U.S. House Committee on Natural Resources

"Federal Impediments to Water Rights, Job Creation and Recreation: A Local Perspective"

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Thank you for the opportunity to testify before you today on federal intrusion into states' rights using the Endangered Species Act (ESA). I am Bill West, general manager of the Guadalupe-Blanco River Authority of Texas. The GBRA, as it is called, was created in 1933 by an act of the Texas Legislature.

GBRA has a 10-county statutory district that covers an area of more than 6,600 square miles and includes the majority of the 432-mile Guadalupe River, which many of us in Texas consider to be the prettiest little river in Texas. Our area also includes the 90-mile Blanco River, the 75-mile San Marcos River and other tributaries. The 10-county district is situated between and serves the high-growth corridor from San Antonio to Austin, the 6th and 12th most populous cities in the United States respectively. A March 18, 2013, article in *Forbes* magazine noted, "Growth momentum has shifted decidedly toward Texas. Austin's population expanded a remarkable three percent last year, tops among the nation's 52 largest metro areas. Three other Lone Star metropolitan areas — Houston, San Antonio, Dallas-Fort Worth — ranked in the top six and all expanded at roughly twice the national average." **[See Attachment A]**

GBRA is a service provider, not a regulatory entity, governed by a board of nine directors who are appointed by the Governor and confirmed by the Texas Senate. The organization cannot levy or collect taxes, assessments, or pledge the general credit of the State of Texas. GBRA has among its statutory duties to control, store and preserve surface water resources of its district; to conserve, preserve and develop underground waters within the district; to acquire water, water supply facilities and storage capacity; and to use, distribute and sell those waters.

To fulfill its duties, GBRA is involved in numerous and diverse planning, development, construction and operational activities. In addition to other operations, GBRA has raw water reservoir operations, water treatment plants, wastewater treatment plants for municipalities and other developers, water transmission pipelines, canals for water delivery for agricultural uses at farms and ranches, several dams and hydroelectric operations, and power plant cooling reservoir operations.

GBRA's primary water supply reservoir is Canyon Reservoir, which is situated in the district between Austin and San Antonio. Canyon's permitted water supply of 90,000 acre-feet annually is fully committed through contracts with municipalities, developers and other customers.

The southwestern area of the United States has experienced a protracted drought in recent years. Texas, and in particular a significant portion of the area of Texas that makes up GBRA is suffering under a multi-year drought that in its intensity has exceeded the drought of record of the 1950s. Drought, of course, affects the river flow. During drought conditions in 2008-2009 for example, the Guadalupe River flow on December 14 at the gauge in Victoria, Texas, was 431 cubic feet per second compared to its median flow of 1,030 cubic feet per second during times when rainfall is normal. Obviously, droughts impact both humans and wildlife.

Over the years, GBRA has been working hard to develop other water supplies, primarily through surface water rights it holds on the Guadalupe River, the development of groundwater and, in the long-term, possible seawater desalination on the Gulf of Mexico. But GBRA not only has been devoting its limited resources to develop new water supplies to serve the constituents of this fast-growing area, it also has been forced, by the simple filing of a citizens suit under the ESA, to spend an enormous portion of its available resources to defend and retain the water rights it holds that are needed to develop new supplies.

GBRA's efforts to fulfill its mission are being needlessly complicated by an ESA citizens suit (case # 2:2010cv00075, brought in federal district court in Corpus Christi). The suit was filed in March 2010 by plaintiff "The Aransas Project" or TAP, a non-profit organization that was created for the purpose of bringing the litigation and that is funded largely by a wealthy Texas oil and ranch family. The wealthy family's objective was to block GBRA from providing surface water to a proposed power plant located adjacent to the family's property in Victoria County.

What started as a typical "Not in My Back Yard" or NIMBY through the misuse of the ESA to stop a power plant has evolved into a classic misuse of the ESA on many levels, including but not limited to reliance by the plaintiff on poor science and inappropriate use of 501(c)3 organizational formation.

