are the legal cause of the "take" when they authorize the activity, particularly over a state-owned resource, and when their regulatory decisions cause a take.

In an important concession, the TCEQ states:

> If water diversions from the Guadalupe and San Antonio Rivers are indeed causing takes of Whooping Cranes in violation of [the ESA], then TCEQ officials are forbidden to draw water from the rivers, or 'cause' others to take water from the rivers by requiring or directing them to do so.

Br. at 28. There is no legally relevant difference between the TCEQ officials using the river water themselves, or selling it, or authorizing it to third parties. These actions equally cause adverse modifications to the Crane habitat in violation of the ESA. They equally make the TCEQ officials the legal cause of the "take."

Nor does the "intervening actor" concept apply as the TCEQ proposes. *See* TCEQ Br. at 23 (citing *Exxon v. Sofec*, 517 U.S. 830, 837-38 (1996), which describes the doctrine of superseding cause as "a later cause of independent origin that was not foreseeable"). It is highly foreseeable that a water permit holder will use water because (among other reasons) the permit holder asks the Watermaster of the TCEQ for permission immediately before diverting any amount of water. R4.5166; Tex. Water Code § 11.327. A water permit holder cannot legally be termed an intervening actor or superseding cause.

The TCEQ Officials propose these various new ways to read the ESA, but all of them "would contradict the statute's plain terms and be tantamount to judicial redrafting." *In re Amy Unknown*, 701 F.3d 749, 766 (5th Cir. 2012) (en banc); *see United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way.").

In their briefing, the TCEQ offers three fallacious analogies that warrant a response: analogies regarding the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*.; a driver's license; and a hunting permit.

First, the TCEQ Officials' analogies regarding the CSA are misleading. Under the CSA, the class of regulated persons does not include officers of the state in their capacity as such. Of course the situation is very different under the ESA, which makes state officials liable as well. Moreover, Colorado officials do not own, grow, or sell the drugs, and they do not authorize or control usage of the drugs. The TCEQ states that "the reality of the federalist system of government" is that there is "no conflict, contradiction, or preemption when one sovereign declines to prohibit or punish acts that the other sovereign has outlawed." TCEQ Br. at 16. This statement makes sense under the Controlled Substances Act. But it ignores the very different mandate of the ESA, where the ESA expressly establishes that—as TCEQ Br. at 28 admits—the State officials are themselves liable for violations of federal law, when they cause a "take."

The TCEQ Officials claim that TCEQ permit holders are just like Colorado marijuana smokers, who act on their own free will. TCEQ Br. at 24. However, marijuana smokers in Colorado do not need to apply for a state permit to do drugs. Colorado is not licensing people to smoke the drug; they are simply decriminalizing its use. The TCEQ says: "Wholesale legalization is indistinguishable from individual licensing." TCEQ Br. at 25. This statement is simply wrong. Licensing requires an act; legalization is a decision not to act.

Second, the TCEQ raises a straw-man argument that, if this Court affirms, it also must conclude that issuing a driver's license violates the ESA. This driver's license hypothetical has been rejected by the First Circuit, and should be rejected here. *Strahan*, 127 F.3d at 164 ("[I]t is possible for a person licensed by Massachusetts to use a car in a manner that does not risk the violations of federal law suggested by the defendants."). A water permit is, legally, nothing like a driver's license due to the amount of regulatory control exercised over the regulated entity.[13] The TCEQ Officials give consent for each water diversion under the permit—location, time, and amount—and if a permit holder does not use the water, the permit may be cancelled for non-use. Tex. Water Code §§ 5.013(a)(1); 11.026; 11.121 (permit required); 11.026 (amount); 11.327 (must authorize each diversion); 11.146 (cancelation for nonuse).

A driver's license, by contrast, does not specify the road travelled on, the date or the time of day; it cannot be cancelled for non-use. Because of the degree of regulatory control, the TCEQ Officials are the legal cause of the "take," whereas the Texas DMV could not be in this scenario.[14] Factually, the comparison of a driver's license to a water permit fails because proximate causation acts as a back-

[13] This is not to say that the issuance of a driver's license can never be the legal cause of a future harm; the United States discusses this point in its Amicus Curiae brief on the *Strahan* case. United States as Amicus Curiae, 1998 WL 34103625, *17 n.7 (App'x 21).

[14] TCEQ says it does not understand the legal "relevance;" this is it. *See* TCEQ Br. at 26.

stop.[15] *Sweet Home*, 515 U.S. at 700-01. There is no meaningful danger that the mere issuance of a driver's license will cause a "take" of any endangered species; and a driver's license does not impact habitat.

Lastly, the TCEQ Officials take their hypotheticals too far with the hunting license. The issuance of hunting license for a federally protected species would likely be found to be "solicitation" of a take and therefore subject to an injunction by a federal court. 16 U.S.C. § 1538(g). Moreover, the ESA itself makes clear that, should the TCEQ issue hunting licenses for Whooping Cranes, this would be preempted under federal law. 16 U.S.C. § 1535(f). The Supremacy Clause, U.S. Const. art. VI, § 1, cl. 2, operates to preclude state officials' obstruction of federal law. *New York v. United States*, 505 U.S. 144, 179 (1992) ("[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials."); *Printz v. United States*, 521 U.S. 898, 913 (1997) ("[T]he 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,

[15] The TCEQ suggests that the issuance of driver's license and possible resulting harm to an endangered species is more "direct" than the issuance of a water permit on the Guadalupe River and the harm to the Whooping Crane habitat. Br. at 26. The Texas DMV has no idea where a driver will journey to, and where an animal will cross the road, when issuing a license; the TCEQ Officials know exactly how much water will come out of the Guadalupe River, and how much less water will end up in Crane habitat, when issuing a water permit and approving each diversion. No party believes that a state agency issuing a driver's license would be liable for ESA roadkill.

and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid.").

D. Neither the ESA itself, nor the relief ordered by the district court, raises concerns under Tenth Amendment.

The Tenth Amendment, U.S. Const. amend. X, forbids a very narrow type of federal mandate: "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (citing *Hodel v. Virginia Surface Mining & Reclamation*, 452 U.S. 264, 288 (1981)); *accord Printz*, 521 U.S. at 925 (stating "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs"). The anti-commandeering doctrine does not prohibit states officials from being regulated, and it has never been applied to a federal court's remedy following a federal court's finding of liability.

Congress may extend general statutory obligations, such as those embodied in the ESA, to the states.[16] *See Reno v. Condon*, 528 U.S. 141, 150-51 (2000); *New York*, 505 U.S. at 161; *Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528, 553-54 (1985); *City of Abilene v. U.S. EPA*, 325 F.3d 657, 663 (5th Cir. 2003).

[16] The Supreme Court has declared that where Congress has the power to regulate private activity under the Commerce Clause, Congress may "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 167; *FERC v. Mississippi*, 456 U.S. 742, 764-65 (1982); *Hodel*, 452 U.S. at 288.

Consistently, the Supreme Court holds Congress may directly regulate state activities. *Reno*, 528 U.S. at 151 (citing *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)).

As allowed by *Reno* and *Garcia*, Section 9 of the ESA is not a command to States to regulate, but rather a generally applicable prohibition on activities by State officials or private entities that cause harm to endangered species. In *Reno*, the Supreme Court held that Congress could regulate the states as the "owners of the databases" and also alongside private parties by means of a "generally applicable" federal law. 528 U.S. at 151. Likewise, the ESA can regulate states as owners of natural resources and also alongside private parties under the Section 9.

The ESA leaves states free to regulate the protection of wildlife as they see fit, provided they do not affirmatively authorize specific activities that "take" federally protected species. TAP is not asking the Court to construe the ESA to require the State to enforce the ESA prohibition against take, as the TCEQ Officials contend. Rather, TAP is asking the Court to hold that the TCEQ Officials cannot *themselves* violate the ESA. The ESA prohibits TCEQ Officials from affirmatively acting to cause a "take" of protected species. So construed, the ESA does not run afoul of the Tenth Amendment.

The Endangered Species Act is not like the Brady Act of *Printz* or the Radioactive Waste Policy Act of *New York*. In *Printz*, the Supreme Court held that

a provision of the Brady Act went too far in "dragooning" state officials to conduct background checks of prospective handgun purchasers pursuant to the federal law. 521 U.S. at 928-33. In *New York*, Congress crossed the line by requiring states to take title to low-level nuclear waste or to adopt laws meeting federal specifications. 505 U.S. at 175-76.[17] In contrast to *New York* and *Printz*, the ESA prohibits State officials from causing a "take" of an endangered species; it imposes no specialized responsibilities on the states.

While the Tenth Amendment acts as a check on the power of Congress, it does not prevent federal courts from ordering state officials to comply with an otherwise constitutional federal law. *See New York*, 505 U.S. at 179 (citing U.S. Const. art. VI, § 1, cl. 2) (and collecting cases).[18] The *New York* court stated plainly that the "federal court may in proper circumstances order state officials to comply with federal law." *Id*. Further: "[T]he power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply." *Id*.

[17] The *New York* Court distinguished between impermissible direct commands to states to pass certain laws from permissible statutes that establish minimum standards states must meet to avoid having their laws and actions preempted by federal regulation. *Id*. at 167-68. Indeed, other parts of the legislation survived the commandeering challenge.

[18] Many cases stand for the proposition that federal courts can order state officials to comply with federal law, with resulting injunctive relief. *See also Milliken v. Bradley*, 433 U.S. 267, 291 (1977) (forced desegregation, no Tenth Amendment violation); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 829 (10th Cir. 2007) (permanent injunction against Kansas officials did not violate Tenth Amendment); *Dakota, Minnesota & E. R.R. Corp. v. South Dakota*, 362 F.3d 512, 518 (8th Cir. 2004) (permanent injunction against Governor did not violate Tenth Amendment); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 928 n. 44 (8th Cir.1997), *affd* 526 U.S. 172 (1999); *Strahan v. Coxe*, 939 F. Supp. 963, 979-80 (D. Mass. 1996).

The anti-commandeering doctrine applies to Congressional action and executive action; it does not apply to judicial remedies. For this reason alone, the district court's injunctive relief in the present case cannot be said to violate the Tenth Amendment.

The TCEQ Officials' Tenth Amendment argument is built on the erroneous premise that the district court "requires the State of Texas to impose and maintain *state-law* prohibitions and penalties against persons who violate *federal* legal obligation." TCEQ Br. at 27 (emphasis in original). But nothing in the district court's decision requires any such action. The district court's remedy does not obligate the TCEQ to impose penalties on water permit holders, and no one knows what will be in the HCP; the district court made no requirements for the HCP. Congress can regulate a state's activities, and a district court can order relief, without running afoul of the anti-commandeering rule. *Reno*, 528 U.S. at 150-51; *Baker*, 485 U.S. at 514-15.

The *Reno* court underscored this point: "'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 150-151 (quoting *Baker*). No new legislation is required here because TCEQ Officials are already authorized by state law 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); 403.453. This authority is specifically granted in order to "promote compliance with federal law protecting endangered species." *Id*. at § 403.452(a); R4.7840-41.

Compliance with federal law may require state officials to make certain adjustments, and whatever these adjustments, they do not constitute commandeering within the meaning of *Printz*. The *Reno* court explained a federal court's remedy or injunctive relief "is, however, an inevitable consequence of regulating a state activity." *Id*. at 150. It is not constitutionally prohibited. According to the district court's injunction here, the TCEQ Officials are not being ordered to implement the ESA, but to bring their own acts (be they policies, regulations or permitting) into compliance with federal law.[19]

Other courts uniformly have rejected Tenth Amendment challenges similar to the TCEQ's. *See Strahan*, 127 F.3d at 164, 167-70 ("The Commonwealth is not being compelled to enforce the provisions of the ESA. Instead, the district court's ruling seeks to end the Commonwealth's continuing violation of the Act."); *Seattle*

[19] One law review article on which TCEQ relies approves the very relief ordered in this case: "The remedy in…the permitting/licensing cases is to order the state to *either stop issuing the permits or obtain its own ESA permit to continue issuing the permits*. This falls short of actually ordering the state to regulate its citizens where or to an extent it has not already done." Ruhl, 16 NAT. RESOURCES & ENV'T at 76-77.

Audubon Soc'y v. Sutherland, 2007 U.S. Dist. LEXIS 39044, *7-8 (W.D. Wash. May 30, 2007); *Pacific Rivers Council v. Brown*, 2002 WL 32356431 at *10 (D. Or. 2002) (rejecting Tenth Amendment defense to case against State approval of logging permits for activities alleged to cause take of coho salmon).

The district court did not order the TCEQ Officials to repeal existing laws, and did not order the TCEQ to impose state-law prohibitions. Thus the district court's injunction in this case presents none of the concerns presented in Judge Kozinski's concurrence. TCEQ Br. at 29-30. The TCEQ Officials fallaciously state: "When state officials are forbidden to license an activity, it logically follows that they are compelled to prohibit that activity under state law." TCEQ Br. at 35. But that is simply not true. By the district court's decision, they are forbidden by *federal* law to continue issuing permits until and unless they find a way to end *federal* violations.

Finally, under the canon of constitutional avoidance, federal courts have a "duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *City of Abilene*, 325 F.3d at 660. The TCEQ turns this doctrine on its head, *see* TCEQ Br. at 27-30, because they argue for this Court to ignore the ESA's statutory language and instead first embrace alleged constitutional infirmities. *Cf. Envtl. Def. Ctr. v. U.S. EPA*, 344 F.3d 832, 843 (9th Cir. 2003) (first reviewing whether the rule at issue was

supported on statutory grounds before reaching the Tenth Amendment). It is not necessary to reach the TCEQ's Tenth Amendment argument here because this case can be decided on settled interpretations of the statute, and because the federal government has done nothing outside its defined powers. *See Nebraska v. U.S. EPA*, 331 F.3d 995, 999 (D.C. Cir. 2003) ("Because the Commerce Clause provides the constitutional authority for the Act, the only issue under the Tenth Amendment is whether the Act regulates the states in a permissible manner."). The ESA is a validly promulgated statute pursuant to the Commerce Clause and the Treaty Clause, and Congress has done nothing outside the defined powers. 16 U.S.C. § 1531(a)(1)-(4) (Congressional findings), 1531(b) (purpose of ESA).

II. The district court's exercise of federal equity jurisdiction was within its sound discretion, notwithstanding GBRA's invocation of *Burford* abstention.

This Court reviews a district court's decision not to abstain for abuse of discretion. *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 313 (5th Cir. 1993) (reviewing whether discretion was exercised "within the narrow and specific limits" prescribed by the abstention doctrine).

Burford abstention represents "an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Quackenbush v. Allstate Ins.*, 517 U.S. 706, 727-28 (1996). In *Burford v. Sun Oil Co.*, the Supreme Court held that it was appropriate for a federal court to abstain

from hearing a constitutional challenge to an oil drilling permit issued by the Texas Railroad Commission, where the challenge turned solely on whether the agency had properly applied Texas law. 319 U.S. 315, 331 & n.28 (1943). The Court reasoned that, because Texas had created a centralized system of judicial review of agency orders, the state court review of the Railroad Commission's decisions was "expeditious and adequate." *Id*. at 334. At its heart, *Burford* is a non-interference doctrine with complex state administrative proceedings, if the proceedings address the federal issue and provide "timely and adequate" review in a state forum. *New Orleans Pub. Serv. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*").

In the present suit, essential predicates for *Burford* abstention simply do not exist, and the district court did not abuse its discretion in so finding. There is no "parallel" state forum that would address the endangered-species claim at issue. *See Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987) ("[Abstention doctrines] reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."). This is the pivotal distinction with *Sierra Club v. City of San Antonio*. 112 F.3d 789, 794 (5th Cir. 1997) (stressing the Edwards Aquifer Act "specifically addresses the preservation of endangered species"). Additionally, this lawsuit did not and does not interfere with Senate Bill 3, or any other state administrative proceedings. GBRA wrongly

characterizes the *Burford* inquiry as about generalized deference to the State's regulation of water and issuance of water permits. GBRA Br. at 2, 11. To the contrary, the crux of an abstention doctrine is that there is actually a state forum to which the federal court can defer and that would address the substance of a plaintiff's claim. *NOPSI*, 491 U.S. at 361; *Lipscomb v. Columbus Mun. Separate Sch. Dist*., 145 F.3d 238, 242 (5th Cir. 1998).

A. Controlling principles make abstention the exception, not the rule.

The "federal courts' obligation to adjudicate claims within their jurisdiction [is] virtually unflagging." *NOPSI*, 491 U.S. at 359. To determine if *Burford* abstention applies, this Circuit has articulated a five-factor test:

> (1) whether the cause of action arises under federal or state law; (2) whether the case requires inquiry into unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in that area; and (5) the presence of a special state forum for judicial review.

Moore v. State Farm Fire Cas. Co. 556 F.3d 264, 272 (5th Cir. 2009) (citing *Wilson*, 8 F.3d at 313). The first *Wilson* factor—whether the cause of action arises under federal law—plays an important role here because this case arises under an Act of Congress and involves a species protected by the ESA and an international treaty. *See* 50 C.F.R. § 17.11 (ESA list); 50 C.F.R. § 10.13 (Migratory Bird Treaty Act list).

The Supreme Court has stated that the presence of a federal basis for jurisdiction raises the level of justification needed for abstention.[20] *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976). The Fifth Circuit recently described this as an "overwhelming" basis on which to affirm a district court's decision to not abstain.[21] *Sierra Club v. Sandy Creek Energy*, 627 F.3d 134, 144 (5th Cir. 2010); *cf. Wilson*, 8 F.3d at 313 (affirming the decision to abstain where "[t]here are only state law issues in this case"). Here, the presence of federal question jurisdiction likewise provides an "overwhelming" basis for this Court to affirm the district court's decision to not abstain.

B. The district court acted well within its discretion in applying these principles.

The district court made copious factual findings in support of its decision not to abstain. GBRA erroneously states that the district court declined to abstain "because it believed that TAP was unlikely to prevail in state administrative proceedings." Br. at 11. This canard disregards what the district court actually did, which was specifically to consider whether it could find "a special state forum" to

[20] The Supreme Court has also said that, when the federal claim is one of preemption, *Burford* abstention is inapplicable. *See NOPSI*, 491 U.S. at 362; *see also United States v. Morris*, 268 F.3d 695 (9th Cir. 2001).

[21] Other appellate courts reject *Burford* abstention when jurisdiction is based on a federal question. *See e.g., Taffet v. Southern Co.*, 930 F.2d 847, 853 (11th Cir. 1991), *vacated on other grounds*, 958 F.2d 1514; *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1308 (2d Cir. 1990); *Izzo v. Borough of River Edge*, 843 F.2d 765, 769 (3d Cir. 1988).

which a federal court might abstain. R4.7756, 7761-65. The district court found none existed. *Id*.

Pursuant to the first *Wilson* factor,[22] the district court acknowledged that it had "jurisdiction under the ESA." R4.7765. Regarding the second factor, TAP's claim does not require inquiry into unsettled issues of state law because the inquiry is the TCEQ Officials' liability under federal law. Regarding the third and fourth factors, no party disputes that, under circumstances that do not create a violation of the ESA, Texas has an interest to determine allocation of surface water. But, as the district court said, "the mere existence of a state-created administrative body [*i.e.*, S.B.3] does not override the jurisdictional power of a federal court." R4.7765. The state has a need for coherent policies, but those policies may not violate federal law. Pursuant to the *NOPSI* admonition that there be "timely and adequate" state review, the district court largely focused on the fifth *Wilson* factor, because the TCEQ and GBRA had argued for abstention to Senate Bill 3—a "scheme for collecting data and information to formulate E-flow recommendations." R4.7759.

As the district court thoroughly analyzed, the S.B.3 process provides a wholly inadequate state forum for at least five reasons: first, the S.B.3 process results only in a "recommended" environmental flow; second, due to it being a

[22] The *Wilson* court acknowledged that "[m]ultiple factor tests are difficult to apply and are particularly difficult in this case because of the narrowness of our discretion." 8 F.3d at 314. In other words, the application of these factors is not intended to mechanically evaluate the district court's discretion to not abstain, but to serve as a simple guide.

recommendation only, S.B.3 has "no enforcement"[23] and "makes no attempt" to ensure those recommendations remain in the river; third, that recommended flow applies only to applications for new water permits; fourth, S.B.3 does not "address, concern, protect, or assist the endangered whooping cranes;" and fifth, the law shows "no steadfast commitment to the bays and estuaries" because, in times of water shortages, the bays and estuaries are "expressly exempt." R4.7761-63. The district court correctly concluded that S.B.3 is riddled with carve-outs and exceptions. GBRA does not rebut these very important findings, which are supported in the statutes and the record.

The district court heard evidence from GBRA's own witness that S.B.3 was neither designed nor implemented with endangered species in mind. Sam Vaugh—who was a chairperson of one of S.B.3's committees for the San Antonio Bay—testified that neither the Whooping Crane nor its food source (the blue crab) was considered in developing the S.B.3 recommendation in the San Antonio Bay. R4.6222. Given this refusal to consider Whooping Cranes when stakeholders had the chance, GBRA cannot now claim S.B.3 represents a fair forum to address TAP's concern for the Cranes.

[23] GBRA confuses an "enforcement mechanism" with judicial review. Br. at 21. The reason that S.B.3 is said to have no enforcement mechanism—which the district court properly concluded—is because, under S.B.3, TCEQ can simply decide not to implement the S.B.3 recommended e-flow number under certain circumstances, including times of low river flows. R4.7762-63 (citing Tex. Water Code § 11.0235(c), (d)).

Moreover, the district court accurately perceived at trial that the S.B.3 process in the San Antonio Bay was thwarted by GBRA's actions. The district court asked Mr. Vaugh whether GBRA had prevented a consensus among stakeholders, when others had been in agreement, and the answer was yes. R4.6198-99 (stipulation by trial counsel).

Statements (and the absence of statements) by TCEQ underscore the foregoing analysis. TCEQ Officials, which are the parties that should be able to say whether TAP could litigate the Whooping Crane's survival in a forum before that Texas agency, are not making any such representation. Instead, the TCEQ Officials repeatedly *disclaim* any State interest to adjudicate questions under the ESA: "If a TCEQ permit holder acts in a manner that violates the Endangered Species Act, then that is a matter for the federal authorities to resolve." TCEQ Br. at 18.

There can be no federal abstention in favor of a regulatory scheme that expressly permits what federal law forbids. Statements in the TCEQ's Brief insist on a bifurcated system in which the state processes address state law, and someone else determines federal law—hardly a state process to abstain to. TCEQ Br. at 16; *id*. at 18 ("…so too may TCEQ officials issue permits for water usage that violates the Endangered Species Act").

Because of S.B.3's deficiencies, GBRA's argument that TAP could seek judicial review of this recommended e-flow for the San Antonio Bay cannot meet

the *Burford* requirement for "timely and adequate judicial review." Even if TAP appealed the S.B.3 e-flow recommendation in state court, under applicable standards of review of agency decisions, TAP would have to show that the agency did not follow statutory authority under S.B.3. *See* Tex. Gov't Code § 2001.038(a). But, because the S.B.3 statute does not have a mandate for endangered species, TAP could not properly compel consideration of Whooping Cranes in the judicial forum. Nor could TAP challenge the Legislature's decision under S.B.3 to exempt existing water rights. In any event, TCEQ would undoubtedly make the same argument that it makes in this case: that it has no enforceable duty to consider endangered species under its laws. Consequently, the district court correctly concluded that S.B.3 has nothing to do with endangered species, the Whooping Crane, or most especially, the Whooping Cranes' survival, and that *Burford* abstention was therefore inapplicable. R4.7763; *NOPSI*, 491 U.S. at 361.

Separately, GBRA argues that TAP could challenge TCEQ's issuance of a future water permit. (TAP cannot challenge a past permit, and GBRA does not argue). GBRA Br. at 21. For multiple reasons, this cannot constitute an "adequate" forum to address the Cranes: the ability to challenge a future permit does not solve the problem of the conditions that led to twenty-three Crane deaths in 2008-2009

or the high mortalities seen in other low-flow years.[24] Cranes would gain nothing from challenging a future permit. Moreover, TAP did not sue the permit holders for "takes" in this lawsuit, but the TCEQ Officials, who actually are in charge of all of the river water use and in fact determine the inflows to the Bay.

C. The *San Antonio* case supports the district court's decision not to abstain.

All of these salient facts readily distinguish the present case from *Sierra Club v. City of San Antonio*, where a state regulatory scheme had a specific statutory mandate to preserve federal endangered species. In *San Antonio*, the Fifth Circuit discussed the 1993 enactment of the Edwards Aquifer Act ("EAA"), an Act that "specifically addresse[d] the *preservation of endangered species*." 112 F.3d at 794 (emphasis added). As the Fifth Circuit explained, the Texas Legislature expressly gave the Edwards Aquifer Authority the duty to "protect species that are designated as threatened or endangered *under applicable federal or state law*." *Id*. (emphasis added). Under the EAA, there was a state administrative forum established to address the plaintiff's specific endangered species claim.

The differences between the Edwards Aquifer Act and S.B.3 are striking. The EAA was passed to address the needs of endangered species. *Id*. at 794 (citing § 1.14 of the EAA). The EAA put a cap on pumping the aquifer in order to protect

[24] Among other evidence, the modeling of Mr. Trungale demonstrating the high salinities in 2008-2009, was based on existing permits. PX106.

the species. Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, 2360 (also "EAA") § 1.14(b) & (c). The EAA established a new regulatory body, whose mandate is to regulate groundwater use to protect endangered species. *City of San Antonio*, 112 F.3d at 794; EAA § 1.14(a)(7) & (h). The EAA instructed that new regulatory body to regulate previously unregulated activities that were threatening the extinction of the endangered species. *Id.* §§ 1.15 & 1.16 (permits required for all users, existing and future; no grandfathering). Thus, the EAA established a process to which the federal court could abstain because the process would prevent harm and extinction to the endangered species.