TAP's complaint alleged that the Texas Commission on Environmental Quality (TCEQ) violated the "taking" provision of Section 9 of the ESA (prohibiting any activity that kills or harms a listed species or that destroys its habitat) merely by permitting water rights in accordance with state law as TCEQ has for decades. TAP contends that during the 2008-2009 drought, a reduced amount of fresh water reaching the coastal marshes caused the salinity to rise so high in San Antonio Bay that whooping cranes wintering at Aransas National Wildlife Refuge were unable to find sufficient food and water, allegedly leading to the deaths of 23 whooping cranes that winter. Because the remedy sought through this lawsuit could mean reallocating water rights on the Guadalupe River, the GBRA immediately filed to intervene as a defendant intervener, and in April 2010, the federal judge issued an order granting GBRA's motion to intervene. After other denied motions to intervene went through appeals, defendants ultimately were comprised of

the TCEQ, GBRA, the San Antonio River Authority, and the Texas Chemical Council. The City of San Antonio (the 6th most populous city in this country), City Public Service (the electric power arm of the City of San Antonio), the Texas Farm Bureau, and the American Farm Bureau all were denied intervention in this critically important case. The U.S. Fish and Wildlife Service was noticeably absent.

When one speaks of endangered species, particularly a species as iconic as the whooping crane, it evokes strong emotions that can impede constructive discussion on the subject. GBRA is proud of its efforts to research and protect the endangered, majestic whooping crane that winters on the Texas coast along the edges of the Guadalupe River Basin. In 2001, long before TAP existed, GBRA founded the Guadalupe-Blanco River Trust to conserve land in the watershed and one of the joint projects established a more reliable water supply in the Refuge where the whooping cranes winter. GBRA and the San Antonio River Authority and other entities, including in-kind support from the U.S. Fish and Wildlife Service (USFWS), funded a seven-year, $2 million study of whooping crane diet, behavior and habitat. Texas A&M University researchers conducted that study and presented the findings in April 2009. GBRA also was instrumental in establishing the San Antonio Bay Foundation to serve as a vehicle for the protection and preservation of the bay and estuary system at the end of the Guadalupe River Basin. As a result of the efforts of the USFWS, the Texas Parks and Wildlife Department, GBRA and other agencies, data show the population of the Aransas Wood Buffalo flock — the world's only naturally migrating flock of whooping crane — has steadily progressed over the years from a low of 15 in the 1940s to nearly 300 today.

While TAP's lawsuit alleged 23 whooping crane deaths, only two whooping crane carcasses and two partial carcasses were found during 2008-2009 – a loss of whooping cranes more consistent with the expected number of deaths over a given winter. The alleged death of 23 whooping cranes was based on airplane flyovers where birds that were not seen were assumed to be dead. There is no proof of 23 deaths, and the number of whooping cranes returning for the next winter (2009-2010) confirms that there was a normal number of deaths the previous winter. The method of determining mortality argued in the lawsuit was so flawed that at best the high number reflected birds moving around so much that year that they could not be found. Even the USFWS has disavowed the previous methodology accepted by the court for counting the birds and determining mortality in the winter of 2008-2009 and previous winters.

Yet, on March 11, 2013, the federal district court judge held that the TCEQ caused the death of 23 whooping cranes by issuing water permits that allowed diversions and ordered TCEQ to immediately stop issuing water permits on the Guadalupe and San Antonio rivers. The Judge also ordered the state to immediately engage in a costly planning process that is duplicative of current state programs. The opinion and involves several novel ESA theories with important broader implications.

First, the district court concluded that the Texas water-rights permitting scheme was preempted by the ESA and the Supremacy Clause of the U.S. Constitution. This is a potentially far-reaching conclusion to the extent it suggests various state permitting programs, including oil and gas permitting by state agencies, must consider and enforce the ESA in policy areas traditionally reserved for state and local decision-making. The effect of the decision, if it stands, is to essentially impose on the TCEQ, a state agency, a Section 7-type consultation process, which otherwise applies in the ESA explicitly to federal agencies only.

Second, the district court concluded that proximate causation can exist under the ESA even when a defendant government agency indirectly authorizes an activity that does not inherently cause take. The district court's finding that TCEQ proximately caused take by implementing a water permitting program is significant precedent for groups challenging permitting schemes indirectly leading to take of endangered species, including state and federal agency programs that permit oil and gas projects.

Third, the district court's 125-page opinion stretched statistical evidence beyond its limits to support its conclusion that TCEQ's regulatory scheme for issuing water-rights permits caused the deaths of 23 whooping cranes. The court's ultimate conclusion on causation involved several faulty scientific findings for each part of a multi-link causal chain leading from TCEQ's water permitting scheme to the purported death of the birds. For example, there was significant doubt whether 23 birds had even died, let alone that they did not die from other natural causes such as extreme local drought (extremely low rainfall on the whooping cranes' habitat). In this case, correlations were equated to causation. The district court's findings on causation suggest even the most attenuated state regulatory decisions could be successfully challenged under the ESA.

Finally, by enjoining all new water rights permits, unless those permits meet certain court-supervised conditions, and ordering the TCEQ to seek an Incidental Take Permit and associated Habitat Conservation Plan within 30 days, the court ordered an extraordinary and expensive remedy for the alleged death of 23 cranes. Similar court-supervised injunctions and costly remedial actions could be ordered for other agencies.

Both the TCEQ and the GBRA filed notices of appeal and requests to stay the district court order. GBRA's motion specifically noted that the district court's order would have irreparable harm on hydraulic fracturing operators in the Eagle Ford Shale needing new water rights permits.

On March 26, 2013, a panel of three judges from the United States Court of Appeals for the Fifth Circuit stayed the U.S. District Court ruling in *The Aransas Project (TAP) v. Shaw,* barely 24 hours later.

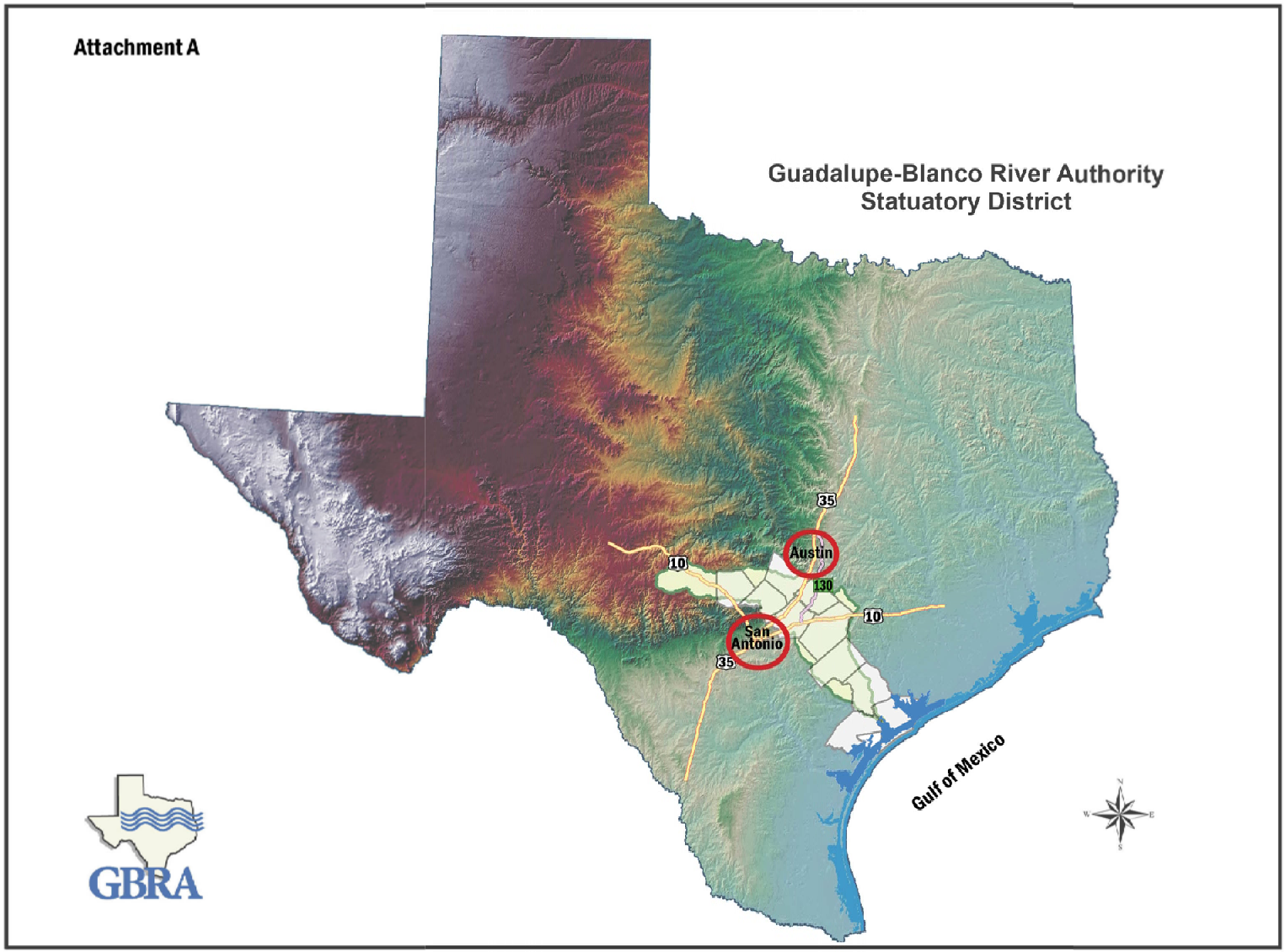
Appellants are pleased that the Fifth Circuit agreed that appellants were likely to succeed on the appeal and we are hopeful that the Court ultimately will vacate the district court's order and reverse.