S.B.3 does none of these things. It was not passed to protect endangered species, and it puts no cap on the TCEQ's issuance of water permits. To the contrary, the carve-outs and exceptions were a key aspect that the district court identified. The *San Antonio* case emphasizes that the Texas Legislature knows how to write legislation to address and protect endangered species, but chose not to do so with S.B.3.[25]

Most evidently, when the same circumstances that caused the Crane deaths in 2008-09 re-occur—unimpeded water diversions under existing permits during low flows—more Crane mortality will result, regardless of S.B.3 or its e-flow outcome. And, if the same circumstances of 2008-2009 re-occur, the TCEQ

[25] S.B.3 actually prohibited the TCEQ from issuing permits for environmental flows. Tex. Water Code § 11.0237(a); R4.7763 n.26.

Officials will not act any differently. Abstention to S.B.3 guarantees more Whooping Crane deaths during low water flows. Absent relief ordered by the district court here, TCEQ will continue to authorize every diversion and issue new permits that may guarantee the future extinction of the Whooping Crane flock. Such abstention is not envisioned by the *Burford* doctrine—and ignores the unflagging obligation of federal courts to adjudicate federal questions.

In *San Antonio*, the existence of a parallel forum was so pivotal to the Fifth Circuit's decision that the court remarked: "We state no bar against the Sierra Club, either in pursuing the merits or in ultimate efforts to protect the water and the darters if the state of Texas fails to do so." 112 F.3d. at 797. But GBRA witness Vaugh has already admitted that the Whooping Cranes were not considered in S.B.3. For all these reasons, *San Antonio* supports the district court's decision not to abstain; *Burford* abstention may be warranted only where there is a parallel state forum that functions to address the harm about which a plaintiff complains. *E.g.*, *Burford*, 319 U.S. at 327; *San Antonio*, 112 F.3d at 794; *Seattle Audubon Society v. Sutherland*, 2007 WL 1300964, *14-15 (W.D. Wash. May 01, 2007).

D. The complaints about the district court's exercise of discretion are unfounded.

Before the district court, GBRA argued for abstention fearing this lawsuit would "require the court to sort out the state's legal regime regarding surface and

groundwater withdrawals [and] the Texas S.B.3 process." R4.645. TCEQ expressed similar fears.[26] None of these fears actually came to pass.

Abstention doctrines can be time-sensitive. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 237-38 (1984) (discussing *Younger* abstention). Because GBRA's fears before the district court did not play out, GBRA shifts to new arguments on appeal, focusing on the district court's relief. GBRA's shifting argument exposes that the *Burford* inquiry can be a time-sensitive one too, and that their arguments have grown stale because their concerns expressed in district court never materialized. For this reason alone, the district court's decision to not abstain cannot be an abuse of discretion.

1. Adjudication of this lawsuit creates no "entanglement" that would justify abstention.

GBRA provides no basis for its new fears that the district court's relief will require the court "to delve into local facts." TAP presented two witnesses at trial explaining how HCPs are developed, and no witness testified that the federal court is itself involved. *E.g.* R4.5459-5461, 5526, 5531, 5528, 5541. GBRA elicited no testimony that an HCP process demands a federal court to involve itself in anything. The attractiveness of an ITP/HCP is that the district court only needs to

[26] The TCEQ Officials complained that the district court "should abstain to give the State time to complete this [S.B.3] process." R4.7032.

see that it is begun and completed. The stakeholders and the TCEQ Officials develop the HCP with help from USFWS, not the federal court. R4.5526, 5541.

Federal court enforcement of the ESA does not conflict with a regulatory scheme that nowhere considers its mandates. For all the reasons that S.B.3 is inadequate to justify abstention, it is impossible that the HCP would "duplicate" S.B.3. The outcome of S.B.3 was an e-flow recommendation, with no enforcement or assurances of the recommendation becoming a reality. By contrast, the purpose of an ITP is to "minimize and mitigate" any incidental takes of an endangered species—that is, the liable party is actually accountable to reduce further takes. 16 U.S.C. § 1539(a)(2)(A)(ii) (HCP); (B)(ii) (ITP). Neither the three-year duration of this lawsuit nor the district court's order has disrupted or conflicted with S.B.3. *Cf. Burford*, 319 U.S. at 327 (abstention justified where parallel exercise of federal jurisdiction led to needless conflict); *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 145 F.3d 238, 242 (5th Cir. 1998) (reversing abstention where "federal lawsuit interferes with no state administrative scheme"). Nothing needs to be untangled. *Quackenbush v. Allstate Ins.*, 507 U.S. at 727.

2. The State Officials' interest in their water policy is not the "motivating force" for abstention.

Burford abstention requires more than a generalized concern for water policy. *Moore v. State Farm Fire & Cas.*, 556 F.3d 264, 272 (5th Cir. 2009) (rejecting the "general" assertions that state law is important to the state). It

requires the "existence of a state administrative proceeding to which the federal court could defer." *Lipscomb*, 145 F.3d at 242.

GBRA's focus on the TCEQ's interest in its own water policy is not the crux of *Burford*, and the possibility of conflict with a state policy was rejected as a basis to abstain by *NOPSI*. 491 U.S. at 361-62 (explicitly rejecting the reasoning that the "motivating force" of *Burford* is "reluctance to intrude" into state proceedings). In *NOPSI*, where a rate-making order by the New Orleans City Council was at issue, the district court abstained, but in a unanimous opinion, the Supreme Court reversed, stating:

> While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or policy.

NOPSI, 491 U.S. at 362 (internal quotation omitted). In a different case, the Supreme Court has also stated that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978). Thus, the existence of a state's interest in its own policy is not the linchpin of *Burford* abstention.

Federal courts regularly adjudicate federal claims that implicate important state policies without the over-deference advocated by GBRA. *E.g.*, *Zablocki*, 434

U.S. at 380n.5 (marriage); *Martin v. Stewart*, 499 F.3d 360, 367 (4th Cir. 2007) (gambling). The *Burford* theory advanced by GBRA would result in federal courts abdicating their virtually unflagging jurisdiction over federal claims, thereby insulating state actors from violations of federal law. Simply because a state manages its water policy, it cannot follow that federal interests (here, endangered species) impacted by a state's policy are forevermore exempted from federal review and protection. The goal of this case is not to tell the TCEQ Officials how to regulate water, but to prevent the TCEQ Officials from causing a "take" of the Whooping Crane in violation of federal law. Areas of state policy do sometimes bend to federal law.[27]

Burford is, in part, a non-interference doctrine, but GBRA argues for it to be an excuse not to comply with federal law.[28] Through their arguments to abstain to S.B.3, GBRA necessarily recognizes that a planning process does *not* destroy Texas water rights. But rather than agree to develop a planning process for the Cranes, GBRA obscures the impotence of S.B.3 to protect the Cranes and seeks to avoid federal mandates to protect endangered species.

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[27] Among other examples, *South Carolina v. Baker*, 485 U.S. 505 (1988), was referenced above in Section I-D.

[28] *See Becker-Jiba Water Supply Corp. v. City of Kaufman*, 2003 U.S. Dist. LEXIS 10334, *16 (N.D. Tex. June 18, 2003) (declining abstention because what the City "characterized as difficulties are not difficult *questions* but difficult *consequences* of fairly straightforward federal law").

III. The district court did not clearly err in determining that the TCEQ Officials caused a "take."

The district court found the TCEQ Officials liable for causing an unlawful take of at least 23 Whooping Cranes in the winter of 2008-2009 in violation of Section 9. R4.7843. "Causation is a question of fact. In a bench trial it is reviewed under the clearly erroneous standard." *Urbach v. United States*, 869 F.2d 829, 831 (5th Cir. 1989). The clearly erroneous standard was articulated at length above in Standard of Review.

The ESA is subject to "ordinary requirements of proximate cause and foreseeability." *Sweet Home*, 515 U.S. at 700 n.13. Proximate cause may be an "indirect" cause and "need not be the sole and only cause." *Strahan v. Coxe*, 127 F.3d at 163; *Sheehan v. N. Am. Mktg.*, 610 F.3d 144, 150 (1st Cir. 2010); *see also 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."). The ESA's language itself infers proximate causation: 'it is unlawful for any person ... to commit ... or cause to be committed [an ESA violation]. 16 U.S.C. § 1538(g).

The district court engaged in a considered, careful, and thorough analysis of all the evidence, which included the testimony of 28 witnesses and 681 exhibits. As is typical in most trials, the finder of fact had to choose between certain competing versions of the facts, based on the credibility of the evidence. Here, the fact finder found credible the witnesses and evidence offered by TAP, and found

less, or not at all, credible the witnesses and evidence offered by TCEQ Officials and GBRA.

On appeal, GBRA cherry picks and spins facts to suit its positions, and disregards facts that contradict their positions. Ignoring the standard of review, GBRA re-urges evidence and testimony that the district court already weighed, and found lacking, less than credible, or overwhelmed by the testimony from more credible witnesses. For the reasons that follow, the facts found by the district court are not clearly erroneous and therefore should not be overturned.

A. There was no clear error that the TCEQ acts reduced freshwater flows, significantly increasing salinity in the Whooping Crane habitat.

As described above in Part I, the TCEQ Officials comprehensively regulate the water inflows and the water diversion process on the San Antonio and Guadalupe Rivers.

1. TAP proved the water diversions authorized by TCEQ Officials increase salinity in the habitat.

The district court had ample evidence that salinity is related to freshwater inflows. *E.g.*, R4.5090, 6119-20, PX84. Freshwater inflows are reduced by water diversions authorized by TCEQ Defendants. R4.5102.The district court reasonably relied on the testimony of TAP expert Trungale, who was the only witness to model inflows, diversions, and bay salinity using the official State-produced model. R4.5064. The district court heard testimony from GBRA's expert,

confirming that Trungale correctly modeled salinity, R4.6157, and from SARA's expert, confirming that bay salinity is an indicator of marsh salinity. R4.6342, 6345-46.

Trungale's modeling relied upon actual inflow and use data from Texas state agencies. R4.5067-72, DX300–304; PX83; PX101 (App'x18. Trungale testified about the difference in bay salinity between the no-diversion scenario, the actual conditions in 2008-2009, and a future diversion scenario based upon full use of all existing withdrawal permits. R4.5095-97, PX92-97, 106. Testimony established that 25 parts per thousand (ppt) is a critical threshold for a healthy bay and estuary, particularly the Cranes' key food source, the blue crabs; and 18–23 ppt is crucial for Cranes' drinking water. *E.g.*, R4.5024, 5033-34, 4585-86. Trungale's modeling and maps demonstrated that the Cranes' habitat was clearly altered by the actual water withdrawals that occurred during 2008-2009. PX106 (showing, for example, that the water diversions caused the percentage area of the bay with less than 25 ppt to drop from 53% to only 15% in December 2008) (App'x 17).

Testimony showed that, in 2008-2009, salinity in the San Antonio bay and estuary system was very high over the majority of the bay. R4.5099-101, PX105-106. The district court heard testimony that Trungale's results were within the

range of his expectations, if not conservative, and reasonably concluded that these salinity changes are significant.[29] R4.5159-60, 7780-81.

For the key period during 2008-2009, Trungale removed system storage and return flows as issues because he used actual withdrawals and gauged flows, and clearly the gauges capture return flows.[30] R4.5067-68. Stored water is water that does not reach the bay. Trungale did not overestimate diversions, and his results were unaffected. R4.5144; R4.5160.

The district court made no clear error in rejecting the testimony of GBRA expert Ward. R4.7785-86. Ward used averages to obfuscate, rather than explain anything probative to the district court. As even Ward himself agreed, in estuaries, salinity gradients matter. R4.6162 ("geographic distribution of salinities is a key aspect of the estuary"); 6108 ("salinity pervades any study of an estuary"), DX280. Ward relied on Trungale's modeling, but instead of analyzing geographic salinity distribution, he simply averaged Trungale's results across the entire bay. R4.6164, GBRA Br. at 56.

Ward testified that he chose "to take that very complicated model output and kind of pre-digest it in a way that we can better summarize what the model is

[29] Another reason that the district court reasonably relied on Trungale's findings is that two defense experts (Alexander and Perkins) designated to rebut Trungale, were never called at trial. *See* R4.249, 267.

[30] Return flow permit conditions, such as the one referred to in footnote 16, GBRA Br. at 55, are exceedingly rare. R4.5149. The implication that there are hundreds of permits with return flow condition is wrong, and not supported in the record.

telling us." R4.6164, 6143 ("I've just averaged them").[31] The district court properly found it "manipulation of the data [that] produced no meaningful results for the [c]ourt." R4.7786.

The district court made no clear error in finding that the drought was not the sole cause of the elevated salinities in 2008-2009. R4. 7780-81. Trungale's modeling showed the difference between the salinity that would have occurred from the drought if there were no diversions, and the actual higher salinity that did occur from the diversions. PX106.[32] The water diversions, even with the drought, made a much larger portion of the bay and estuary unsuitably salty. No party challenged Trungale's methodology under *Daubert*.

2. TAP proved the increased salinity reduces vital resources for the Cranes.

The district court made no clear error in concluding that increased salinity in the estuarine ecosystem throws the habitat of the Whooping Crane out of balance. R4.7742. The district court heard ample evidence on the typical productivity of the estuary ecosystem, and the negative impacts on that ecosystem due to high salinities. R4.4986-88, PX59; R4.4992-93.

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[31] The problem with averages is nicely captured thus: "If you have one foot in boiling water and one foot in ice, you're not comfortable, are you? If you and a friend are out hunting and you shoot two feet to the left of the target and your friend shoots two feet to the right, you didn't get your target, did you? A day that starts sunny but ends with a tornado isn't, on average, an "OK day," is it?" S. Parrish, Forbes (Oct. 3, 2012), at http://www.forbes.com/sites/steveparrish/2012/10/03/the-flaw-of-averages/.

[32] Trungale also showed that even higher salinities would result if existing water rights were used to their fully permitted extent. PX106.

There was ample evidence concerning the importance of healthy salinity gradients for the blue crab and that the preferred salinity zone for blue crabs is a range between 10-25 ppt. R4.5016-17, 5019, 5024; R4.5019-20, 6264, 6266, 6271. Based on his modeling, TAP expert Montagna testified that, in order to manage San Antonio Bay for blue crabs, salinities should be kept below 25 ppt over as much of the bay as possible. R4.5022, 5025, 5057-58; PX248 (App'x 23), R4.5022-24, 5026-29, 5033-34, 5036-38. GBRA places great importance on one demonstrative exhibit, DX377, which was created by their lawyers (not their experts), which purports to show blue crab abundance. GBRA Br. at 44. This is a misleading tactic, because it is an average over ten years, and says nothing about crab abundance during 2008-2009.

Regarding wolfberries, there was universal agreement that they are adversely impacted by high salinities, and that lower salinities in the bay lead to greater wolfberry production in the habitat. R4.6342-46, 6307-08, 4844, 4627, 5858, 5880. The district court heard evidence that, in 2008-09, the wolfberry crop was "notably less than average." R4.4837-38; R4.4834. GBRA complains about the wolfberry fact-findings, GBRA Br. at 44, but does not acknowledge that the testimony was credible and unrebutted.

The district court had ample evidence for the fact finding that when salinity in the marsh is above 15 to 20 ppt, cranes leave their territories to drink at the

freshwater ponds in the uplands. R4.4579-81, 4585-4587, 4704, 4845-46, PX25 at 1, PX11 at 21. GBRA abandons their trial arguments that Cranes do not drink water, or can excrete the salt. Instead GBRA merely complains that there might be other reasons for Cranes to fly to the uplands, but no scientific study confirms the undisputed observations of Stehn and Chavez-Ramirez. The district court did not err giving weight to the observations and salinity measurements of these highly experienced field researchers, who had videos to substantiate their assertions. R4.4579-4581; R4.4704, 4412, PX365-370. Even GBRA witness Slack substantially praised the field work done by these two witnesses. R4.5893, 5888-89.

There was also overwhelming evidence concerning witnesses' observations of the conditions in 2008-2009, including lower numbers of crab and a poor wolfberry crop. R4.4834 ("the food supply was not good….from my experience, that kind of screams out that trouble is brewing for the whooping crane flock"); R4.5267 ("You almost never saw them get a blue crab that winter."), 5260 (in other years "we will often see whooping cranes reach down and pick up a crab"), PX34 (App'x 14), PX33 (App'x 15). The district court heard testimony from three TAP witnesses who actually observed the conditions that winter, which stood unrebutted. R4.4834, 4837-38, 4845, 4877 (Stehn); 4527-28, 4535, 4557 (Chavez-

Ramirez), 5267 (Kirkwood). DX124 at TAP-006359. GBRA provided no witnesses who had personal knowledge or field observations from that winter.

The district court heard compelling testimony that, over time, high salinities can "kill" an estuary. In another bay along the Texas coast, Nueces Bay, Dr. Montagna[33] explained that freshwater inflows into that bay were so reduced by water diversions that resulting high salinities essentially "killed" that ecosystem. R4.4997, 5002-03. In light of all this evidence, there was no clear error that high salinities negatively impact the San Antonio bay and estuary habitat.

B. There was no clear error that the habitat modifications impaired essential behaviors and caused actual injury and death.

A "take" can be caused by significant habitat modification, 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3. The district court made no error in concluding that the habitat modification actually killed or injured the Whooping Cranes and significantly disrupted the Cranes' normal behavioral patterns. The court heard ample evidence that a lack of vital food sources impacted the Whooping Cranes' ability to survive. *See, e.g.*, R4.4553 (without blue crabs, Cranes "would either have to move or perish"); R4.4838 ("What happens is the blue crab level gets so low that it's not energetically, it makes no sense energetically for a whooping

[33] Chair for Ecosystems Studies and Modeling at the Harte Research Institute at Texas A&M University-Corpus Christi.

crane to keep searching for crabs"); R4.4837 ("I was seeing a horrible picture of habitat for the whooping cranes that winter").

Ample evidence showed that the Whooping Crane's behavior changed due to the stress from adverse habitat modification—such as a parent responding aggressively to a juvenile seeking food from parent; and the juveniles molting their brown feathers late that year. R4.4556-57; R4.4574, 4591-92, 4214-15, PX22 at 31-32; R4.4557-58, 4560, 4564-65, 4568-73, DX194-198. There was evidence of the "very unusual" circumstance that juveniles were separating from their parents, and then inevitably disappearing (*i.e.* dying). R4.4787, 4789, 4828-29, PX107-109 (photos of a solitary juvenile) (App'x 9). In 2008-2009, out of the 23 reported mortalities, 16 were juveniles, R4.4524. There was abundant evidence of the Crane's increased movement away from their territories, which is an indication that the resources they need to survive, such as food and water, are not available in their territory. R4.4574-75, 4585, 4848, 5266-67, 4542-43, 4546, 4233. And forced movement away from the safety of the territories increases the risk of predation. R4.4575.

The district court reasonably rejected GBRA's characterization that there will always be sufficient food for the Cranes. Evidence confirmed that the two most important foods are blue crabs and wolfberries. R4.4421, 4529, 4532, 4536, 4549-50, PX372 at 112 (Table N), PX52-56; R4.4436 (stating that blue crab was

"by far the most important"). Other food items are not sufficiently abundant, or only used for short periods of the winter in certain years. R4.4528-29, 4550-52. After 29 years working with Cranes, Stehn observed that "whooping cranes really struggle when they don't have their primary abundant food sources of wolfberry and blue crab." R4.4839.

Witnesses agreed that Cranes were "opportunistic foragers" and also "omnivores," R4.4704, R4.4839, R4.4421-24; but such testimony does not mean that food was or is available to the Cranes in sufficient quantities. Contradicting GBRA's assertions, testimony showed that items such as snails and insects are not sufficient for the Cranes: "They're going to find something to put in their stomach. The problem is that these other foods that they get, such as insects, it's a lot harder to fill up your stomach trying to catch grasshoppers in upland areas, compared to catching large size blue crabs that you can, that are very, very high in fat content." R4.4839 (Stehn). Thus, there can be no clear error in the district court rejecting testimony from GBRA's witness (Slack), who the district court did not find credible in any event. R4.7777.

GBRA's argument concerning the Crane's food in the winter of 1993-1994 only adds weight to what was proven at trial. That winter was a high mortality winter, and there were low inflows and a low food supply of blue crabs. R4.4623, R4.4416, 4630, 5944 (Slack discussing his published study, PX207 at 736), PX74.

The district court committed no error in concluding that GBRA witness Porter's model was flawed, used hypothetical diets, and his testimony lacked probative value regarding food availability. All Porter did was take observed diets *of food that was actually available* from studies in other years, run them through his model and show that the cranes survive. R4.6100-03. He admitted that his theoretical model did not include anything to account for actual food availability. R4.6100. Additionally, data for Porter's hypothetical diets came, in part, from the student work of Greer (and 'overseen' by Slack and the basis for the SAGES study) whose self-taught (indeed un-described in any publication) method for inferring food items from blurry videos was thoroughly discredited at trial. R4.6049, 4537-39, 4537-39, PX386, 5968-75.

The district court reasonably gave weight to the findings of "emaciation" in the two necropsy reports—particularly in light of testimony of GBRA witness Stroud, who agreed that lack of food or starvation can lead to emaciation, and also a compromised immune system, and death. R4.7813, 7817-18; DX118, DX119, R4.4604, R4.5770 (Stroud: "There is no question it's emaciated."), R4.5755, 5775. Emaciation made Cranes vulnerable to predators and disease. R4.5755, 5775.

C. The district court did not commit clear error in determining that 23 Cranes died in 2008-2009.

The district court committed no clear error in finding that at least 23 Cranes died. R4.4958; 4781-82, PX29 (App'x 4). Contrary to GBRA's arguments,[34] GBRA Br. at 24, the record is replete with admissible, relevant, and compelling evidence establishing the deaths in 2008-2009. The district court heard testimony from Tom Stehn, who conducted censuses and determined mortality for 29 years; heard testimony from two preeminent Whooping Crane biologists, Dr. George Archibald and Dr. Felipe Chavez-Ramirez, both members of the International Whooping Crane Recovery Team and both familiar with Stehn's work and methods; and also reviewed USFWS documentary evidence.

The district court reasonably gave weight to Stehn's testimony. He was a witness called by both sides, R4.4262-63; 4370; but prepared by neither. He was independent. Stehn had only a few hours of notice after receiving approval from his former federal employer that he would be testifying in this case. His testimony was unvarnished by the preparation with any lawyer. It reflected the three-decade long career of a diligent, dedicated public servant, and a highly experienced biologist with intimate knowledge of Whooping Cranes. As the evidence showed,

[34] One very obvious contradiction in GBRA's brief is their simultaneous attack on every aspect of Stehn's aerial census methodology, while at the same time relying on his peak flock numbers to urge–contrary to all evidence-- that the flock is "thriving." *See* GBRA Br. at 63.

Stehn is highly respected in the relevant scientific community, and his data is relied upon by many, including GBRA's own experts.

GBRA had planned to try Stehn "in absentia," and their defense strategy evaporated when they could no longer criticize Stehn's work, methods and data in his absence. R4.4712. Quite simply, Stehn was present to rebut all of their criticisms, and the district court was able to view Stehn's credible responses to the questions of GBRA's counsel in order to evaluate his credibility, *Daubert* considerations, and to determine what weight to give to his testimony. *French*, 637 F.3d at 577.

The district court was also reasonable in giving credible weight to Stehn because his expertise with the Whooping Cranes was confirmed by Slack at trial, R4.4518-19, 4478-82, 5888-89; his own scientific publications independent of the litigation, R4.4757; and is underscored by the use of his data in countless other scientific publications. R4.4476-77, 5796, 6436-39. The district court thoroughly reviewed all the evidence from multiple witnesses regarding the aerial census and mortality, and exhaustively assessed it in the opinion's findings. R4.7798-7812.

Stehn's assessment of Crane mortality is important because it established the severity of the consequences of significant habitat modification in 2008-2009. The legal standard is whether habitat modification led to essential behavioral changes, actual injury, and death. 50 C.F.R. § 17.3. The district court did not commit clear

error in finding the greater weight and degree of credible evidence met this standard.

1. *Daubert* factors are not used by appellate courts to re-weigh admitted testimony.

GBRA failed to exclude Stehn's testimony under *Daubert*. R4.4957. GBRA abandons the *Daubert* challenge on appeal, but instead asks this Court to make rulings on Stehn "as a matter of law" and to use the *Daubert* factors to assess the weight of Stehn's factual testimony. GBRA Br. at 25. However, these are aspects of trial under the district court's vigilant province. *Canal Barge*, 220 F.3d at 375.

Daubert functions "to ensure that only reliable and relevant expert testimony is presented to the jury." *Rushing v. Kansas City S. Ry. Co*., 185 F.3d 496, 506 (5th Cir. 1999) (citing *Daubert*, 509 U.S. at 590-93). Consequently, "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000). The district court's admission of the Stehn's evidence over the objections of GBRA indicates the district court's conclusion that Stehn's testimony was both relevant and reliable. As GBRA does not re-urge its Daubert challenge, this Court's "only role" is to determine whether the district court committed clear error. *St. Martin v. Mobil Exploration & Producing U.S. Inc*., 224 F.3d 402, (5th Cir. 2000). There is no legal support in GBRA's brief showing that *Daubert* factors must be used by an appellate court to re-weigh admitted evidence.

2. The district court reasonably concluded that Stehn's mortality count for 2008-2009 was reliable.

The district court heard extensive testimony from Stehn on his systematic approach to determining winter mortality. R4.4824-33. There was detailed testimony that Stehn's methods for counting peak abundance and mortality utilized well-documented behaviors of the Whooping Cranes, including site fidelity and territoriality (meaning that the birds return to the same "territories" year after year and defend those territories against other Whooping Cranes), R4.4233-34, 4542-43, 4730, 4775, 4781; that the adult birds pair up and mate for life, R4.4214, 4753-54; and that a family unit consisting of an adult pair and a juvenile is a cohesive unit that stays together on the winter grounds. R4.4215, 4554-55, 4573-74, 4861, 4790. These aspects of the Cranes' biology were uncontested, actually admitted by defendants' witnesses. *E.g*. 5866-67 (Slack), 6365 (Conroy).