The lower court ruling had enjoined the TCEQ from issuing any water rights permits on the Guadalupe or San Antonio rivers, except as required for public health and safety, which would seriously disrupt economic development in a growing part of Texas.

Policies and regulations based on unproven and potentially false premises are not the way to govern. The state's water resources must be shared for many uses, including population growth, agricultural productivity, environmental needs and economic development. Parties that bring these suits ought to have legitimate, not just plausible, interests in the results of such a case. The citizens suit provision should be reviewed and modified. It is particularly troubling to have a system where a novel and extremely disruptive ESA enforcement judgment is allow to occur without the USFWS even being a party to the case. Endangered whooping cranes need and have protection for their continued recovery, but they should not be the pawns for special interests. The ESA — in particular the citizens suit provision — needs to be amended to avoid the "unintended consequences" that have developed over the years.

Members of the Committee, thank you again for this opportunity to testify regarding this case of federal intervention into state's rights — specifically the state's surface water rights and its ability to issue permits. I will be happy to address any questions you might have.

Attachment A



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- TAP's lawsuit alleged that the Texas Commission on Environmental Quality (TCEQ) violated the "taking" provision of Section 9 of the Endangered Species Act (ESA). The provision prohibits any activity that kills or harms a listed species or that destroys its habitat.

- TAP contends that during the 2008-2009 drought, a reduced amount of fresh water reaching the coastal marshes caused the salinity to rise so high that whooping cranes wintering at Aransas National Wildlife Refuge (ANWR) were unable to find sufficient food and water, allegedly leading to the deaths of 23 whooping cranes.

- Yet carcasses or remains of only two to four whooping cranes were recovered that winter, a number more consistent with normal winter losses.

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- A significant point of contention was the accuracy of the aerial survey methodology because the retired USFWS employee counted a whooping crane as dead if it failed to be present after a second fly over (missing equals dead). It is primarily this retired employee's aerial counts and claims on which the plaintiffs based their case.

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- The state defendant (TCEQ) primarily presented evidence to prove the TCEQ had limited authority in changing/redistributing existing water permits. The defendant intervener (GBRA) presented experts to challenge TAP's entire causation theory, the actual number of whooping crane deaths, the accuracy of the aerial survey methodology, what causes bay salinity to rise and how it affects the abundance of whooping crane food sources. And GBRA also presented an expert to explain the economic impact of the freshwater inflow requirements initially sought by TAP.

- The GBRA's experts exposed many of the flaws (breaks) in TAP's chain of causation theory.

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- The GBRA incurred the lion's burden of the costs associated with defending the state's system of water permitting and protecting its senior water rights. As of the end of December 2012, this litigation had cost GBRA more than **$6 million**. The appeals costs will only add to that amount for an agency whose annual budget is only $50 million.

T A P v. Shaw: The APPEAL

- After the State and GBRA filed motions for emergency stay, the **U.S. Fifth Circuit Court of Appeals granted the stay** of U.S. District Judge Janis Jack's decision in *The Aransas Project (TAP) v. Shaw*.

- The appeal ruling came on March 19, 2013, barely a week after the District Court decision. As it stands, the Appeals Court ordered the case to be placed on the **August 2013** oral arguments calendar.