Stehn provided testimony that 23 Whooping Cranes died in the 2008-09 winter and this was a "conservative number." R4.4958; 4781-82. Stehn explained that it was conservative because he did not include possible additional subadult mortality, as the movements of subadults are less predicable. R4.4781-82, 4784.

The district court heard testimony regarding Stehn's methodology, which has been published and long known to the relevant scientific community: that Stehn used aerial flight surveys (with a pilot, in which he was an observer) to view and count the number of Cranes; that Stehn conducted multiple flights throughout

each winter; and that, on these flights, the Cranes are easy to detect in all habitats—such as mudflats, open water, very low vegetation, or on upland burns—due to their large size and white color. R4.4763, 4497-4502, PX186 (App'x 24). Stehn created maps identifying the location of families and plotted the birds on the maps. R4.4769, 4769-4771, PX110 (App'x 7). The flights enabled Stehn to verify the location and mapping of territories; identify the mated pairs with their juveniles; determine peak population; record evidence of mortality; verify habitat use of Crane families; observe Crane movement outside of the typical winter grounds; and record sightings of certain Cranes. R4.4767. Stehn sometimes flew as low as 20-50 feet above the marsh. R4.4750. If birds were missing from their known territory, then Stehn would revisit that territory and search for the birds at surrounding watering holes or uplands. R4.4770-73, 4518. Stehn's methodology is published as a paper in a scientific journal. DX123. Chavez-Ramirez was the only witness who accompanied Stehn on his flights many times, and testified that he was able to verify Stehn's methods. R4.4478-79, 4482.

Stehn testified that a mortality was counted when a bird went missing from its known territory on two or more flights and was not relocated on any subsequent flights. R4.4783, 4786, 4520-21, 4298. Stehn explained that mortality is a conclusion logically drawn from the sustained absence because Whooping Cranes exhibit site fidelity and territoriality. R4.4780-81. Whooping Cranes strongly

defend territories established by family units of either a pair, or two parents with juvenile(s). R4.4235. Thus, when a Crane suddenly disappears from its territory and never returns for the remainder of the winter, Stehn reliably can conclude that the bird died. R4.4783. Stehn did not declare a mortality of a bird without repeated confirmation. R4.4786, 4770-72.

The district court watched, and directly examined, Stehn meticulously testify about the specifics of each of the 23 instances when he determined that a Crane mortality had occurred during 2008-2009, and the court watched Stehn plot those locations on a map, providing detailed descriptions of each mortality. R4.4824-33, PX32 (App'x 6), PX377 (App'x 8). Without preparation, Stehn recalled the circumstances leading to each mortality. *Id.*

The district court heard from other witnesses regarding the Crane deaths of 2008-2009. Chavez-Ramirez, who flew 30 to 40 times with Stehn, testified that, based upon his personal experience, there was "no way" and "almost impossible" that 23 birds were simply overlooked for the entire 2008-2009 winter season. R4.4518-4519. Testimony at trial rebutted GBRA's contention that missing cranes had left the census area. *See* GBRA Br. at 30 n9. Stehn explained that he would actively search for any missing cranes outside the territories, and wayward Cranes would be reported by the spotter network. R4.4767, 4770-71, 4761-62, 4788-89, 4205, 6405. There was absolutely no evidence or reports in 2008-2009 that missing

cranes were sighted off the Refuge, and these very large white birds are noted when they appear where they are not usually found.

Stehn provided the district court with an example when his mortality determinations were verified in real time. R4.4914-15. For instance, he testified that, in 1989, he made a mortality determination, and returned to learn that a Houston lawyer had indeed shot a Crane:

> "When that crane was shot, I was actually up in the air doing a census flight. And when I landed and drove back to the refuge office, I reported, "We've got a missing adult out there." And the secretary said, "Yes, we've been in touch with law enforcement, and there's been a shooting."

R4.4914.

The district court had added confirmation of Stehn's high mortality determination in 2008-2009 from the unprecedented four carcasses found that winter. R4.4575-76, PX22 at 27–31; DX6 at TS008841–8845. Between 1938 and 2011, less than twenty crane carcasses had been recovered at Aransas, four of which were in the 2008-2009 winter. R4.4575-76. Carcasses are rarely found due to scavenging, as GBRA's witnesses confirmed. R4.4576-78, 6423-25, 6427, 6431-33.

Testimony by GBRA witness Conroy further underscores that the district court did not commit clear error in relying on Stehn's testimony. Importantly, Conroy agreed that it is in theory possible to infer Whooping Crane mortality due

to their strong territoriality and parent care. R4.6399-6400. Conroy agreed that Mr. Stehn's methodology correctly used repetitive flights, air speed, altitude, timing, area covered, route, and the same observer, all of which would maximize accuracy. R4.6408-11. Conroy testified the peak population counts are reasonably accurate. R4.6365-66, 6408-11. These statements of testimony alone, *by GBRA's own expert*, refute GBRA's *Daubert* arguments.

Conroy gave further testimony supporting the validity of Stehn's methodology and counts. He agreed that, on their wintering grounds, the Cranes are highly detectable and conspicuous and the families have predictable locations. R4.6365. Conroy agreed that "every area known to have cranes in recent years was covered during the course of the season." R4.6408. Conroy specifically confirmed that "if territories remain fixed over a given period of time and individuals within territories are relatively easily counted or distinguished by age, then sequential visits to the territory may be capable of providing inference on mortality subject to caveats." R4.6447.

3. The district court heard ample testimony that other scientists have credibly relied on Stehn's counts.

The great weight of evidence in the record established that Stehn's data has been relied upon for decades and was never challenged until this litigation. *E.g.* PX270 (CD of published papers relying on Stehn's census and mortality numbers). Archibald and Chavez-Ramirez both verified that they, the U.S. and Canadian

governments, and all other scientists have relied upon Stehn's numbers for decades. *E.g*. R4.4229, 4476-77.

The International Whooping Crane Recovery Team, which understands the biology and behavior of these birds, and understands Stehn's methods, has relied on Stehn's counts for years and believes that 23 cranes died in the winter of 2008-2009. R4.4205, 4206, 4229, 4230, 4517. No published literature questioned the accuracy of Stehn's data until this litigation. R4.4231.

GBRA experts Conroy and Slack both have approved of Stehn's methods. Conroy provided testimony during trial. R4.6366; 6399-400, 6447-48. Slack relied on Stehn's population and mortality counts both prior and subsequent to trial, as co-author of a paper accepted for publication. R4.5796; PX391 at 3, 6; R4.6436-39. Slack's paper expressly approved of Stehn's mortality methodology, stating: "Data included censuses of juveniles, sub-adults, and adults, observations of banded birds, and reports of mortality, with the latter usually inferred from the disappearance of an individual from its territory." PX391 at 6. GBRA cannot plausibly assert that no one views Stehn's data as reliable when their own experts do.[35]

[35] GBRA's counsel, as well as TAP's, referred to Mr. Stehn as "Mr. Crane" during trial. R4.4628, 4697, 4824.

4. The district court correctly concluded that Stehn's methodology in 2008-2009 was the same as prior years.

GBRA's brief paints a fantastical picture that Stehn suddenly and radically changed his methodology in 2008-2009. GBRA Br. at 28. This is a gross misrepresentation of evidence before the district court. In reality, nothing Stehn did in 2008-2009 was any different from the other 28 years he performed the surveys. R4.4763, 4767. Nor was it much different from any of the other surveys since 1950. R4.4749, 4746.

GBRA argues that the lack of color bands, low flying passes, and slower planes somehow makes Stehn's count *in just 2008-2009* unreliable. GBRA does not explain, much less prove, that high mortality counts in other earlier low inflow years were also aberrant and, under their theory, unreliable when those variables were not an issue. For example, the color banding program, which ended in 1988, was undertaken primarily to determine territoriality, family cohesiveness and mortality. R4.4234, 4289, 4294, 4753-54. Since 1988, the numbers of cranes with color bands steadily declined due to mortality and band loss and fading. R4.4294, 4297, 4594, 4752. In several winters preceding 2008-2009, no Cranes were radio tagged and very few had color bands, R4.4294-95, 4297, PX22 at 33 (App'x 25), so the lack of individual identification cannot explain the sudden increase in mortality in 2008-2009.

GBRA places great emphasis on written statements by Stehn during the 2008-2009 winter regarding the Crane movements away from their territories. GBRA Br. at 30-31. However, testimony explained that these unusual movements were caused by the lack of essential resources in the territories, forcing the Cranes to leave and look elsewhere for food and freshwater.[36] R4.4574-75, 4585, 4848, 5266-67, 4542-43, 4546, 4233. Therefore, the increased movement of Cranes that winter is *confirmation* of the very poor habitat conditions in the territories.

GBRA takes some of Stehn's written comments out of context, ignoring Stehn's testimony on the stand. For example, Stehn explained that, on a flight where there is too much Crane movement, he would not factor in that day's numbers when rendering his peak abundance calculation. R4.4775. This explains why out of eleven flights in 2008-2009 only six were used for peak abundance. GBRA Br. at 28. But, as Stehn testified, mortality is determined independently, and based on the repetition of observations. R4.4780 ("The mortality is not based on the count that I'm getting that day. The mortality is based on behavior, crane behavior, of what I have been observing for 30 years."), 4781-88. Thus, all eleven flights in 2008-2009 were the basis for Stehn's mortality determinations, not six.

Stehn testified that the number of flights during the winter season had been reduced over the five years prior to trial. R4.4776. Thus, the fact of reduced flights

[36] Whooping Crane territorial behavior during the non-breeding winter season is only explained as a way for the family unit to procure and defend food sources. R4.4542-43, 4546, 4233.

alone does not explain any alleged sudden change in mortality findings in just one of those years, in 2008-2009. Stehn also explained that his error rate in a good year (without much movement) to be about 1%, and in 2008-2009 (with a lot of Crane movement) his error rate was about 3%. R4.4779-80. An error rate on the peak flock number of 270 in 2008-2009 is only six birds. R4.4780. With all this evidence, the record clearly shows that no alleged changes in his methodology can explain the higher mortality numbers in 2008-2009.

5. The subsequent 2009-2010 winter numbers were fully explained at trial and confirmed the prior winter's mortality.

GBRA's argument concerning the Cranes that arrived during the winter of 2009-2010, Br. at 33-34, are wrong for two reasons: first it misrepresents Stehn's summer estimate; second, it assumes that any additional birds must be the ones declared dead. The evidence showed that 247 cranes left Aransas in spring of 2009, and the peak count the following winter was 264. R4.4926, DX7 at TAP-006981, PX30 (App'x 5). This is an increase of 17 cranes over the number that left however, describing this as "unexpected" misstates the facts.

GBRA conjures the "unexpected" claim due to Stehn's estimate of how many cranes he thought might arrive that fall. Stehn does a "very rough guestimate" each year for media inquiries, and it is based on the flock size leaving Aransas, plus the number of known chicks in Canada, and the average mortality

during migration. R4.4922-23. ("the media is always interested in how many cranes are going to arrive, and I make this estimate"). Stehn made two guesstimates for the number of Cranes returning in the 2009-2010 winter—he made one guess of 247 (*i.e.*, no population growth), and another guess of 260. R4.4922, 4926-27. GBRA focuses on the first guess, does not mention the second guess, and suggests that these "guesstimates"—for the media—are accurate population predictions (which of course Stehn was not trying to do). Thus, based on Stehn's second guessed number, his prediction for media would be off by only four birds (260 vs. 264). In either case, these are plainly guesses only.

The second error is that GBRA implies that a returning flock of 264 in 2009-2010 is inconsistent with the previous winters' mortality figures and that, therefore, the dead birds were, they say, just undetected.[37] GBRA's claim is contradicted by the record. The peak number of paired adults in 2008-2009 was 140 cranes (70 pairs). DX6 at TS008847. This is the exact number of paired adults in 2009-2010. DX7 at TAP-006985. Chavez-Ramirez testified that if the 16 dead juveniles had in fact just gone missing, and all 38 juveniles had survived to return the next year, there would have been approximately 122 unpaired subadults in the flock, and a total peak population of "281 to 284 birds." R4.4726. The subadult count in 2009-

[37] GBRA claims that the 17 "unexpected" birds were all sub-adults, "returning for a second winter." Br. at 35. This is conjecture because sub-adults are simply unpaired Cranes that may be many years older than 2.

2010 was only 102 cranes. DX7 at TAP-006985. The fact that only 264 birds returned in 2009-2010, rather than 281 or 283, and there were only 102 subadults, support the 2008-2009 mortality levels reported by USFWS. Thus, there is no "analytical gap" much less a "chasm" in between the flock numbers for the two years. No GBRA expert testified about this topic, so GBRA's argument is largely the post-trial suppositions of counsel. For all these reasons, there is no clear error concerning the district court's conclusions that Whooping Cranes died in 2008-2009.

D. The district court made credibility findings, and GBRA lacked evidence of "alternate theories."

GBRA frequently emphasizes that the district court adopted TAPs findings on causation. GBRA Br. at 41. They refer to this as "recycled findings" and adoption "verbatim." *Id.* This is incorrect. The district court made extensive fact findings of its own. *E.g.* R4.7842-46, 7799-800 (n.65 & 67). In some instances, like the present case, the adoption of one party's findings is entirely justified. *E.g. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co*., 73 F.3d 546, 574-576 (5th Cir. 1996).

GBRA relies on *Luhr* to call into question the clear error standard of review. However, in *Luhr*, the physical evidence undercut the court's finding; the testimony of an independent witness contradicted the court's finding; the plaintiff's own expert altered his opinion on the stand; and the plaintiff's chief witness gave

facially implausible testimony. *Luhr Bros., Inc. v. Shepp*, 157 F.3d 333, 339-42 (5th Cir. 1998). None of the *Luhr* problems are present in this case.

If anything, the very sharp contrast of the *Luhr* facts to those in the present case underscore the correctness of the district court's findings. First, Stehn was essentially an independent witness, without prior preparation or even deposition. R4.4263-63, 4370, 4463, 4744, 4749-48. TAP's proposed findings simply reflect Stehn's testimony. Second, the testimony of all of Plaintiffs experts was internally consistent. If anything, GBRA's experts lacked internal consistency. For example, Conroy admitted that Stehn's methodology was valid, crane biology meant mortality could be determined from repeated aerial censuses, and that his peak counts were "reasonably accurate." R4.6365-66, 6399-400, 6408-11. Third, GBRA's whooping crane expert Slack significantly retreated from his opinions regarding whether cranes need to drink freshwater, R4.5908-09, 5917-18, 5923, 5925, 7820, admitted he used Stehn's data without criticism until being hired for this litigation, R4.7819-20; and Davies omitted entirely one of his opinions from his expert report, R4.6336. The *Luhr* court reiterated the well-worn principle, applicable here, that, "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." 157 F.3d at 338.

1. The sworn testimony supports adverse credibility findings against certain GBRA witnesses.

That there was no clear error by the district court is even more apparent in light of the credibility findings. Examples to substantiate the district court's adverse credibility findings are given here. GBRA initially flaunted the SAGES report it funded, calling it the "most definitive study" on Whooping Cranes, salinity and food. R.368-69. Only one aspect of SAGES was presented at trial. The district court heard testimony that led it to reasonably determine that the SAGES student-collected data underlying the opinions of Porter and Slack lacked a reliable methodology. R4.5900, 5968-71, 5968-71 (student trained herself), 5817-18 (inferred food from videoed behavior), 5971-5975 (no known methodology), 7818-20 (court findings). The district court (and TAP's expert) reviewed the SAGES student's videos and found them too poor quality or lacking observable food items. R4.7777, 7819, PX237-244; DX313-367 (videos), 4537-39, PX386 (listing Chavez-Ramirez review).

The district court noted that GBRA's Whooping Crane expert, Slack, used Mr. Stehn's data without criticism, R4.5892-93, until he was retained as a litigation consultant for GBRA. R4.5897-98, 5899-900, 7819-20. Slack admitted he had no observational basis to state that Cranes do not drink water, and did not review literature on cranes drinking water. R4.5908-09, 5917-18, 7820.

The district court heard and found a lack of candor from Porter regarding his selection of data making several conflicting misrepresentations on significant points. R4.6060, 6064-65 (data not provided by counsel), R4.6061, 6062-64, 6078 (he selected the data), 6088-90, 6093-94 (data provided by counsel after Greer's data discovered to be flawed). The district court heard evasive and misleading testimony from Stroud. R4.5775-76, 5784 (refused to answer), 5748-50, 5777-78, 5782-83, 5741, 5742-43, 5750, 5757-59 (misleading). Many of GBRA's experts followed parameters of what GBRA counsel instructed them to do. R4.6094 (Porter), 6479-80 (Sunding), 6400 (Conroy).

The district court saw that witnesses from both GBRA and SARA had limited experience with Whooping Cranes. R4.6219, R4.6221 (Vaugh); 6336 (Davis); 6072-73, 6047, 6072-73 (Porter); R4.5805-06, 5902-5905, 5906, (Slack only spent an average of one day per year in the field over the past fifteen years).

GBRA attempts to explain away some of these findings in footnotes, but these amount to nothing more that *post hoc* rationalizations in an attempt to rehabilitate flawed witnesses. As the record demonstrates, there was no attempt to use credibility determinations to insulate the court's decision. It was the witnesses' own statements that undermined them to the district court, and the court rightly weighed credibility in favor of TAP's witnesses, and adversely against GBRA's.

2. There was no evidence to support GBRA's alternate theories.

GBRA offers a litany of alternative theories, based on speculation, without proving any of them. GBRA's scattershot defense of multiple alternate theories was heard, weighed and rejected by the district court. Sowing doubt may be a tactical decision as a way to defend a case, but once the fact finder overcomes the doubts, argument unsupported by evidence is not a basis for an appeal, much less requiring a reversal for a "clearly wrong" standard.

First, some theories are simply contradicted by the record. For example, with respect to salinity, testimony established that that salinity is obviously driven by inflows, but two other variables—dissolved oxygen and temperature—are also related to inflows, so they cannot be alternate explanations. R4.4991-92, 5028, 5057, PX61, 247. As another example, the pattern of Whooping Crane mortality cannot be explained by long-term, nationwide trends in blue crabs, and GBRA never attempted to make such a link. Instead this trend makes salinity in the bay even more "critical." R4.5019. Similarly, GBRA never presented any evidence to the district court that crabbing activity in 2008-2009 was anything other than normal; GBRA *had crabbing data* but did not attempt to present it on a year-by-year basis. *E.g.* R4.6260, DX261 (presenting only total catch over a 22-year period).

With respect to drought, the unrebutted modeling of Trungale puts this to rest. The TCEQ-authorized water diversions made the bay salinity (1) higher and (2) higher over a greater area than just the natural flow conditions that otherwise would have occurred (*supra* III.A.1). It is not simply the "absence of rain" as was found in *Ala. v. U.S. Army Corps of Eng'rs*, cited by GBRA. GBRA. Br. at 51. In that case, the court held that no evidence was even offered to show that Corps dams lowered flows, and FWS attributed the low flows only to basin-wide declines in rainfall. 441 F. Supp. 2d 1123, 1134 (N.D. Ala. 2006). Neither circumstance exists in this case: the district court heard undisputed testimony from Trungale; additionally, USFWS attributed low flows to diversions. PX11 at 20-21. GBRA mentions evaporation and local rainfall as a possible theories, GBRA Br. at 57, but never presented any such data during trial. These are appellate theories, devoid of record support.

GBRA also asserts low water levels or tides as alternate theories, but without adequate supporting evidence, and certainly no evidence demonstrating a "clearly wrong" decision by the trial court. The fatal flaw in their argument is that water levels are driven by wind, and the water in the bay piles up on the north or south shorelines depending on wind direction. R4.6176, 6297-98, 6313, 6322, DX292. When it is low on the north shore, it is high in the south. R4.6340. The record shows Crane mortality was distributed on both north and south shorelines so water

levels cannot explain them. R4.4839, PX377. GBRA finally asserts that wolfberries and blue crabs "thrive" in high salinities, but this is not what the record reflects (*supra*. III.A.2).

GBRA's strategy of blaming anything and everything other than inflows fails at every turn. For instance, GBRA even attempted to imply that increased water diversions was associated with an increase in numbers of cranes, though the witness wisely disavowed this on the stand. R4.6226-27. The *Cold Mountain v. Garber* case does not help GBRA because, there, the plaintiffs simply lacked proof that a take occurred, relying on scientific abstracts and no proof from the field. 375 F.3d 884, 890 (9th Cir. 2004).

Finally, in an attempt to introduce new evidence into the record on appeal, GBRA's trusted consultant, retained for over a decade and a member of their litigation team, Dr. Lee Wilson, wrote his own assessment of the trial, and he presented data and opinions on the evidence and on the district court itself.[38] In getting his assessments before this Court, this effort was aided and abetted by two amici: the Texas Public Policy Foundation and the Texas Farm Bureau, who act more as friends of GBRA, instead of "friends of the court." *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Judge Posner recognizing that there are limits to amicus briefs). Federal Rule of

[38] TAP has documentary evidence, produced by GBRA during discovery, to substantiate the very close relation of Dr. Wilson to GBRA and this litigation.

Appellate Procedure 10 limits the composition of the appellate record to the testimony and documents before the district court. Fed. R. App. P. 10(a). Any attempt by a party to smuggle in facts not reviewed by the district court through an amicus brief must be rejected.

E. The district court committed no error in concluding that statistical proof of correlation gave weight to the causation.

TAP did not use correlation alone to prove causation. TAP used two independent methods of statistical analysis to check and test the direct observations and expert opinions of the biologists on the ground. Statistical methods can underscore the strength of factual proof of causation. As this Circuit has discussed, when " evidence of correlation itself is potentially relevant and unlikely to mislead [the fact finder]," then experts may present such findings. *United States v. Valencia*, 600 F.3d 389, 425 (5th Cir. 2010) (collecting cases in support).

From the historical pattern of years of low inflows and high Crane mortality, PX74 (App'x 11), PX76 (App'x 12), Dr. Sass undertook a statistical analysis called the Fisher Exact Probability Test to test the hypothesis that high mortality is associated with low freshwater inflow. R4.4338, 4346, PX265. Sass concluded that low inflows and high mortality are "causally correlated" and "in all cases of high mortality you have low river flow, no exceptions really." R4.4349, 4350, PX265. Sass, a biogeochemist, opined that his result was scientifically supported and

explained by the biological reasons in the extensive literature that he reviewed. R4.4323-4325, 4350.

Dr. Ensor explained that the Fisher Test (p-value = 0.02) shows that there is a strong association between the level of freshwater inflow into San Antonio Bay and Whooping Crane mortality. R4.4379, PX265 (App'x 13). Ensor performed a separate test—called a Poisson Count Regression—and also found a strong relationship (p-value <0.0001) between low inflows and high mortality. R4.4380-4382, PX27; PX28. Thus two experts testified to a statistically significant correlation between high winter Whopping Crane mortality and low freshwater inflows.

The cautionary statements contained in the *Valencia* opinion are not applicable to the present case. TAP's own witness, Ensor, testified that the use of statistics can support a finding of causation when paired with a scientific argument or a biological explanation for that causation. R4.4381-4382, 4391; *see Int'l Bd. of Teamsters v. U.S.*, 431 U.S. 324, 340 (1977) (stating statistics' "usefulness depends on all of the surrounding facts and circumstances"). The district court explicitly recognized this caution—that a biological explanation must also be provided—and that it was in the present case. R4.7797.

Moreover, with all the factual findings already discussed, the proof in this case goes well beyond *Valencia.* Far from "substituting correlation for causation,"

GBRA Br. at 25, TAP's evidence showed that causation is based upon facts and scientific testimony from the experts at trial. The experts discussed all aspects of causation from water flows, to salinity, to impacts on the Crane habitat, and finally to impacts on Cranes themselves. Sass and Ensor considered and accounted for the biological factors as testified to by the other Crane experts.

The Supreme Court has observed that "statistics…[are] like any other kind of evidence, they may be rebutted." *Int'l Bd. of Teamsters v. U.S.*, 431 U.S. at 340. The district court observed that Drs. Sass and Ensor's statistics were not rebutted by GBRA or any other party. They were not challenged under *Daubert.* Instead, GBRA witness Sam Vaugh redid Dr. Sass's analysis and obtained the same result. R4.6216.

F. The district court did not err in finding causation.

As stated, the ESA is "subject to the ordinary requirements of proximate cause and foreseeability." *Sweet Home*, 515 U.S. at 700 n.13 & 713 (proximate cause eliminates the "bizarre") (O'Connor, J. concurring); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. at 1078 (recognizing the Supreme Court in *Sweet Home* "rejected the [] argument that the regulation should be limited to direct applications of force against a protected species"); BLACK'S LAW DICTIONARY (9th ed. 2009) (defining proximate cause as "A cause that is legally sufficient to result in liability"). The district court easily found it was foreseeable that the TCEQ's acts

in regulating the surface waters of the Guadalupe and San Antonio Rivers would adversely alter Crane habitat, and cause a "take."

1. Foreseeability was established.

The district court reasonably found that the federal and Texas agencies recognized the TCEQ Official's "take" as not only as a foreseeable problem, but actually it was "anticipated." R4.7782-83. The acts of TCEQ Officials result in less freshwater flowing into the bay, which causes higher salinity in the Crane habitat; without suitable habitat, Cranes die. This simple result is not only foreseeable, it was in fact actually foreseen prior to the 2008-2009 winter.

In 1998, the State of Texas recognized the significance of freshwater inflows into habitat of San Antonio Bay, calling for a guaranteed minimum annual inflow of 1.1 million acre feet, R4.5103-04, PX382 at 2. In 2007, the USFWS International Whooping Crane Recovery Plan was revised, and explicitly identified lack of freshwater inflows as a threat placing the Whooping Crane in danger of extinction by destroying their habitat. R4.4197-98. The Recovery Plan discussed the need for inflows to maintain proper salinity gradients and the productivity of food sources for the Whooping Cranes. PX11 at 20. It also stated:

> Withdrawals of surface and groundwater for municipal and industrial growth are predicted to leave insufficient inflows to sustain the ecosystem in less than 50 years.

PX11 at 21. This statement leaves no doubt about foreseeability. The Plan also stated:

> Inflows are already at times insufficient and reduced over historic levels, leading to increases in mean salinity and decreases in blue crabs, the primary food of the whooping cranes. Long before ecosystem collapse, due to lack of inflows, significant adverse impacts to blue crab populations would occur.

PX11 at 21).

The Executive Director of the Texas Parks and Wildlife Department signed to concur with these findings of the Recovery Plan. R4.4221-22, 5331-32, PX11. This has never been disputed. This buttresses the conclusion that impacts to the San Antonio Bay and harm to the Whooping Cranes actually were "anticipated." R4.7782-83.

Naturally, the record contains no evidence that TCEQ's grant of permission (through permits, regulations, and actual authorization each time) for third parties to divert, store or use that water, would *not* result in actual water use, or bay impacts. It is common sense, and foreseeable, that lack of freshwater can cause the collapse of a bay ecosystem; it actually happened in the Nueces Bay, due to the upstream water diversion and impoundments. R4. 5003-04.

The fact that TCEQ-authorized permittees will actually divert water each time they are authorized to do so, does not relieve TCEQ of causal responsibility. *See Paige v. Coyner*, 614 F.3d 273, 281 (6th Cir. 2010) (stating, under § 1983,

"[e]ven if an intervening third party is the immediate trigger for plaintiff's injury, the defendant may still be proximately liable, provided that the third party's actions were foreseeable."). Rather, it is highly foreseeable that water permit holders will divert water after they have specifically asked the TCEQ Watermaster for permission to do so.

In *Sweet Home*, Justice O'Connor discussed the foreseeability issue at length:

> It is easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby. At the same time, the landowner who drains a pond on his property, killing endangered fish in the process, would likely satisfy any formulation of the principle.

515 U.S. at 713 (emphasis added). The record supports the findings that this case is much closer to the landowner draining the pond.

More generally, Justice O'Connor recognized Supreme Court precedent that "proximate causation normally eliminates the bizarre." *Id.* (citing *Jerome Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527, 536 (1995)). There is nothing "bizarre" in finding that withdrawing water increases salinity and hurts Crane habitat—it is what biologists predicted.

When a federal agency simply has programs that provide mortgage insurance, loan guarantees, and loans for residential and commercial development,

it is not foreseeable that those programs will cause a "take." *Ctr. for Biological Diversity v. HUD*, 541 F. Supp. 2d 1091, 1094-95, 1100-1101 (D. Ariz. 2008) (describing as too attenuated the chain from federal financial assistance to hypothetical developments with groundwater wells, to reducing the aquifer, to lowering flows in the river where the endangered species lives), affirmed *Ctr. for Biological Diversity v. HUD*, 359 Fed. App'x 781, 783 (9th Cir. 2009). In contrast, here the link between inflows, salinity and Whooping Crane habitat has been well-known for many years.[39]

TCEQ Officials misapprehend Justice O'Connor's comments on the *Palila* case in the *Sweet Home* concurrence. Justice O'Connor's disagreement with *Palila* was stated clearly: "Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land *not currently sustaining actual birds*." *Sweet Home*, 515 U.S. at 714 (emphasis added). The point is that there is no take because the "harm" definition requires actual injury or death. When the species is not even present on the land, modifications to that land cannot meet the definition of harm. In contrast, the record here is undisputed that Whooping Cranes are present in San Antonio Bay and the lands of the Refuge.

[39] Indeed, that is why no liability could attach for simply issuing drivers licenses. It is simply not foreseeable when, where and who might hit an Ocelot while driving; it would be "bizarre" for the ESA to affect all driver's licenses.

The issue is not the numbers of "steps" of causation, GBRA Br. at 41, but foreseeability. Based on foreseeability, the district court found that TCEQ Officials were the cause. *E.g*. R4.7791, 7843. Of course if necessary, causation can be stated in a single step: the TCEQ Officials' control over of freshwater inflow adversely altered the Cranes' habitat. R4.7746 (summarizing the "crux" of TAP's case).

2. The TCEQ is the legal cause.

TAP has above described that the TCEQ officials, in law and in fact, authorize third parties to withdraw state-owned waters in the San Antonio and Guadalupe Rivers, and they exercise day-to-day control over the amount of water actually withdrawn. TAP has compared the TCEQ to the Forest Service in *Yeutter* to illustrate the similarity of regulatory control that makes the governmental agency the legal cause.

GBRA falsely presses that the TCEQ cannot be the legal cause, citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004). This case involved potentially conflicting obligations of a *federal* officer under competing *federal* statutes. 541 U.S. at 756 ("In this case, we confront the question whether the National Environmental Policy Act…and the Clean Air Act require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA's

promulgation of certain regulations would allow such cross-border operations to occur."). The plaintiff complained that in acting under one federal statute, the federal officer violated the other federal statute. The present case is not analogous, where the issue is State officials' violation of federal law.

GBRA also presses that the TCEQ Officials were unable and could not comply with federal law, but courts routinely reject arguments predicated on a state official's purported lack of authority to comply with federal law.[40] *E.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695-96, modified sub nom., *Washington v. United States*, 444 U.S. 816 (1979) ("It is also clear that Game and Fisheries, as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so"); *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) ("[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."); *Pacific Rivers Council* at *24-29 (D. Or. Dec. 23, 2002) (state forester could be enjoined from implementing

[40] As stated above, the TCEQ Officials are authorized by state law to develop HCPs and apply for ITPs, Tex. Gov't Code § 403.452(a)(1)-(2), in order to "promote compliance with federal law protecting endangered species." *Id*. at § 403.452(a). R4.7840-41.

state regulations that violate federal ESA law); *Seattle Audubon Society* at *2 ("Defendants have failed to cite any controlling authority for the proposition that a state official's liability under the ESA turns on whether that official has discretionary authority."). Justice O'Connor observes, "The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts." *Sweet Home*, 515 U.S. at 713. Against this backdrop, there was no clear error in the district court's conclusion.

IV. The district court did not abuse its discretion because the new USFWS report was fully reviewed, and committed no error in giving it little weight.

A district court's evidentiary rulings, such as motions to reopen, are reviewed under the deferential abuse-of-discretion standard. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). When "the district court has conducted, on the record, a carefully detailed analysis of the evidentiary issues and the court's own ruling, appellate courts are chary about finding an abuse of discretion." *Kelly v. Boeing Petroleum Services*, 61 F.3d 350, 356 (5th Cir. 1995). Here, the district court fully evaluated the USFWS preliminary report in eleven pages, reviewed all parties' arguments, and determined that it lacked the probative value that GBRA sought to assign to it. R4.7822-33.

The document that GBRA promoted—the "Aransas-Wood Buffalo Crane Abundance Survey"—represented USFWS's potential new methodology for

determining peak abundance, in light of Stehn's retirement. As one of the authors of the document admitted, the potential methodology was an acknowledgment that no other USFWS biologist on staff had sufficient knowledge of the Cranes to duplicate Stehn's counts. R4.7509-10, 7543 (video of Strobel statements at USFWS public meeting). In short, the report was prospective. Neither the report, nor USFWS, rejected Stehn's prior numbers or methodology; it just changed Stehn's counting methodology to a sampling survey. GBRA cites no authority for a claim that USFWS has "rejected" Stehn's data presented at trial, and USFWS has not.

Far from "side-lining" the document, GBRA Br. at 37, the district court fully evaluated it and assessed that it lacked probative value.[41] R4.7822-33. One reasonable basis for the district court's decision not to afford the document weight was its preliminary nature. The Abundance Survey states: "All data and conclusions contained in this report are preliminary and subject to revision." R4.7387. The district court's decision to give little weight to a document that is "subject to revision" and "preliminary," R4.7828-31, simply cannot be abuse of discretion. *E.g., Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 264 (4th Cir. 2005) (affirming district court because "the Department of Energy's

[41] Also, the district court was willing to have a hearing. R4.7676. However, a hearing was predicated on the availability of one or more of the authors to testify. R4.7676. Both sides sent the requisite *Touhy* requests to USFWS, but they were denied. R4.7684.

assessment was only a draft report"); *Smith v. Isuzu Motors Ltd.*, 137 F.3d 859, 861-863 (5th Cir. 1998).

Also, the "concerns" expressed in the document were "superficial conclusions" by three authors who had very little experience with Whooping Cranes. R4.7822. Equally important, GBRA's own experts at trial disagreed with some of those very opinions. For example, GBRA's expert and their counsel expressed none of the 'concerns' in the document of Stehn's peak abundance census. R4.6366 (Stehn's peak flock number is "reasonabl[y] accurate"), 4929 ("we're not moving to exclude population counts"). As another example, the new document claimed that Whooping Cranes are not territorial, but at trial all witnesses agreed that Cranes are territorial. *E.g.* R4.6365, 6406 (Conroy), 4213, 4229, 4235 (Archibald), 4753-54, 4781 (Stehn), 4541-444 (Chavez-Ramirez). And GBRA's SAGES report was premised upon observing the same cranes in fixed and well-defined territories. 5866, 5877. When testimony from GBRA's own witnesses at trial contradicts opinions expressed in the USFWS document, the district court reasonably concluded that it should be afforded little probative weight.

Additionally, the district court rightly recognized that the lack of underlying data in the report presented problems with its reliability. R4.7831-32. Although the report based some of its opinions on "recent data" (and GBRA seizes on this statement), no data was attached to the report or available for review. TAP's

Whooping Crane expert Chavez-Ramirez, who is familiar with much of the developments in Whooping Crane science, knew of no such data. R4.7537. GBRA presses various opinions expressed in the document, without realizing that it is the basis and reliability of those opinions that matter for the district court. Without *any* data to back up propositions that were actually contradicted by trial testimony, the document is not reliable for the proposition asserted by Defendants. *Distaff, Inc. v. Springfield Contracting Corp*., 984 F.2d 108, 111 (4th Cir. 1993) (stating that "inadequate foundation for conclusions" is a factor indicating lack of trustworthiness).

Importantly, even if GBRA had had this document during trial, the outcome would be the same, and thus there any error was harmless. Fed. R. Civ. P. 61. That is, the district court actually did weigh the evidence in the USFWS report and assessed it in light of the other evidence. Moreover, the document added no evidence beyond that already presented by GBRA through Dr. Conroy at trial. *See United States v. 41 Cases*, 420 F.2d 1126, 1132 (5th Cir. 1970) (stating that evidence for reopening must be material, and not cumulative, and must be such to require a different result). It was no surprise Conroy's criticisms appeared in the new USFWS document, as he engaged in behind-the scenes communications with the document's authors. PX161, PX162.

Although GBRA quotes case law on motions to reopen, it appears that what GBRA really complains about is that the district court afforded the document little weight. Br. at 40. When the document is subject to revision, preliminary for several years, authored by biologists with little Whooping Crane experience, contradicted by trial testimony (even by GBRA's own experts), and lacks underlying data to support its conclusions, it is reasonable for the district court to question the reliability of the opinions contained in the document. In light of these deficiencies for reliability (among others detailed in the district court's opinion), there was no abuse of discretion. R4.7822-33.

V. The district court's remedy was within the scope of the ESA, a court's equitable powers, and the Eleventh Amendment.

The ESA authorizes injunctive relief for violations of the "take" provision.[42] 16 U.S.C. § 1540(g)(1)(A). The ESA provisions on injunctive relief do not limit a federal court's broad equitable powers. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."). In ESA cases particularly, district courts have recognized the wide range of available relief. *See, e.g.*, *Strahan*, 127 F.3d at 167 (holding that "the *Ex Parte Young* exception to the

[42] The district court also ordered declaratory relief, which is authorized by 28 U.S.C. §§ 2201 & 2202.

Eleventh Amendment…does not place limits on the scope of the equitable relief that may be granted once appropriate jurisdiction is found"); *Loggerhead Turtle*, 148 F.3d at 1254–55 (collecting examples from cases) (stating the discussed relief is not an "exhaustive list"). This Court reviews the district court's decision to render an injunction for abuse of discretion. *See Newby v. Enron Corp.*, 302 F.3d 295, 301 (5th Cir. 2002).

A. The ITP was proper.

The Supreme Court repeatedly has recognized that, due to its purpose and statutory text, the ESA at a minimum requires an injunction to stop actions that cause a "take" by destroying essential habitat.. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 543 n.9 (1987) (discussing that the ESA requires district courts to issue injunctions to stop takes); *Weinberger*, 456 U.S. at 313-14 (same) ("The purpose and language of the [ESA]…compelled that conclusion."). Here, finding a take, the district court could have ordered a more far-reaching remedy—for example, cutting off all water diversions. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 695 (stating that "State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause" and holding that the Washington state agencies could be "ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties"). The actual remedy here was

instead very narrowly crafted to achieve the goals of the ESA and also include the competing interests of other water users.

The district court enjoined approval of new permits until TCEQ gave assurances that no prohibited "take" would occur. It stands to reason that if the district court can enjoin this activity, then it can also specify the conditions under which the otherwise enjoined activity can occur. That is what the district court did in ordering the HCP/ITP, and the federal court's equitable powers plainly permit such sensibly crafted equitable relief. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power…to mould each decree to the necessities of the particular case.").

The Supreme Court did not state that an ESA remedy is limited to only traditional injunctions. Unless a statute clearly provides otherwise, the federal court retains discretion in equity to fashion relief. *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 488 (2001). Nothing in the ESA suggests that there is a restriction of the equitable powers of the federal court to fashion relief.

Here, by ordering the TCEQ Officials to seek and obtain an ITP, the district court—following the language of Section 10—orders the violator to come into compliance with the ESA (*i.e.*, ending the ongoing violation by authorizing incidental takes). They do so by obtaining a permit for "incidental takes." 16

U.S.C. § 1539(a)(1)(B). The district court merely specified the conditions under which the injunction against new water permits may be lifted.[43] Moreover, at trial, TAP's witnesses testified about the reasonableness, viability, and success of HCPs. *E.g.* R4.5526, 5531, 5528-29, 5541 (involves stakeholders), 5459, 5465-66 (ESA Section 6 funding available). GBRA's own witness Sunding testified to the success of HCPs. R4.6479. In light of the ESA's statutory framework, and the evidence presented at trial, the district court did not abuse its discretion in ordering an ITP that would end the ongoing violation.

Other federal courts have ordered ITPs in ESA lawsuits against a regulator.[44] *E.g.*, *Strahan*, 127 F.3d at 158 (affirming the district court's order to Massachusetts officials to obtain an ITP); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1081–82 (D.C. Minn. 2008) (ordering defendant state agency to apply for an Incidental Take Permit). The key aspect of the ITP is that it recognizes that the stakeholders and TCEQ are the best entities to develop the HCP and the suite of measures that would "minimize and mitigate" incidental takes. The district

[43] The TCEQ Officials asked for, and were granted, an exception for new emergency permits to protect public health and safety. R4.7908-09, 7935-36.

[44] Far from a novel process, the U.S. Fish & Wildlife Service regularly approves Habitat Conservation Plans submitted by regulators, including state agencies and local governments. Here in Texas, the TCEQ has been working with the Edwards Aquifer Authority and others to develop a Habitat Conservation Plan to protect endangered and threatened species affected by pumping the aquifer. Outside Texas, approved Habitat Conservation Plans include, for example, one for the State of Georgia protecting 10.9 million acres for the Red Cockaded Woodpecker. See USFWS, Habitat Conservation Plan and Agreements Database, at http://www.fws.gov/ecos/ajax/conserv_plans/public.jsp.

court recognized that its job was not to take on this role. The ITP does not necessarily eliminate all future "takes" but it merely makes them no longer illegal so long as done in compliance with the ITP.

B. If ordering an ITP was not proper, this Court can order a limited remand.

The TCEQ Officials do not object that the injunction against new permits is an "unlawful remedy" under the ESA, only the ITP. If this Court takes issue with the district court's order to seek an ITP, it can look to *Loggerhead Turtle* for one possible alternate path. In that case, the district court did not order an ITP but made it clear that the defendant-county could "move for dissolution" of the court's injunction when it received an Incidental Take Permit. *Loggerhead Turtle,* 896 F. Supp. at 1183. There, the district court specified the circumstances that would lift the injunction, if the defendants so chose. District courts may finesse the language in their ordering provisions, but the ITP/HCP is still the remedy desired by Congress under the ESA. Here, if this Court deems necessary, a limited remand would allow the district court to finesse the language of its order.

There are of course other possibilities for remedies in this case: for example, the district court could specify a salinity trigger that would enjoin further diversions when the trigger is hit. As the record shows, this is consistent with what

the TCEQ Officials are establishing in Nueces Bay.[45] R4. 6222, 6225-26. The TCEQ is familiar with the operation of salinity triggers, having included them as water permit conditions in other basins. R4.5126-28. Hence, this represents another possible remedy if the HCP is deemed undesirable.

C. A "straightforward inquiry" shows an ongoing violation and no Eleventh Amendment issue.

For the challenge raised by the TCEQ Officials, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011) (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (holding there is "no doubt" the plaintiff's suit satisfies the straightforward inquiry)); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997).

TAP's complaint alleged an ongoing violation, making the inquiry very straightforward. R.46-47 (Count IV entitled "Future Takes are Reasonably Foreseeable and Must be Enjoined"). Moreover, the thrust of TAP's case and the proof at trial showed that ongoing violations of federal law are occurring: among

[45] Vaugh testified that the S.B.3 target salinity for a healthy Nueces Bay (utilizing blue crab and four other species as indicators) is 18ppt. R4.6225-26. No similar salinity target was set, utilizing either blue crabs or Whooping Cranes, for the San Antonio Bay. R4.6222, 6226.

other facts, (1) TAP proved that too-low freshwater inflows causes Cranes to die in great numbers, *supra* III.; (2) such winters of significant Crane deaths have occurred multiple times within the past two decades, always associated with too-low freshwater inflows, *supra* III.E; (3) the full use of existing water permits will cause even higher salinity than in 2008-2009, *supra* III.A.1, PX106; (4) TCEQ continues to issue permits, including two pending for GBRA of more than a quarter-million acre-feet, GBRA Mot. Emergency Stay at 4-5 and App'x Tab 8; and (5) no state process is committed to the Cranes, *supra* II. (These five points are also relevant for standing, below).

In light of the complaint and proof at trial, there is no Eleventh Amendment concern. Continued, unconstrained, and unmitigated water diversions will cause further "takes," and the district court enjoined such activity. The *Ex Parte Young*, 209 U.S. 123 (1908), exception to the Eleventh Amendment "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law." *Milliken v. Bradley* 433 U.S. 267 (1977) (prospective injunctive relief to remedy state policy of desegregation); *see also Alden v. Maine*, 527 U.S. 706, 747 (1999) (stating "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").[46]

VI. TAP established standing.

For standing, the question is whether TAP proved an "imminent" or "credible threat" of future injury—distinguished from mere "conjectural" or "hypothetical" future injury (which would be insufficient). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983). Danger of death or harm to an endangered species is not speculative, and establishes imminent injury for purposes of standing. *E.g*., *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 25-26 (1st Cir. 2010).

Here, the district court found a "take" already occurred with TCEQ's unconstrained water diversions. R4.7843, 7856. For standing, the Supreme Court has stated that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974). Both TCEQ and GBRA ignore this critical point.[47] Past actions take on particular significance when the TCEQ Officials admit—or insist—that their

[46] Few courts have applied these principles to an ESA context. In one case, the district court held that the Eleventh Amendment did not bar a district court from considering defendants' past conduct as it related to ongoing or future violations. *Pacific Rivers Council v. Brown*, No. CV 02-243-BR, 2002 WL 32356431, *6 (D. Or. Dec. 23, 2002) (citing *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist*., 13 F.3d 305, 309–10 (9th Cir.1993) for the this proposition).

[47] The TCEQ addresses standing in their jurisdictional statement only. To whatever extent the TCEQ officials present an appellate point concerning proof of future injury, it is addressed in this section. To whatever extent the TCEQ officials present a point concerning traceability, it is addressed in this brief on causation.

challenged policies and acts are ongoing, and will not be ended absent court order. After a "take" is found, no ESA purpose would be served by requiring plaintiffs to wait for more unspecified additional harm before getting relief. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (stating that "[one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough"); *Trinity Industries, Inc. v. Martin*, 963 F.2d 795, 798 (5th Cir. 1992) (same).

Moreover, in light of the five points of proof just discussed above with regard to an "ongoing violation" of federal law, the future harm to the Cranes is not a "subjective apprehension," but based on the past take, historical patterns, and the continued issuance of permits (among other evidence). *See* GBRA Br. at 60 (citing *Lyons*). In *Laidlaw*, the Supreme Court observed: "In *Lyons*, we held that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a *realistic threat* from the policy." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*. 528 U.S. 167, 184 (2000) (emphasis added). The plaintiff in *Lyons*, unlike TAP, merely had "subjective apprehensions" that recurrences would take place. *Id*. Furthermore, because TCEQ continues to issue permits, to authorize diversions, and to disclaim any responsibility to ensure the Cranes or the Crane habitat will be

protected, the present case is nothing like the *National Wildlife Federation* case cited by GBRA.[48] *See* GBRA Br. at 63.

Although GBRA argues that Whooping Cranes are "thriving," to the contrary, the Whooping Crane is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (defining "endangered"); R4.6395 (Conroy), 4209 (Archibald: "consider a little village with 300 people, and that's it for the species, it becomes slightly more sobering."). The Whooping Crane is not yet close to the targeted population goals established by USFWS. PX11 at 38. R4.5797. Indeed, GBRA expert Slack testified that the downlisting goal is 1,000 Cranes in this flock, and that number will not be reached until 2060 at present growth rates. R4.5797. Thus it will be almost five more decades before the Whooping Crane may even be considered for downlisting to "threatened" status. Thus not only does GBRA's argument have no bearing on standing, it is contradicted by their own witnesses. R4.6395, 4209. The clear purpose of this litigation is not only the events from 2008-2009, but the long-term survival of the last remaining natural flock of Cranes.

[48] TCEQ officials' insistence on continuing their challenged conduct, including more authorizations to withdraw state-owned water, and refusing to consider ESA protections while they control water withdrawals, entirely distinguishes *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508 (9th Cir. 1994), on which GBRA relies. In that case, the defendants had significantly changed practices eliminating future risk to the species. Indeed, GBRA admits that, in that case, the train company had made significant "efforts to clean up spills and prevent future derailments [that] had minimized the risk of future injuries." GBRA Br. at 63 (23 F.3d at 1511-12). By contrast, the TCEQ officials have taken no steps to comply with federal law and avoid future Crane deaths.

No evidence in the record indicates the TCEQ Officials—or any of the Intervenors—will ensure the Cranes will be safe in the future. Whatever the outcome of "Texas's ongoing efforts" of S.B.3, GBRA Br. at 61-62, it cannot defeat the need for the district court's injunctive relief. As presented elsewhere in this Brief, S.B.3 is inadequate to address the Cranes' survival, and the e-flow recommendation lacks teeth to protect the bay. *Supra* II (discussing *Burford*). Instead, the realistic threat concerns whether the continuing acts of the TCEQ will harm the San Antonio Bay habitat in the same way that the Nueces Bay was killed by hyper-saline conditions. R4.5003. This is no "string of hypotheticals"; it has already happened.

TAP also presented witnesses to testify on their likelihood of future injury if Cranes perish. R4.5228-31, 5261-62 (describing decline in tourism business), 5265 ("I would be devastated [if Cranes were gone]"). The Supreme Court has interpreted the ESA as creating the broadest possible interpretation for standing. *Bennett v. Spear*, 520 U.S. 154, 164-66 (1997). The plaintiffs in *Laidlaw* had "reasonable concerns" that the defendant's actions were having a "direct" effect on their interests. 528 U.S. at 183-84. TAP's members have reasonable concerns that the TCEQ Officials' acts directly impact the Crane's survival. Given the ESA's generous concept of standing, TAP has readily met and surpassed its burden, Under GBRA's arguments, one would have to wait until the last Crane disappeared

for anyone to have standing to litigate this issue under the ESA. No case law supports this absurd result.

VII. If necessary, the use of the word "TCEQ" in the district court's injunction can be remedied.

Throughout this lawsuit, the parties and the district court interchangeably referred to the TCEQ Officials (or the State Official Defendants) as simply the "TCEQ." *E.g.* R4.5581, 5569. The TCEQ Officials quibble about the wording of the district court's injunction and term it an Eleventh Amendment violation. TAP believes the argument is ill-founded, because parties have used "TCEQ" as shorthand, because the TCEQ (agency) was not actually a party, and because the injunction causes no confusion concerning the district court's meaning or objectives. However, if this Court determines that the use of the word "TCEQ" offends the Eleventh Amendment, then this Court can remedy it with a limited remand. Or, this Court can correct the word itself, replacing "TCEQ" with "TCEQ Officials" and affirming the injunction with the corrected term. *E.g.*, *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 857 (5th Cir. 2010) (correcting a word in the district court's order).

CONCLUSION

TAP respectfully requests that this Court affirm the district court's judgment. In the alternative, if this Court has concerns about aspects of the remedy

ordered by the district court, then this Court should affirm the finding of liability and issue a limited remand for the purpose of finessing the remedy's language.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 31st day of May, 2013, a true and correct copy of the foregoing **BRIEF OF PLAINTIFF – APPELLEE THE ARANSAS PROJECT** 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.

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Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R.25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: May 31, 2013

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